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THE
HINDU CODE

BEING
A CODIFIED STATEMENT
OF
HINDU LAW
WITH
A COMMENTARY THEREON

BY
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PREFACE.

The advantages of codified law are now too well known to need expatiation. The Indian Legislature has reduced to the form of Codes its laws on many subjects, but it has left the Hindu and Mahomedan Laws alone, and for an obvious reason. Warren Hastings knew that the Mahomedan rulers had administered justice according to the personal law of the parties. Accordingly, in 1772 he ordered that it should be continued to be so administered. This executive order was subsequently embodied in several statutes with the result that in matters relating to personal status, adoption, marriage, partition, alienation of property and succession, the law applicable to the Hindus is Hindu Law. But where is it to be found? Not in their sacred books alone, for a good deal of what is contained in the books, is not law at all, while a great deal more of what is law is not to be found in the books, the result being that the modern Hindu Law is a curious blend of the sacred texts, judicial dicta and analogies varied by custom or local usages, and eked out by the salutary rule of justice, equity and good conscience.

The ordinance of Warren Hastings was, no doubt, intended to be a privilege: in practice, it has stayed to be a penalty.

For the latest Hindu text is about a thousand years old. It was suited to a people, condition and age which have long since greatly altered. Even the most devout Hindu feels that he can no longer be held fast to the archaic laws of his forefathers. Even if he were so inclined he should have much difficulty in ascertaining them. For there is scarcely a topic upon which contradictory texts cannot be found and upon which contradictory gloss cannot be put. The fact that three divergent systems are the outcome of three commentators on the same text is an instance which is daily repeated in the Courts. For over a quarter century the present writer has seen this spectacle in the Courts. Without legislative authority he has no power to stop it. Nor indeed can it be wholly stopped. But it occurred to him that if other subjects are reduced to codified statements, why should not the Hindu Law be codified if only to present it in a compact form to be easily mastered and applied. It is only a coincidence that of all laws, the laws of the Hindus which were always stated in aphoristic Codes, still remain to be re-enacted in a consolidated Code.

The present work may, it is hoped, prepare the public opinion to be alive to the necessity of such a Code. Jagannatha's Digest, prepared under the direction of that Sanskritist H. T. Colebrook, can in no way be regarded as its prototype, for the latter is merely a collection of selected aphorisms from the sacred texts. This work is prepared on a wholly different plan. It is intended to be a plain and concise statement of modern Hindu Law—of the law as it is understood and administered in the Courts to-day. In the ensuing commentary the *raison d'être* of the rules so collected, their genesis and their application are all illustrated by concrete cases in which all the case-law to be found in all the reports, authorised and unauthorised, will be found set out.

Those who desire to make themselves acquainted with the outlines of Hindu Law need go no further than the collected rules. But those to whom precedents are all in all, the detailed discussions should furnish a repertory of cases arranged and discussed in their logical sequence, which it is hoped, present to some extent the same advantages as an annotated edition of an Indian enactment.

The plan adopted is the same as in the author's two other works on the Law of Transfer and the Penal Law of British India. The guiding principle in this case has been the same, namely, completeness. The writer does not profess to be a Sanskritist, though he has striven to examine the original authorities whenever they were available. He has avoided lengthy discussions on barren topics, which as a busy lawyer, he knows the practitioner would much rather eschew in arriving at a solution of his problems. If at times he has departed from this rule it has been to refute views which other writers have advanced but for which the text might have remained obscure. But the aim throughout has been to combine simplicity of treatment with perspicacity of expression. How far he has achieved this purpose he leaves it to the judgment of the reader.

H. S. G.

1st August, 1919.

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LIST OF ABBREVIATIONS.

A.	Allahabad (Indian Law Reports.)
A. C. J.	Appellate Civil Jurisdiction.
A. & E. ....	...	Adolphus & Ellis' Reports (1834—1841) (N. S. 1841—1852)
Agra. ....	...	Agra High Court Reports.
A. L. J. ....	...	Allahabad Law Journal
Arub. ....	...	Arubler's Reports (1737—1784.)
App. Cas. ....	...	Law Reports, Appeal Cases.
Atk. ....	...	Atkins' Reports (1736—1754.)
A. W. N. ....	...	Allahabad Weekly Notes.
B. ....	...	Bombay (Indian Law Reports.)
B. & Ad. ....	...	Barnewall and Adolphus' Reports (1830—1834).
E. & Ald. ....	...	Barnewall and Alderson's Reports (1817—1822).
B. & C. ....	...	Barnewall and Cresswell's Reports (1822—1830).
B. & S. ....	...	Best and Smith's Reports (1861—1866).
Bac. Ab. ....	...	Bacon's Abridgment.
Beav. ....	...	Beavan's Reports (1838—1866).
B. H. C. R. ....	...	Bombay High Court Reports (1862—1875).
Bing. ....	...	Bingham's Reports (1822—1834).
Bing. N. C. ....	...	Bingham's New Cases (1834—1840).
B. L. R. ....	...	Bengal Law Reports (1868—1876).
Bl. Comm. ....	...	Blackstone's Commentaries.
Bom. L. R. ....	...	Bombay Law Reports
B. P. J. ....	...	Bombay Printed Judgments (1869—1896)
Br. C. C. ....	...	Brown's Chancery Cases (1778—1794).
Brow. & Lush. ....	...	Browning and Lushington's Reports.
Bur. L. R. ....	...	Burmah Law Reports
Bur. L. T. ....	...	Burmah Law Times
C. ....	...	Calcutta (Indian Law Reports)
Camp. ....	...	Campbell's Reports (1807—1816).
C. B. ....	...	Common Bench Reports (1845—1856).
C. B. (N. S.) ....	...	Common Bench (New Series) (1856—1865).
C. & J. ....	...	Crompton and Jerira's Reports (1830—1832).
Ch. ....	...	Chapter.
C. L. R. ....	...	Calcutta Law Reports (1877—1883)
C. & M. ....	...	Crompton and Meson's Reports (1832—1834).
C. M. & R. ....	...	Crompton, Meson and Roscoe's Reports (1834—1835)
C. & P. ....	...	Crompton and Payne's Reports.
Ch. C. C. ....	...	Cases in Chancery (1660—1668).
Ch. R. ....	...	Reports in Chancery (1616—1712).
Cowp. ....	...	Cowper's Reports (1774—1778).
Co. Litt. ....	...	Coke upon Littleton.
Coll. ....	...	Colles (House of Lords) (1697—1714).
C. & P. ....	...	Carrington and Payne's Reports (1823—1841).
C. L. J. ....	...	Calcutta Law Journal
C. P. L. R. ....	...	Central Provinces Law Reports (1866—1904).
C. P. D. ....	...	Law Reports Common Pleas Division.
Cowp. ....	...	Cowper's Reports (1774—1778).
Cr. J. ....	...	Crompton and Jerri's Reports (1830—1832).
Cr. M. ....	...	Crompton and Meeson (1832—1834).
Cr. M. & R. ....	...	Crompton, Meeson and Moxoe's Reports (1834—1836).
C. W. N. ....	...	Calcutta Weekly Notes
D. & C. ....	...	Deacon and Chitty's Reports (1882-1885).
De G. & J. ....	...	De Gex, and Jones' Reports (1862-1865).
D. M. and G. ....	...	De. Gex, Macnaghten and Gordons Reports (1851—1857)
De G. & S. ....	...	De Gex and Smale's Reports (1846-1852).
Datt. Ob. ....	...	Dattak Chandrika.
Datt. Min. ....	...	Dattak Mimamsa.

De G. F. & J. ...	... De Gex, Fisher and Jones' Reports (1859-1862).
De G. J. & S. ...	... DeGex, Jones, and Smith's Reports (1862-1866).
De G. M. & G. ...	... DeGex, Macnaghten and Gordon's Reports (1851-1857).
Dick ...	... Dioken's Reports (1559-1798).
Dig. ...	... Morley's Digest.
Doug. ...	... Douglas's Reports (1778-1784).
Dowl. ...	... Dowling's Reports (1830-1840).
Dowl. (N. S.) ...	... Dowling's Reports (New Series) (1841-1842).
Dowl. & L. ...	... Dowling and Lounde's Reports (1843-1849).
Dr. ...	... Drewry's Reports (1852-1859).
Drl & W. ...	... Drewry and Warren's Reports (1841-1843.)
Drew. ...	... Drewry's Reports (1852-1859).
Drew. & S. ...	... Drewry and Smale's Reports (1859-1865).
Durn & E. ...	... Durnford and East Reports (1785-1800).
East. ...	... East's Reports (1800-1812)
E. & B. ...	... Ellis and Blackburn's Reports (1852-1858).
E. B. & E. ...	... Ellis, Blackburn and Ellis Reports (1858).
Ed. ...	... Edition.
E. and E. ...	... Ellis, and Ellis' Reports (1858-1861).
Eq. Cal. Ab. ...	... Equity Cases Abridged (1853-1855).
Esp. ...	... Espinasse's Reports (1793-1807).
Ev. A. ...	... Evidence Act
Exoh. ...	... Exchequer Reports (1848-1856).
Ex. D. ...	... Law Reports Exchequer Division
F. B. ...	... Full Bench.
Fin. ...	... Finch's Reports (1673-1681).
Free ...	... Freeman's Reports (Ch.) (1660-1706).
Giff. ...	... Giffard's Reports (1857-1865).
Hare ...	... Hare's Reports (1841-1853).
H. & C. ...	... Hurlstone and Coltman's Reports (1862-1866).
H. & M. Hemming and Miller's Reports (1862-1865).
H. & N. Hurlstone and Norman's Reports (1856-1862).
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Holt. Eq. Holt's Nisi Equity Reports (1688-1711).
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Imp. Gaz. Imperial Gazetteer of India.
Ir. Irish
Ir. Eq. R. Irish Equity Reports.
I. J. Indian Jurist.
I. J. (N. S.) Indian Jurist (New Series).
J. & H. Johnson and Hemmings Reports (1859-1862).
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Keen Keen's Reports (1886-1888).
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Leon. Leonard's Reports (1553-1615).
L. J. Law Journal Reports (1823-1831).
L. J. (N. S.) Law Journal Reports, (New Series)
L. J. Ch. ...	... Law Journal Chancery.
L. R. ...	... Law Reports
L. R. Ch. ...	... Law Reports Chancery.
L. R. C. P. ...	... Law Reports Common Pleas.
L. R. Eq. ...	... Law Reports Equity Cases
L. R. Ex. ...	... Law Reports, Exchequer.
L. R. H. L. ...	... Law Reports English and Irish Appeals
L. R. H. L. C. ...	... Law Reports House of Lords Cases.
L. R. I. A. ...	... Law Reports Indian Appeals.
L. R. Q. B. ...	... Law Reports Queen's Bench Cases.
L. T. ...	... Law Times Reports.
Lit. ...	... Literally

M	...	...	Madras (Indian Law Reports)
Maon	...	...	Macnaughten
Mar.	...	...	Marshall's Reports (1814—1816).
M. & A.	...	...	Montagu and Ayrton's Reports.
May.	...	...	Mayukh.
Mit.	...	...	Mitaksbara
M. & C.	...	...	Mylne and Craig's Reports (1835—1841)
M. and G.	...	...	Macnaughten
Man and G.	...	...	Manning and Granger (1840—1844)
M. H. C. R.	...	...	Madras High Court Reports.
M. and K.	...	...	Mylne & Keene's Reports (1832—1835).
M. and P.	...	...	Moore and Payne's Reports (1828—1831).
M. I. A.	...	...	Moore's Indian Appeals (1836—1872).
M. L. J.	...	...	Madras Law Journal.
M. L. W.	...	...	Madras Law Weekly.
M. & S.	...	...	Maule and Selwyn's Reports (1813—1817).
M. & W.	...	...	Meeson and Welby's Reports (1836—1847).
Mad.	...	...	Maddock's Reports (1815—1822.)
Meq.	...	...	Mcqueen's House of Lords Cases (1851—1852)
Mac & G.	...	...	Macnaughten and Gordon's Reports (1849—1852.)
Marsh.	...	...	Marshall's Reports (1813—1816)
Mer.	...	...	Merivale's Reports (1815—1817.)
Mont.	...	...	Montagu's Reports (1829—1832).
Mood.	...	...	Moody's Chancery Cases (1824—1844).
Moo. P. C.	...	...	Moore's Privy Council Reports (1836—1862)
Moo. P. C. (N. S.)	...	...	Moore's Privy Council New Series (1862—1865.)
My. & Cr.	...	...	Mylne and Craig's Reports (1835—1841)
My. & K.	...	...	Mylne & Keene's Reports (1832—1835.)
N. L. R.	...	...	Nagpur Law Reports.
N. & M.	...	...	Neville and Mannin's Reports (1832—1836.)
N & P.	...	...	Neville & Perry's Reports (1836—1838.)
N. S.	...	...	New Series
N. W. P. H. C. R.	...	...	North West Provinces High Court Reports (1866—1875)
O. A.	...	...	On Appeal
O. C.	...	...	Original Civil Jurisdiction.
P. C.	...	...	Privy Council.
P. D.	...	...	Law Reports Probate Division.
P. L. R.	...	...	The Punjab Law Reporter.
P. R.	...	...	Punjab Record.
Pat.	...	...	Patna.
Pat. L. J.	...	...	Patna Law Journal.
Pat. L. W.	...	...	Patna Law Weekly.
Phil.	...	...	Phillip's Reports (1841—1849).
P. Wms.	...	...	Peere Williams' Reports (1695—1736).
Q. B.	...	...	Law Reports, Queen's Bench.
Q. B. D.	...	...	Law Reports, Queen's Bench Division.
R. & M.	...	...	Russel and Mylne's Reports (1829—1831).
Reg.	...	...	Regulation.
Russ.	...	...	Russell's Reports (1826—1829).
S.	...	...	Section.
Sarv. Inh.	...	...	Sarvadhikari on Inheritance.
S. B. E.	...	...	Sacred Books of the East.
S. C.	...	...	Select Cases.
S. D. A.	...	...	Sudder Dewany Adaulat Reports.
Sch. & Lef.	...	...	Schoales and Lefroy's Reports (1802—1806).
Sel. Rep.	...	...	Select Reports.
Skt.	...	...	Sanskrit.
Sm. and Giff	...	...	Smale and Giffard's Reports (1852—1857)
Sm. L. C.	...	...	Smith's Leading Cases
Stark	...	...	Starkie's Reports (1815—1822).
Str. L. H.	...	...	Strange's Hindu law
Suth	...	...	Sutherland
Sw.	...	...	Swanston's Reports (1818—1819)
T. R.	...	...	Term Reports (1785—1800)
T. L. R.	...	...	Times Law Reports
Taunt	...	...	Taunton's Reports (1807—1819)

Vaugh	...	...	Vaughan's Reports (1865—1874)
Vern....	...	...	Vernon's Reports (1681-1720).
Ves.	Vesey's (Junior) Reports (1789-1817).
Ves. Sen.	Vesey's (Senior) Reports (1746-1755).
Vol.	Volume.
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W. N.	Law Reports Weekly Notes.
W. R.	Weekly Reporter.
W & T. L. C.	White & Tudor's Leading Cases.
Willes	...	...	Willes' Reports (1737—1760)
Y. & C.	...	...	Young & Colleyer's Reports (1834—1842)
Y. & C. C C	...	..	Young & Colleyer's Chancey Cases (1841—1844
Y. & J.	Young & Jervis' Reports (1826—1830)
Y & C. Ex.	Young & Collyer's Exchequer Reports (1826—1830).
Yaj.	Yajnavalkya.
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GLOSSARY.

Word.	Sanskrit.	Meaning.	Remarks.
Adhyagnik.	अध्यग्निक् ...	Presents given to the bride before the nuptial fire (<i>Adhi</i> -before and <i>Agni</i> -fire).	A species of stri-dhan.
Adhyavahnik ...	अध्यावाहनिक्.	Presents given to the bride at the time of the bridal procession (<i>Adhi</i> near or during, <i>Avahnik</i> procession).	Do.
Angir } Angiras }	अङ्गिरः ...	Writer of a Dharmashastra.	He flourished before Yajnavalkya and is mentioned by him in his Smṛiti in Acharadhaya Sloka 4.
Annydeyic.	अन्यदेयिक् ...	Gifts by stranger (<i>Aunya</i> other outsider, <i>deyik</i> what is given, gift by another).	A species of Stri-dhan.
Aparaditya Dev or Aparark	अपरादित्य देव अपरार्क	Name of a king of the Silahora dynasty one branch of which reigned in J h a n a the other in Panola near Kolhapur in Konkan in the Bombay Presidency.	He flourished either at the time of Vijnaneshwar or subsequent to him. See Sarvadhikari p. 381-387.
Aparark ...	अपरार्क ...	Writer of a Dharmashastra.	Mayne in Para 26 says that his work is of paramount authority in Kashmir which appears doubtful.
Apastamb.	आपस्तम्ब ...	Do.	
Ashahaya...	असाहाय ...	Do.	

Word.	Sanskrit.	Meaning.	Remarks.
Ashahaya Vidyanes- war ...	अषाहय विद्या नेश्वर ...		
Ashvalayan.	आश्वलायन ..	Name of Smriti writer ...	
Atharva Ve- da ...	अथर्व वेद ...	The fourth Veda ...	See § 50.
Atri	अत्रि ...	Writer of Dharmashastra.	He is mentioned by Yajnavalkya in Acharadhya Sloka.
Baudhayan.	बौधयन ...	Do.	His work is trans- lated in S. B. E. Series.
Bharuchi...	भारुचि ...	Do.	
Bhashya ...	भाष्य ...	Commentary ...	
Bhrigu ...	भृगु ...	Name of a sage who re- vealed to the people the doctrines of Manu ...	See Manu, Chapter 1 Sloka 59.
Bhrigusan- hita.	भृगुसंहिता ...	Bhrigu's recension of Manu.	
Brihaspati.	बृहस्पति ...	Writer of Dharmasastra...	His work is trans- lated in S. B. E. Series.
Brihat ...	बृहत् ...	} Great wise {	Often used to dis- tinguish the vari- ous writers of Dharmasastras
Budh ...	बुध ...		
Daksh ...	दक्ष ...	Writer of a Dharmashastra	
Dh a r e s h- war.	धारेश्वर ...	King of Dhar ...	He is mentioned by Yajnavalkya in Acharadhya Sloka 5.

Word.	Sanskrit.	Meaning.	Remarks.
Dattak ... Chandrika	दत्तक् चंद्रिका.	Work on Adoption. ... <i>Dattak-on A d o p t i o n- Chandrika-moonlight...</i>	Name of the work on the law of adoption.
Dattak ... Mimamsa...	दत्तक् मिमांसा.	Work on Adoption (au- thor-Nand Pandit) ...	Mimamsa-inquiry.
Dayabhag. D a y a Vi- bhag ...	दायभाग ... दाया विभाग.	Partition of h e r i t a g e (daya-what is given hence- Inheritance and bhag or vibhag partition ...	A treatise on the law of Inheri- tance by Jimut- vahan.
Deval ...	देवल ...	A writer of Dharmashastra	He flourished pro- bably prior to Brihaspati ...
Dharnidhar	धरणिधर ...	Do.	
Gautam ...	गौतम ...	Do.	His work has been translated in 2 S. B. E.
Govindraj.	गोविंदराज ...	Commentator on Manu...	
Harit ...	हारीत ...	Writer on Dharmashastra	He is mentioned by Yajnavalkya in Acharadhaya Sloka 4.
Hiranya .. Keshin ...	हिरण्य ... केशिन ..	'Golden haired' ...	A school forming a sub-division of Apastamb ... See Apastamb S. B. E. Series In- troducton.
Jeemut Va- han ...	जीमूत वाहन.	Name of a Bengal writer of Dayabhag.	He probably flour- ished in the fif- teenth century. See Sarvadhikari p. 403.

Word.	Sanskrit.	Meaning.	Remarks
Kalpataru.	कल्पतरु ...	Dharmashastra ... (Kalp - desire, Taru - a tree—a Wishing tree).	A work written by Lakshmidar sometime between the 12th and 14th century. See Sarvadhikari p. 391.
Kamlakar.	कमलाकर .	Dharmashastra ... (Kamal-lotus, Akar, mine; treasure) ...	Name of the Author of Nirnaya-sindhu and Kinada Tandava flourished in the 13th century.
Karvir	करवीर ...	He was the minister of Hara Sinha Deva King of Mithila ...	
Chandeshwar Thakur ...	चंदेश्वर ताकुर.		Author of Vivad Ratnakar an authoritative work of the Mithila School ...
Kashyap ...	कश्यप ...	Writer ...	His date is not fixed but flourished after Brihaspati ...
Katyayan...	कात्यायन ...	Writer ...	
Kulluk Bhatt ...	कुल्लुक भट्ट ...	Best known commentator on Manu ...	
Kulluk Dharmasar	कुल्लुक धर्मसार.	Epitome of the work by Kulluk ...	
Lakshmidar ...	लक्ष्मीधर ...	Writer ... Shankh and Likhita were joint authors. (Likhita—what is written—a pen-name) ...	
Likhita ...	लिखित ...		They are mentioned by Yajñavalkya in Acharadhaya, Sloka 5.

Word.	Sanskrit.	Meaning.	Remarks.
Madhav ...	माधव ...		
Manu ...	मनु ...	He is the first law giver said to be a Magadh or Mithila Brahmin. ...	SS. 58-72.
Medhatithi.	मेधातिथि ...	Commentator on Manu...	Flourished before Vijnaneshwar.
Mitakshara.	मिताक्षर ...	A commentary on Yajna- valkya Smriti by Vijnaneshwar (<i>mit</i> -few, measured <i>Akshar</i> - Letters) <i>i.e.</i> , concise ...	
Mitr Misra.	मित्र मिश्र ...	Author of Virmitrodaya. A work of the Benares school. Written in the 16th century.	
Lakshmi-dhar ...	लक्ष्मीधर ...	Author of Kalptaru ...	
Nand Pandit ...	नन्द पण्डित...	Author of "Dattak Mimansa"	
Narad ...	नारद ...	A writer on Dharmashastra. ...	His work has been translated in the S. B. E. series.
Nilkanth ...	नीलकण्ठ ..	Author of Vyavhar Mayukh ...	
Parashar ...	पराशर ...	Paramount authority in the Kalinga. His work on law is lost, though extracts from it are cited in the commentaries. His date is not settled..	
Madhaviyam • ...	माधव्यम् ...		

Word.	Sanskrit.	Meaning.	Remarks.
Mayukh ...	मयूख ...	A ray or beam (of the sun) Vyvhar Mayukh is the chapter on <i>Vyavhar</i> or duty.	
Prajapati.	प्रजापति ...	Lord of the People King.	
Pratap Rudra Deo.	प्रताप रुद्रदेव..	King of the Kakataya Dynasty of Warangal and is said to be the author of <i>Saraswati Vilas</i> , a work of authority in the Madras Presidency. He flourished in the 14th century.	
Rigveda ...	ऋग्वेद ...	The first Veda (<i>Rikh-Hymn</i> and <i>Veda</i> knowledge—Hymn book).	
Samvart ...	संवर्त ...	Name of a writer on Dharmashastra.	He is mentioned by Yajnavalkya in Acharadhaya Sloka 4.
Sam Veda.	सामवेद ...	Third Veda ; (<i>Sam-song</i> ; <i>Veda</i> , knowledge).	
Saudayik ...	सौदायिक ...	A kind of Stridhan-comprising presents made by parents and other relatives of the bride.	A species of -stri dhan.
Shankh ...	शंख ...	Name of a writer (<i>Sankh-couch</i>)	
Sankhyayan	संख्यायन ...		
Saraswati-vilas ...	सरस्वति विलास	A work (<i>Saraswati-Goddess</i> of learning <i>vilas</i> -sport or amusement, sport of the Goddess of learning).	

Word.	Sanskrit.	Meaning	Remarks.
Shatatap ...	शातातप ...	A writer on Dharamashashtra. He is mentioned by Yajñavalkya in Acharadhaya Sloke 5.	
Shaunak ...	शौनक ...	An author more known to lawyers on account of the ritual prescribed by him to be observed in the adoption ceremony.	
Smritichandrika	स्मृतिचंद्रिका ..	Name of a work on Dharamshashtra by Devananda Bhatt also called Deva or Devanna Bhatt.	(<i>Smriti</i> — tradition <i>Chandrika</i> — moon light).
Srikar ...	श्रीकर् ...	Name of an author ...	
Subodhini.	सुबोधिनी ...	A commentary (<i>Su</i> -good ; <i>Bodh</i> -knowledge).	
Shulk ...	शुल्क ...	Bride price	A species of stri dhan.
Upnishads.	उपनिषद् ...	Metaphysical chapters of the Vedas.	
Usanas ...	उषन् ...	Name of an author on Dharmashastra.	He is mentioned by Yajñavalkya in Acharadhaya Sloka 4.
Ushan ...	उषन ...	Writer	
Ushanas ...	उशनस ...	Sutras of Ushanas	
Sutras ..	सुत्राणि ...		

Word.	Sanskrit.	Meaning.	Remarks.
Vachaspati misra.	वाचस्पति मिश्र	Author of Vivad Chintamoni, an authoritative work of the Mithila School. He flourished in the beginning of the fifteenth century.	
V a i s h n u follower of the Ramanuja sect.	रामानुज पदानुयामी वैष्णवः	Worshippers of the God Vishnu—A sect.	
Vadyanatha Dikshityam ...	वैद्यनाथ दिक्षितयाम ...	Name of a work ...	
Vasishth ...	वसिष्ठ ...	Name of an author on Dharmashastra.	His work has been translated in the S. B. E. Series.
Vijnyaneshwar ...	विज्ञानेश्वर ...	Author of the Mitakshara (<i>Vidya</i> learning <i>Ishwar</i> Master).	
Virmitrodai.	वीरमित्रोदय...	"Rise of the brave Mitra" name of a work by Mitakshara (<i>Vir</i> -brave <i>mitra</i> -name of a king- <i>udai</i> rise).	
Vishnu ...	विष्णु ...	Name of the author of a minor law book.	His work has been translated in the S. B. E. Series.
Visvarup ...	विश्वरूप ...	An author of a commentary on Yajñawalkya Smṛiti (<i>Vishva</i> universe; <i>rupa</i> appearance having the appearance of the universe).	

Word.	Sanskrit.	Meaning.	Remarks.
VivadChandra ...	विवाद चंद्र ...	The moon on discussion. A work supposed to be prepared by Laxmi Devi though the name of her nephew Devi Misaru Misree is mentioned the writer.	
Vivad Chandrika ...	विवाद चंद्रिका ...	Moon-light on discussion. name of work ...	
Vivad Chintamani ..	विवाद चिन्ता मणि ...	Antidote against anxiety regarding discussion.	
Vivad Ratnakar ...	विवाद रत्नाकर ...	Ocean of discussion from <i>Vivad</i> discussion and <i>Ratnakar</i> ocean ...	A work of the Mithila School composed by war.
Vridha Satatap ...	वृद्ध शतातप ...	Shatatap the senior ...	prataparudriya, Author of.
Vrihaspati.	वृहस्पति ...	Name of the author on Dharmshastras. His work has been translated in the S. B. E. Series.	
Vrihat Harit	वृहद् हरित ...	Harit the senior.	
Vyas ...	व्यास ...	'Diamater' A writer on Dharmashartras.	
Vyavahar Chintamani	व्यवहार चिन्ता मणि ...	Antedote against anxiety regarding legal matters.	Another work of U'achespati Misra.
Vyavahar Mayukh ...	व्यवहार मयूख ...	See Nilkanth a ray of light on matter of law...	
Vyavahar Nirnai ...	व्यवहार निर्णयि	Decisions on legal topics.	

Word.	Sanskrit.	Meaning.	Remarks.
Veda Vyas.	वेदव्यास ..	The diametre of the Vedas. The great sage arranged the Vedas. The author of Mahabharat and a number of Puranas are also attributed to him.	
Yadnaval- kya ... or	याज्ञवल्क्य ...	Name of a writer ...	
Yajnaval- kya ...	याज्ञ वल्क्य ...		
Yajur Veda.	यजुर्वेद ...	A book containing the sacrificial formula a retrial from यजुः a sacrificial and वेद knowledge.	
Yajur Veda school ...	यजुर्वेद ...		
Yama ...	यम ...	Name of a writer, an author on Dharma-shastras mentioned by Yajnavalkya in Acharadhaya Sloka 4 and quoted by Vashistha ...	
Yautak ...	यौतक ...	Nuptial presents a kind of Stridhan from "यु to join" ...	

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GENERAL INTRODUCTION.

I

1. THE true prototype of the institutions peculiar to Hindu Law is to be found in the primeval tribal customs which are the common stock of all sections of the Indo-European race. **Genesis of Aryan Institutions.** The law of joint Hindu family, of adoption, marriage and succession is not the peculiar feature of archaic Hindu Law. It was a part of the customs of the ancient Greeks, Romans and other nations who claim their descent from the common parent race. The system of Hindu law is, indeed, not a peculiar feature of the Aryan races. It is to be found up to the present day in countries such as China and Japan, though somewhat modified by the force of modern circumstances. The joint family is but the natural outcome of the gregarious instinct of man. Indeed, in one sense there are joint families even among certain classes of lower animals. They play a necessary part in the growth of civilization and the development of society. But the joint families as now known to the Hindus are not the joint families as known to their primeval progenitors. To them a family meant a body of men united for purposes both offensive and defensive, to which were necessarily attached a number of women as dependant serfs. It was both natural and necessary that this band of men should have a leader, and what can be more natural than that in such a society respect should be paid for age, for with age went experience and with experience, wisdom. The oldest male would naturally become the leader of such a flock. This is then the genesis of the particular society which in its primitive and rude simplicity may still be observed in several remote parts of India such as *e.g.*, in the case of Santals, the Oraons, the Bhils and other aboriginal hill tribes. Writing of the *Oraons*, an aboriginal tribe inhabiting the Chota Nagpur and the adjoining tracts of the Central Provinces plateaus and describing the institution of *Dhumkuria* or Bachelors' Dormitory, Sir H. Risley says: "In all the older Oraon villages where there is any conservation of ancient customs, there is a house called the *Dhumkuria* in which all the bachelors of the village must sleep under penalty of a fine . . . I not long ago saw a *Dhumkuria* in a Sirguja village in which the boys and girls all slept every night." (1) Sexual intercourse before marriage, he continues, is tacitly recognized and is so generally practised that in the opinion of the best observers no Oraon girl is a virgin at the time of her marriage. "To call this state of things immoral is to apply a modern conception to primitive habits of life. Within the tribe, indeed, the idea of sexual morality seems hardly to exist, and the unmarried Oraons are not far removed from the condition of modified promiscuity which prevails among many of the Australian tribes. Provided that the exogamous circle defined by the *totem* is respected, an unmarried woman may

(1) *Ethnography*, p. 248

bestow her favours on whom she will. If, however, she becomes pregnant, arrangements are made to get her married without delay, and she is then expected to lead a virtuous life." (1)

Such was the social order in the administration of the cyclops of which Homer wrote :

" Meetings, that counsel bring, to them are not,
 " Nor legal Judges. On the high hill tops
 They dwell, or in the hollow cave and each
 To wife and children gives the law, nor care
 Aught have they of each other." (2)

2. In this primitive State of Nature idealized by the modern man as the golden dawn of history, there was little to choose between the grim battle for life which the human hunter fought and his animal prey upon which he subsisted. For, as Hobbes has pointed out, the primitive state of human society was not that of Universal peace but one of indiscriminate war, and even when men were not actually engaged in war their condition was at all times one of armed neutrality. "For war consisteth not in battle only, or the act of fighting ; but in a tract of time wherein the will to contend by battle is sufficiently known ; and therefore the notion of 'time' is to be considered in the nature of war, as it is in the nature of weather. For as the nature of foul weather lieth not in a shower or two of rain, but in an inclination thereto of many days together : so the nature of war consisteth not in actual fighting, but in the known disposition thereto during all the time there is no assurance to the contrary. All other time is peace." (3) This state of insecurity from without necessarily dictated the assurance of society within. The tribal units were too loosely formed and unwieldy for a strict discipline in detail which necessitated their splitting up into smaller groups held together by the combined forces of personal and sexual affinity, and dictated by the natural instincts of self-preservation. Strangers would be freely admitted into this social group. The modern social order is thus the result of modified promiscuity. (4)

3. The formation of hordes and the formation of familial groups are the two facts which mark the dawn of history. But which of them preceded the other is a question upon which ethnologists are still at variance. There are those who trace the growth of family relations from the primitive promiscuous hordes, while there are others who with Maine hold that "the conclusion which is suggested by the evidence is *not* that all early societies were formed by descent from the same ancestor, but that all of them which had any permanence or solidity either were so descended or assumed that they were. An indefinite number of causes may have shattered the primitive groups, but wherever their ingredients recombined it was on the model or principle of an association of kindred." (5) But the very conception of kindredship postulates an earlier era ; and while it is true that the earliest speculation starts with a dominant affinity for familial ties, it is not safe to predicate that it must have been necessarily the very first stage in social evolution. Even Sir Henry Maine suggests several causes which may have led to the predominance of one over the other while the numerical inferiority of the sexes suggests a variation which makes the working of the two theories

(1) 2 Tribes and Castes, p. 141.

(2) Odyssey, IX. 12.

(3) Leviathan, Ch. XII.

(4) Maine's Early Law and Custom, Ch. VII, p. 200.

(5) Ancient Law, Ch. V.

simultaneously possible in different surroundings. Society must have been circumstanced by its environment. Maine thinks it "more than probable that, since the appearance of mankind on the earth, an indefinite portion of the race has suffered at different times from a serious inferiority in numbers of women to men." "It must further be acknowledged," he continues, "that the advance in intelligence of which Darwin speaks ⁽¹⁾ would lead men to establish institutions in conformity with this proportion between the sexes, if only for the purpose of keeping within bounds that sexual jealousy which could not fail under such circumstances to produce, if unrestrained, a perpetuity of violence and bloodshed."⁽²⁾ "Patriarchal theory," he adds, "supposes that the motive which led to the exertion of power was sexual jealousy. The counter-theories assume the abeyance during long ages of sexual jealousy."⁽³⁾ But Maine allows for the promiscuity of intercourse; and the polyandry even practised up to the present day in certain parts of Southern India makes one pause before applying to the diverse human institutions a single *a priori* test. Moreover, those who strive for a logical sequence of social evolution seem to ignore that it is not only possible for the two units to come into existence in response to local conditions, but it is equally possible for both of them to co-exist at the same time and in the same place. This will be evident if regard is had to the fact that a tribe in its original form is distinguished from a caste by the fact that its basis is political rather than economic or social and that the impelling demand of social necessity may equally be combined with political exigency. To these causes might be added other adventitious causes leading to the formation of tribes and families side by side.

4. One thing is certain. The ancient nomadic groups all practised female infanticide. Daughters were an incumbrance to the people who had every moment to turn their strength to account in defence of their property and person, while grown-up women afforded an attraction for hostile attacks enhancing the worries of an insecure existence. Each primitive group depended for its necessary supply of women upon women-stealing for which marauding excursions were frequent which are immortalized by the legend of the founder of Rome. That such wife-hunting expeditions were common long after the Hindus had established a settled social order is evident from the forms of marriages described in the law books to which particular reference will be presently made. This practice had a far reaching effect upon the history of the Aryan people. They appear to have early discovered the evils of consanguinous inter-breeding which in many cases afforded ample ocular demonstration of transmitted maladies and deformities. Exogamy was, therefore, not only the acknowledged necessity but became the prevailing rule. But in this way some of the groups became sufficiently large to dispense with exogamy. Endogamy then took its place and thus arose the notion of a *gens* and *gentiles*, self-centred and self-contained, who all claimed descent through males from a common male ancestor. It was a further bond for cementing the ties of association. The mimetic faculty of man traceable to his simian ancestry would play a conspicuous part in shaping all groups after a settled model once it was well formed and its utility sufficiently demonstrated. There would also be the equally natural egoism, that pride of self or something like self, which accounts for the continuance of clans, castes and races. But here again one must not lapse into the danger of a too wide generalization. For while it is true that the

(1) 2 Descent of man, p. 362.

(3) *Ib.* p. 216.

(2) Early law and custom, Ch. VII, p. 214.

Aryan *gens*, such as, of the Hindu, the Greek and the Roman types, trace their ancestry in a continuous agnatic line, there are instances on records of groups, such as, the so-called aborigines of Australia or the American islands among whom kinship is traceable exclusively through the female parent. These groups mark their bodies with a common mark or "totem" (1) to preserve their clannish identity and members of the same group never inter-marry. This "totem" becomes a symbol of great cohesive value. People of the same "totem" will often travel long distances to assist their fellow-totems. But kinship so created is naturally apt to become confused in course of time, and even where it is not so, it naturally yields the palm to the agnatic group which represents the flower of its masculine strength and mind whose exploits and achievements would naturally out-distance the cognatic clans.

5. This fact accounts for the ancestor worship as to which Sir John Lubbock wrote: "Although descent amongst the lowest **Ancestor worship.** savages is traced in the female line, I do not know of any instance in which female ancestors were worshipped."

The worship of female ancestors marks yet another stage in the evolution of society. Here again, the genesis of the custom is laid in the dawn of history. The savage races believed in the continued existence of their dear departed dead who had assisted them in life and who they fondly believed could not do otherwise after their death. The primitive conception of a great warrior leading the same life and following the same occupation before and after death led to the funeral offerings of food, clothing and weapon, and so tenacious are these rites and beliefs of a by-gone age that they linger even yet in several parts of Europe, where the Britons leave the remains of the 'All Souls' supper on the table for the ghosts of the dead kinsfolk to partake of, and Russian peasants set out cakes for the ancestral manes on the ledge which supports the holy pictures, and make dough ladders to assist the ghosts of the dead to ascend out of their graves and start on their journey for the future world; while yet another provision for the same spiritual journey is made when the coin is still put in the hands of a corpse at an Irish wake. (2) The strewing of flowers on the graves, the lighting of tapers and other offerings of love are but relics of the same thought which have survived the combined attacks of science and the testimony of reason. The gorgeous funeral pageants of the ancient Greeks and Romans were inspired by the same thought. Those who were most endeared in life offered their utmost homage to the vanished spirit and the test applied by the Dayabhagh for determining the heirs thus becomes at once intelligible. Those were the nearest of kin who offered the largest obsequial feasts. That these should

(1) A "totem" is an animal or thing which members of a totem group regard as sacred and who consequently regard themselves as members of the same family amongst whom inter-marriage or co-habitation is not permissible. Totemism prevails amongst the Dravidians in India who have for totems the month of June, Wednesday in every week, the moon, the rainbow, and the constellation pleiades, besides the entire flora and fauna of the country where the tribe is settled—Risley's Cens. Report. 1901-Pt. 1, § 890; People of India, p. 105; Spencer and Gillen, Native Tribes of Central Australia,

1899; Totemism and Exogamy, 1910 Vol. 1, p. 91 *et seq.* For totems in the C.P. See C. P. Census Report, 1901 Vol. 1, p 189 *et seq.*; in Madras E. Thurston's Castes and Tribes of Southern India. 1909; Cochin Tribes and Castes, Vols. 1 and II-1909-12. For Assam-Census Report 1911, Vol 1, p. 72; Bombay-Ethnographic Survey (1909) 184, pp. 1, 12; (1904) No. 12, p. 2; Census Report Bombay (1911) Vol 1 p. 268; Central India Census Report (1901), p. 198.

(2) Tylor "Primitive Culture," Ch. I, III, IV, XI, XII. Early History of Man-kind, Ch. VI.

be confined to the priestly class of Brahmins, is only due to their sacerdotal influences. They were the scribes of old and naturally placed their class interest before the public weal. But it marks a later epoch in the development of society. As adoption was necessary to strengthen the patriarchy, so ancestor worship was persisted in to preserve its identity. The two institutions now peculiarly Hindu have thus persisted in the march of ages. The law of inheritance is only a necessary corollary of the ancestor worship. Those who performed the obsequial rites were naturally the offspring of the deceased. By a confusion of cause and effect ancestor worship and inheritance became a part of the established usage of classic antiquity. Those who conferred the utmost benefit upon the deceased were admitted to preferential claim for participation in his worldly effects. The medieval Christian Church made the one a condition precedent to the other, and upon it, it founded the jurisdiction of the Ecclesiastical Court in which all moveable and personal property of the deceased vested in the first instance, before it could be distributed; and this jurisdiction, extended to the powers over executors in the case of wills and of administrators in the case of intestacies, has descended to the modern Court of Probate.

6. The clear line that now divides the secular from the ecclesiastical law did not exist. One special feature of archaic society was
Law and religion. the blending of law with religion and of both with social duty. The clear line that divides the three is of recent growth. In ancient society all passed under the garb of religion as religious conceptions were the first to develop; and as the executive was necessarily weak, there was a distinct gain in appealing to divine authority for the government of society. It tended to ensure implicit obedience by hushing all doubts and silencing all dissent and opposition.

7. "Of all the problems," writes Hunter, "that the human race had to confront the greatest perhaps is to know what conduct is really injurious to mankind, and what is the best way to secure good conduct. Scarcely less important is it to know the degree in which conduct is injurious. On all these points, early societies had every thing to learn; and, as was unavoidable, the lesson was acquired slowly and imperfectly. It would be rash to assume that even now the classification of wrongs and offences is satisfactory or final; and it is universally admitted that the art of punishment or rather of prevention is still far from perfect. The first great step in the progress of law is when the distinction between acts that are harmful to human society, and acts that may not be so, but are hateful to supernatural beings is thoroughly grasped. The distinction between sin and crime, between an offence against some god, and an offence against the State, lies at the root of all legal development. It is impossible to make any advance towards rational classification of offences, until the elementary conception of an offence—as an act injurious to man living in society—is thoroughly apprehended and firmly grasped." (1)

8. Judged by this test Hindu Law never emerged out of its pristine infancy. Indeed, its social development as portrayed in the law as now administered remains far behind that of the earliest Roman Institutions as seen in the Twelve Tables promulgated about 500 B. C. It is not even comparable to the regal period which heralded the establishment of the Republic in 509 B. C. This period was marked by very strong religious feeling. Nothing could be done in private or public life without consulting the gods who exercised a direct supervision over the affairs of men through the agency

(1) Roman Law, 1068.

of the priests of which there were three colleges or guilds, namely, the pontiffs, the augurs and the fetials. Of these the pontiffs were most intimately connected with the law. "In the earliest times they were in exclusive possession of the civil as well as of the religious law. They alone regulated the calendar, and determined the *dies fasti* on which alone legal business could be lawfully transacted; they alone were in possession of the technical forms according to which law suits must be conducted; they convoked the assembly of the wards when wills were to be received or adoption was to take place. In some cases of deep moral offence they might even pronounce the sentence of death; but a right of appeal lay to the people. In spite of the intensity of Roman religious feeling the religion of the State was always absolutely subject to the political authority." (1)

9. In classical Grecian history priests played even a less conspicuous part in the administration of law. The fact is that Hindu Law took the turn suitable to the genius of the people as the Grecian and Roman Laws overtook the fast developing republican genius of the people. Consequently, while the early laws of these people furnish close analogies, which are to be expected by reason of their common ancestry, their later developments furnish matters only for contrast rather than for comparison (§ 23).

10. The early development of Hellenic culture on account of the emancipation of the people from the thralldom of priestcraft

The Laws of Solon. gives to the laws of Solon promulgated in 594 B. C. a comparative modernity which is not found in the laws of Apastamb and Baudhayan who promulgated their sutras 800 years later. The fact is, as Solon observed, the trend of laws is determined by the genius of the people. Their usages are transformed with the permeation of new ideas. The welding of law with religion can only stand so long as the people are in their habits and thoughts implicitly religious, and childishy credulous. With the growth of political institutions the divine law becomes separated from human commands as the conception of civic duty becomes disentangled from religious piety. The laws of Solon, inscribed on wooden tablets arranged in pyramidal blocks turning on an axis, announced to the people the distinction between civil law and religious duty. They were at first deposited in the Acropolis, but afterwards for greater convenience of inspection they had to be brought down to the Prytneum. They mark an epoch when the people had already risen against their tyrants, driving out Pisistratus and installing Lycurgus in his place. At the same time they show the struggle that was still raging between religious fears and civic liberty. To allay the fears of the superstitious, Solon is said to have invited Epimenides of Crete who was reputed to possess the power of magic. He performed certain rights which appeased the superstitious Athenians, offering, it is said, even a human sacrifice to allay their fears. He founded a temple to Eumenides on the Areopagus not forgetting the two altars which appeased the malignance of Hubris and Anaideia under which Athens had been suffering for years. He curtailed the extravagant funeral expenses, released the pledged lands from their incumbrances, and repealed the law which enabled the creditor to enslave his debtor, and had led debtors even to sell their own children. The nobles had appropriated all the lands. He substituted property for birth as a qualification for citizenship. As such, he divided the Athenian citizens into 4 classes and assigned to them their respective duties. The first consisted of persons

(1) Hunter's Roman Law, Ch. I, p. 10.

whose rent or yearly produce yielded 500 measures, the second whose income yielded 300, the third whose income yielded 200, while the rest were relegated to the fourth which was a servile class. All the highest offices were reserved for the first class, the second and third performed military duties and were on that account lightly assessed. The people were given a democratic constitution. The archons retained their judicial powers but appeals were allowed to the Senate and the Areopagus, which were popularly elected bodies. The fact that Solon prohibited women from going abroad with more than three changes of apparel and a limited quantity of provisions, and not to pass through the streets at night otherwise than in a carriage with a light carried before them, shows the freedom they had previously enjoyed and the necessity felt for restraining their licence—a restraint which in later years introduced a semblance of purdah amongst them.

11. The education of the Athenian was an affair of the State. Up to his sixteenth year he was educated at home. But on attaining that age he was compelled to spend two years in a gymnasium under publicly appointed masters. At 18 he was enlisted as a citizen. He could then inherit his patrimony, but was liable to attend to public duties. This Hellenic influence tended to greatly influence the course of Roman legislation. The genius of both people was, as already remarked, democratic, and even during the regal period of its history (B. C. 754-509) the popular assembly or the *comitia curiata* was, in Rome, the final Court of appeal with power to revise even the King's decrees.

12. Under the Republic established in 509 B. C., the people became divided into two classes—the patricians and the plebians, and while both possessed theoretical equality, the patricians in fact enjoyed all the powers and emoluments of office. But the plebians were not long in asserting themselves. The first thing they forced the patricians to do was to define the constitution which led to the codification of the customary law which was published to the people on twelve bronze tables, known as the Laws of the Twelve Tables which are the foundation of the whole fabric of Roman Law. Of these the first two tables prescribe the procedure for the trial of cases. They provide for the hearing of both sides, and for an *ex parte* decree against the absent party. The third table prescribes a mode of execution. The debtor was to be made over to his creditor in bondage. The latter might bind him with thongs or with fetters which were not to weigh more than 15 pounds. The creditor must provide a pound of bread a day for the maintenance of his debtor who could, moreover, live on his own means. The maximum period of his bondage was 60 days during which he was brought in 3 times before the praetor who publicly proclaimed his debt. After the third market day he could be put to death or sold beyond the Tiber, and if there were several creditors they might cut and divide amongst themselves the several portions of his body. The fourth table permitted parents to put to death their deformed children. They had the power of life or death over their legitimate children. The fifth table codifies the law of guardianship and inheritance. All women, except the vestal virgins were always to remain under the guardianship of their agnates. The *pater familias* could will away his property in the absence of which the property devolved upon his *sui heres* failing which the agnate and the gentile succeeded. By the Praetorian edicts these terms were explained to mean as follows :—

(1) *Sui heres*—children and grand-children by son.

(2) *Agnates*—statutory heirs.

(3) *Gentiles*—cognates and husband and wife.

It will be noted that women were not excluded but brothers and sisters equally participated in their patrimony.

13. The system of joint family, yet an established institution of Hindu Law, was as has been already seen (§§ 1-4) an institution dictated by the necessity of all archaic societies, for it was the one condition of safety to be a member of an organized group. The family was such a group, and the history of the Roman Law commences with such a family. From a legal standpoint such a family consisted of a Head Ruler or patriarch called the *pater familias*, and the members who were absolutely subject to his despotic sway. His own sons had no rights in the family any more than the slaves attached to the household. They could possess no property of their own. All they acquired became his. He could flog or imprison them regardless of their position or age. He possessed the supreme power of life and death in the exercise of which he usually destroyed all the elder female children excepting only the eldest. As already remarked the primitive man preferred to steal his wives instead of rearing them (§ 4). This power of life and death continued until it was revoked by an edict of Constantine (318 A. D.) who also curtailed the power of sale, permitting only the poor to dispose of their new-born babes reserving to them, however, a right of redemption.

14. In this state of society the adoption or affiliation of children was a matter of course. In early times adoption was known as *arrogatio* and required the sanction of the Pontiff and the people in their *comitia curiata*, in accordance with the following formulæ addressed to the person about to be arrogated and to the people:—

To the person to be arrogated. "Do you formally agree that Lucius Titius shall have power over you, as over a son, the power of life and death?"

To the People. Is it your will, your order, *Quirites*, that Lucius Titius by right and statute a son as if by birth the child of Titius and his *mater familias* and that Titius should have over him the power of life and death?

Law prohibited the adoption of an only son, while the arrogator could not adopt unless he was married, childless and of sixty years of age, or if on account of illness or other reason there was a probability of his dying childless. In early law women could not be arrogated; but later on their adoption was sanctioned. A person of any age could be adopted. The arrogator might adopt one as his son, grandson, great-grandson, grand-daughter or great-granddaughter.

The old juridical character of adoption was to bring the adoptee within the *potestas* of the *pater familias*. Justinian permitted adoption but allowed the natural father to retain the *potestas*. He also simplified the procedure by allowing adoption to be completed by a declaration in writing made before a Magistrate. (1) At first women could not adopt as they had no *potestas* but Diocletian and Maximian relaxed this restriction in A. D. 29.

(1) Gaius, I—99. Just., 1-11-1.

Adoption could not be repeated. The adopted son succeeded to his father in case of intestacy.

15. The Greeks also practised adoption. But while the primary object of their adoption was to ensure that some one should make the proper sacrifices and offer the funeral cake, the underlying principle of a Roman adoption appears to have been to strengthen the family and to avoid its extinction by securing an heir.⁽¹⁾

16. It will be thus seen that while both the Hellenic as well as the Roman Laws in their inception furnish many interesting and close analogies to Hindu Law, their early secularization and rapid development makes the relationship look like that of a child to a grown-up man. In regard to the law of inheritance however, the Roman and the Hindu systems retained close association for a longer period. But the point of divergence between them was also equally striking. Under Hindu Law the institution of the joint family has a peculiar significance. But the Roman joint family resembled more a Dayabagh family than the one contemplated by the Mitakshara. The *patria potestas* excluded the law of co-parcenership. At the same time in both the systems inheritance is inextricably connected with the performance of obsequial rites. Both the Romans and the Greeks inherited the tradition of their forbears that life in some form persists after death and that the dead needed the same nourishment and comforts as the living. The performance of the obsequies was a concern of the State, as much as of the individual. For the disconsolate spirit not only inflicted the family but also the State as an abettor of the family, if it suffered it to do wrong. But the early secularization of Roman Law led to restrictions upon lavish expenditure on funerals and the tenth Table is directed towards the curtailment of all such expenditure. It restricted mourners to three and flute-players to not more than ten in numbers. "Women shall not tear their cheeks nor indulge in wailing." "No person shall have more than one funeral, or more than one bier." "Gold shall not be burned or buried with the dead, except such gold as the teeth have been fastened with." Both the Greeks and the Romans cremated their dead, as do the Aryan Hindus, but while burial supplanted cremation in the western countries till its modern revival, the twice-born Hindus now cremate their dead though like the Romans the Vedic Hindu both buried and cremated their dead and it appears that of the two, burial was more common.⁽²⁾ But this means of disposal is now exclusively confined to the Shudras.

17. The one outstanding difference between the two branches of the Aryan family, migrated in opposite directions, is in their mental outlook on life. The one migrating to the East were meekly submissive to the usages which they continued to regard as records of divine wisdom, while the others threw the divine influence into the back ground, and secularized their laws which they modified with the growing earnestness of the age. Ethnologists have not adverted to this radical distinction which has produced such far reaching results.

18. It was a part of the education of the Roman youth to commit to memory the laws of the Twelve Tables. But though they long continued to

(1) Cicero *Pro Domo* 13, 15 Dig. 1, 7, 15, 2.

(2) Cf. the funeral hymn in Rig. Veda, X—18.

enjoy this distinction they did not long remain the sole repositories of the existing law for within 500 years three thousand brass plates did not suffice to record the growing laws of the people which had to be supplemented by the Edicts of the Praetors. These were the supreme Judges of the City annually elected and upon ascending the tribunal it was their duty to announce by the voice of the crier the rules which they proposed to follow in softening the rigour of ancient statutes and in the decision of doubtful cases. These rules were then inscribed on a white wall. They are monuments of chicanery intended to circumvent the old statutes which could not be repealed but which could no longer be followed. "Subtilities and fictions were invented to defeat the plainest meaning of the decemvirs, and while the end was salutary, the means were frequently absurd."

19. Heirs who had been excluded under the archaic agnatic succession dictated by the sterner requirements of a ruder age could no longer be superseded. The indulgent Praetor admitted their claims on the assumption that it was the secret or probable wish of the deceased. Compensation was substituted for the absolute rigour of the Twelve Tables, and recourse was had to infancy or fraud to dissolve the ties of an unequal contract. This was the fountain head of the praetorian equity which in practice led to most scandalous abuses due to the individual vagary, prejudice or self-interest of the praetor. But as his office had to be vacated at the end of the year, his successor was free only to propound whatever he considered right and thus precedents became established which were cited before the tribunal as the reported cases are to-day. But nevertheless to minimize individual aberrations the *Corucia* Law (67 B. C.) made all the Praetors adhere to the letter and spirit of their first proclamation and in 131 A. D., the Praetor Salvius Julianus compiled the perpetual edict which was ratified by the Emperor and the Senate thereby fusing both law and equity in a well-digested code, which finally superseded the Twelve Tables. Still these laws continued to be supplemented or supplanted by the *Rescripts* or replies of the Judges on questions put to them on doubtful points, the epistles, orations and supplementary edicts, grants, decrees and pragmatic sanctions inscribed in purple ink by the Emperors and transmitted to the provinces as general or special laws for the magistrates to enforce and the people to obey. The cumulative volume of these was sought to be reduced to three codes, the Gregorian, the Hermogenian and the Theodosian Codes.

20. These three codes were supplemented by other laws and legal opinions which filled many thousand volumes which rendered the study of law beyond human capacity. In 528 A. D., the Emperor Justinian appointed a commission of ten lawyers headed by Tribonian to codify this mass of ill-digested legal learning which they did in fourteen months, compiling their Code in twelve books or tables. It received the royal assent and became the authorized Code of the Roman Empire. Notaries and scribes were employed to make copies which were sent out to the European, Asiatic, and African provinces where they were proclaimed and their authority published on solemn festivals from the door of churches.

21. On the completion of this Code in 530 A. D., Justinian appointed Tribonian and seventeen other lawyers to digest the two thousand treatises in which lay imbedded the forgotten wisdom of praetors and lawyers of a thousand years. Within three years (in 533 A. D.) this commission was able to reduce three millions of sentences to a hundred and fifty thousand. This

became known as the Digest or Pandects and it likewise received his royal authority. Another legal work specially designed for students and called the Institutes was also ordered to be simultaneously prepared and it was got ready a month before the Digest.

22. Thus then the Codes, the Institutes and the Digest constituted the system of civil jurisprudence which alone were taught in the academies and admitted in the tribunals. They were supplemented by the new constitutions (*novellae constitutiones*) called the Novels from time to time which corresponded to the modern Amending and Repealing Acts.

23. "Greece and India, are, indeed, the two opposite poles in the historical development of the Aryan race. To the Greek, existence is full of life and reality; to the Hindu it is a dream, an illusion. While Gibbon sees the affinity between the Laws of Solon and those of the Twelve Tables comparing them to those of the Egyptians and Phœnicians and while he rightly discards as incredible the embassy suggested both by Livy and Dionysius to the Athens of Pericles to borrow her laws, he naturally fails to suggest the true explanation since discovered in the science of language of the common heritage of the three peoples. The Greek is at home where he is born; all his energies belong to his country; he stands and falls with his party, and is ready to sacrifice even his life to the glory and independence of Hellas. The Hindu enters this world as a stranger, all his thoughts are directed to another world; he takes no part even where he is driven to act; and when he sacrifices his life, it is but to be delivered from it." (1)

24. That climate had played an important part in shaping the destiny of these two peoples appears to be unquestionable. The ancestors of the western emigrants found themselves settled on rugged hills and the hardening influence of a colder climate and the growing congestion in cramped surroundings led to the overthrow of religious conventions which grew unchecked in the more spacious and fertile plains and enervating climate of the East. The one fell an easy prey to the toils of a wily priestcraft. The other shook off as early as the dawn of their authentic history their subtle and baneful authority. The religious rites and duties were, indeed, not altogether abolished, but they were clearly separated from the secular law and relegated to the domain of moral duties or to the care of the Pontifex Maximus. It was the duty of the latter to see that the family worship was perpetuated and the religious observances duly performed by the heir. But there was nevertheless a complete severance of his right as heir and his obligation to observe the rituals. This early divorce of law from religion furnishes the master-key to the comprehension of the two great systems, the oriental and the occidental jurisprudence. The one is but a fossil, an inert mass, a relic of a by-gone age applied to a people who have long since outgrown it, but as to whom it is perpetuated only by legislation; the other is a living organism full of life and vigour.

25. While the hierarchical rule of India is in no way comparable to the early institutions of Greece and Rome, it bears a favourable comparison with the rule of Egypt under the Ramses. There as in ancient India, the influence of the priests was paramount, with this difference, that while in India they continued

the gilded litterateur of the land, in Egypt the priests who had monopolized most of the wealth of the country and established the temples at Heliopolis, Memphis and Thebis did not rest content till they had usurped the reins of Government. The High priest of Thebes, or as he styled himself "the first prophet of Amon" at first took precedence of all after the king who originally nominated him. But in the reign of Ramses III the high priest nominated his own son as successor and thenceforth the office became hereditary with the result that for some years the spiritual and the secular leader ruled the kingdom side by side. The king became luxurious and indolent and the high priest carried on the dual administration, when at last with the death of Ramses XIII in 1181 B. C., the twentieth dynasty became extinct and Her-Har the High priest of Anedu ascended the throne as the sole ruler of Thebes and Southern Egypt. The rule of the priests led to discontent and the eventual dismemberment of the kingdom. It had long been the custom to bury the wealthy Egyptians with ornaments and jewels, for the same reason as the dead in India, Greece, and Rome were cremated with their earthly paraphernalia. There was no caste system in Egypt and the high and low cultivated the fine arts with an assiduity which made Egypt the prized seat of ancient learning. Their tribal movements did not obscure them to the feeling of nationality. They maintained a national army but the predominating spirit was religious. The kings lavished large sums upon tombs, temples and monuments. The taxation was heavy and the people were subjected to forced labour, though they were allowed a mere subsistence.

26. The patriarchal system equally prevailed amongst the Hebrews whose original home was Egypt. Abraham the founder of their race had several wives and many sons. The latter migrated to the East and became progenitors of tribes who driven by recurring famine and want settled down in the Sinai peninsula where they established a pure monotheistic religion and a republican form of government. A written constitution was drawn up under which all tribes though in offensive and defensive alliance with one another were internally free and independent.

27. It is sometimes difficult if not impossible for those born and brought up in a modern state with its developed form of society and government to realize the condition of insecurity and constant struggles which heralded the dawn of civilization. The primitive man had not only to wage war with the forces of nature and brute creation, but also with his fellow-men whose savage instincts for spoil and strife rendered existence precarious and in the case of women and children, impossible. The gregarious instincts which man inherited from his brute progenitors first asserted themselves in the formation of alliances and aided by the self-same instinct of parental protection and control, family groups were naturally formed in which the wives, sons, and slaves came under the sway of the adult men of whom the eldest, usually the father, became soon recognized as the headman and leader. His authority was supreme and all things came under his sway. The idea of property was then in its embryo. No distinction was made between his dependants and his belongings. All were alike his property. The virile ruled the weak. As women and sons were weak and defenceless he afforded them protection in return for their services which he commanded without any restraint of social conventions. For social conventions were of slow growth and could not influence his action till their utility was demonstrated by experience and acknowledged by tradition. But since the first requirement of the patriarchal

age was the accession of adult men, they were seized and sold, appropriated and employed at the sweet will of the patriarch.

28. This condition continued for long ages and when the Hindu *Smritis* were written it was the prevailing practice. Wives, sons and slaves fell into the general category of this property and could own no property of their own. Accordingly Manu says : " A wife, a son, and a slave are devoid of property ; whatever they acquire become his whose they are." (1) Even when some order was established their position of positive dependence continued undisturbed and the courts were disinclined to interfere with the paternal control which had led to the establishment of peace. So in a *Smriti* cited in the *Mitakshara*, it is said : " Even when there is a cause of dispute between preceptor and pupil, between husband and wife, between father and son, between master and slave, no action is maintainable." The infusion of religious ideas into the fabric of society merely gave to it a new reason and an added solemnity. The wife became even more dependent upon her husband who continued to be her *Swami* or master. The father was free to sell his children and as such he sold his daughters in bondage or marriage. The *Asur* form of marriage was thus the precursor of the *Brahma* form in which the daughter was to be gifted to the bridegroom. But in either case it was a transfer, whether by sale or by gift—and little distinguishable from the transfer of a chattel such as a goat or a cow. The *patria potestas* was transferred by marriage to the husband. She still continued a chattel and as the husband was himself a dependent in the family of his father his acquisition of her was an acquisition of, and for, the family who could use her for her primary purpose of procreation. This enabled them to use her independently of her own volition which did not count ; for she was foredoomed to life-long dependence upon her husband and his relations. "The younger brother of the husband, a sapinda, or a sagotra, being anointed with clarified butter, and with the permission of the Guru, may go to a sonless widow, when in season, with the desire of raising a son." (2) If the wife is withdrawn after marriage the delinquent is punishable for theft (3) and the punishment of a thief is that his head be cut off. (4) This was the stage of development when the earlier *Smritikars* ending with *Yadnyavalkya* described the *status* of women.

29. This property in women, sons and slaves was no peculiar feature of the Hindu system for it is equally shared by the ancient Greeks and Romans who sold or lent their wives to their friends either for pleasure or procreation. So *Plutarch* describing the life of *Lycurgus* the Spartan Law-giver wrote : "He laughed at those who revenge with wars and bloodshed the communications of a married woman's favours ; and allowed, that if a man in years should have a young wife, he might introduce to her some handsome and honest young man, whom he most approved of, and when she had a child of this generous race, bring it up as his own. On the other hand, he allowed that if a man of character should entertain a passion for a married woman on account of her modesty and the beauty of her children, he might treat with her husband for admission to her company, that so planting in her beauty bearing soil, he might produce excellent children, the congenial offspring of excellent parents." (5) *Lycurgus* justifies this regulation on the ground that children were not so much the property of their parents as of the state which

(1) VIII-416.

(2) *Yad.* I-68.

(3) *Yad.* III, 68, *Narad XII-80, 81, See § 29 post.*

(4) *Narad*, XII. 82.

(5) *Plutarch's Lives—Lycurgus* (Ward Lock), p. 86.

was interested in seeing that they were begotten by the best men in it. The regulation was held to have had the most salutary effect upon the morals of the women themselves. The privilege of lending and receiving a wife was esteemed a high privilege of the Spartan citizen and its forfeiture was deemed a condign punishment reserved for serious delinquencies. The lending of wives to friends was regarded as one mark of favour in Athens, and Socrates is said to have lent his wife Xantippe to his young disciple and friend Alcibiades. That the wife was friendship's offering is illustrated in the life of Cato the younger. When he married his second wife Martia after divorcing Atilia, his friend Quintus Hortensius "a man of great dignity and politeness" requested Cato to lend him his married daughter Portia for the purpose of propogation. "Cato answered that he had the greatest regard for the friendship of Hortensius, but he could not think of his application for another man's wife," whereupon Hortensius requested him to lend him his own wife which Cato did not only lend but presented to his friend with the consent of the lady's father. ⁽¹⁾

30. The Athenian Law permitted divorce but required that the wife should appear in person to present her bill before the Archon when the husband was free to seize her person and carry her off if he was so minded. ⁽²⁾ Both in the ancient Hellenic and Roman Republican days, women lived in seclusion, married early and when their husbands became old young men were welcome to improve the breed. Lycurgus argued that when men took care to improve the breed of dogs and cattle why should they not take the trouble to improve their own race. He ridiculed the vanity and absurdity of other nations where people study to have their horses and dogs of the finest breed they can procure either by interest or money; and yet keep their wives shut up that they may have children by none but themselves, though they may be doting, decrepit or infirm. ⁽³⁾ This was the prevailing view of the classic age shared alike by the Egyptians, Persians, Assyrians and the Babylonians and it was the underlying current of the Indo-Aryan thought.

The second stage marks some improvement in her status, but her dependence still continues. She is still a chattel in her husband's home. Her sole purpose is still to breed sons to strengthen her husband's household.

31. Marriage under Hindu Law is a sacrament. So was the marriage of the Romans who denoted the communion of the married life by the necessary elements of fire and water, and the divorced wife resigned the bunch of keys by the delivery of which she had been invested with the government of the family.

Polygamy was from the earliest time prohibited both in Greece and Rome ⁽⁴⁾ but concubinage was common and customary in both countries and from the age of Augustus to the tenth century it was regarded as a secondary marriage, as real marriage was only permissible between free citizens and the concubines were ordinarily drawn from the plebian or servile stock; but nevertheless the humble virtues of a concubine were often preferred to the pomp and insolence of a noble matron. The children of such unions were classed as *natural* offspring of concubinage as distinguished from the spurious breed of adultery, prostitution and incest. Justinian allowed the former

(1) Plutarch's Lives—Cato the younger
(Ward Lock) pp. 588, 589.

(2) *Ib.* Alcibiades, p. 144.

(3) *Ib.* Lycurgus, p. 86

(4) 2 Gulab, XLIV.

one-sixth of their reputed father's inheritance while he reluctantly allowed the latter a bare maintenance. He also made provision for adopting without reproach the out-castes of every family as the children of the State.

32. Ancient law contains no prohibition against incestuous marriages. Abraham had espoused his own daughter, while in Egypt the marriage of uterine brothers and sisters was admitted as a customary and even a favoured alliance. As such Cleopatra had to marry her younger brother though it led to endless misery. The Spartan might espouse the daughter of his father, an Athenian that of his mother, and the nuptials of an uncle with his niece were applauded at Athens as a happy union of the dearest relations. But the Roman lawyers prohibited these incestuous alliances and laid down the rules of prohibited degree for marriage. And later jurisprudence has more or less copied those restrictions. Under Hindu Law the prohibited degree has been extended much further beyond the Roman Law. The relation of guardian and ward, or to quote the Roman words, of tutor and pupil, occupies an important place both in the Institutes and the Pandects.

33. Roman Law condemned females to the perpetual tutelage of their parents, husbands or guardians; a sex created to please and obey was never supposed to have attained the age of reason and experience. This is her place in Hindu Law. For says Manu, "In childhood must a female be dependent on her father; in youth, on her husband; her lord being dead, on her sons; if she have no sons, on the next kinsmen of her husband; if he left no kinsmen, on those of her father; if she have no paternal kinsmen, on the sovereign; a woman must never seek independence." (1) "Day and night must women be held by their protectors in a state of dependence; but in lawful and innocent recreations, though rather addicted to them, they may be left at their own disposal." (2) "Their fathers protect them in childhood; their husbands protect them in youth; their sons protect them in age; a woman is never fit for independence." (3) As regards males Roman Law placed all youths up to their fourteenth year in charge of their tutors and afterwards up to the twenty-fifth year in charge of a curator. The tutor held a public office. Without his consent no act of the pupil could bind him to his own prejudice though it might oblige others for his personal benefit.

34. Under the laws of Rome both the son, natural or adopted, and the wife, were classed not as a person but as a thing in the family of the *pater familias* over whom the latter exercised absolute jurisdiction of life and death. If the wife was seduced by another, the action maintainable against the seducer was not that for adultery but one for theft. As both the son and the daughter occupied the position of a chattel they could not marry without their parents' consent. But a Roman marriage differed from a Hindu marriage in that the contracting parties in the one case were the husband and wife, while the husband and wife play no part at all in a Hindu marriage which is arranged for them by their parents.

35. Marriage in ancient Rome was a sacrament, called *confarreatio*, in which the wedded pair partook of a salt cake of *far* or rice to symbolize the union of their minds and bodies. But such a union could be put an end to by the husband though not by the wife. Her barrenness was a sufficient cause

(1) V-148.
(2) IX-2

(3) IX-8.

for divorce but public opinion soon rallied to the support of the wife who was entitled to divorce her husband as freely as she was liable to be divorced in her own turn by the husband. This new found liberty the Roman wife enjoyed to her fill and Juvenal and the other poets satirize the matron who in five years could submit to the embraces of eight husbands. (1) This was the logical result of the freedom of marital contract the end of which horrified the lawyers, who could not have foreseen it. In Rome marriage commenced as a sacrament. It ended as a loose and voluntary contract which could be put an end to at the will of either party. This was its state till the advent of Christianity when its dignity was once more restored and its original validity and duties prescribed by the precepts of the Gospel, the tradition of the synagogue and the canons of the general or the provincial synods.

36. As in ancient and modern India so in ancient Greece and Rome early marriage was customary. Numa (715-672 B. C.) fixed the age of the wife at 12 so that the husband might educate to his will a pure and obedient virgin. This had also been the practice in Greece till Lycurgus (884 B. C.) raised the age to insure a robust progeny. According to the custom of antiquity which still survives in the ceremonies of a Hindu marriage, the husband purchased his bride of her parents and she fulfilled the co-emption by purchasing with three copper pieces a just introduction to his house and household deities. The pontiff who performed the marriage seated the bridal pair on the same sheep skin and then offered a sacrifice of fruits offering to the pair a salt cake of *far* or rice, called *confarreation* which was the food of ancient Italy and which served as an emblem of the nuptial union of their mind and body.

37. In Greece which lived for the worship of Beauty marriage never assumed the same dignity. Before the reforming zeal of Lycurgus, early marriages of girls even when not older than 14 were customary and in Sparta all marriageable girls used to assemble in a dark room sparsely attired on stated occasions which the boys entered and selected for their wives from amongst them such as they could lay hold of. Girls used also to appear naked on certain days of festivity and wrestle in a public assembly promiscuously with boys of equal age with themselves. Lycurgus raised the marriageable age and permitted mothers to destroy their feeble and deformed offspring.

38. Greek custom allowed of marriage between half brothers and half-sisters when not descended from the same mother. Their position was subordinate. They never mixed with men except on days of festivals and religious celebrations. The women lived in a separate part of the house situated in the upper story at the back and no men except the nearest relations were allowed to enter it. Except in Sparta they could acquire no property.

39. Unnatural vice infected all ancient society and it grew with the increase of wealth. Marriages became unpopular so much so that in 131 B. C. the censor Metellus urged marriages as a patriotic necessity. The position of a married woman among the Romans compared favourably with her position in Greece. In both countries she was no doubt subordinate to her husband, but while in Greece the wife looked after and performed other menial offices, in Rome the wife was the mistress (*domina*) of her household. In Greece the women lived in seclusion and appeared only veiled in public. In Rome the wife appeared at religious services, at meals, in the theatres and even in the courts.

Women's position compared.

(1) *Satires*, VI-20.

40. In both countries while polygamy was prohibited, concubinage took its place and the offspring of such an alliance were not treated as illegitimate. As compared to this, the Hindu wife occupies by no means an unfavourable position. With her, marriage is a lottery as it was with the ancient Greeks. But the position of a Hindu wife in the household is more that of the *domina* than that of a dependent. She is entitled to own and hold separate property. She succeeds to the separate estate of her husband in the absence of male issue though her right is restricted to the enjoyment of the estate without impairing it except in the case of legal necessity. But with all this although the position of her western sister has immeasurably improved in recent years the status and lot of the Hindu wife have remained unaltered for over 3,000 years.

41. The laws of a people are the best index of their character. The ancient Romans were neither benevolent nor generous but they were strictly honest and cheerfully discharged their most onerous obligations. In this respect they differed from the Greeks who were astounded at the simplicity of the Romans adhering to their contracts from which they saw an easy escape. But in later years wealth and prosperity had the effect of entirely converting their national character. The Romans became immoral, corrupt and lazy, preferring the dialects of the conquered countries to their own. The Greeks and the Romans with most other ancient nations, were addicted to unnatural vice which grew with the growth of prosperity and power. (1)

The History of Hindu Law falls into three epochs (i) the first from the earliest time down to the writing of Mitakshara (1300 B. C., 1150 A. D.), (ii) the second from the Mitakshara to the establishment of British rule (1150 A. D.—1772 A. D.), (iii) and the third from that date onwards which marks its modern development by the British Courts.

II

42. As the four Vedas are regarded by the Hindus as the main repository of all their laws, sacred and secular, a brief reference to them is necessary in order to assign them their proper place in the legal literature which is ever growing and changing with the progress and altered condition of society.

43. All Hindu sacred literature is divided into two main groups—the *Sruti* and the *Smriti*, the former being synonymous with the Vedas ; while the latter comprises most of the early post-vedic literature which has by its antiquity acquired the halo of sacredness. The words *Sruti* (which means *heard*) and *Smriti* (which means *remembered*) though now used as conveying a secondary meaning really point to a time when writing was unknown, and the sacred lore had to be memorized to be preserved for posterity. The *Sruti* matter was embodied in set forms of language, mostly in metre, so that the words could be recited and sung. The Vedas have become so known because of their antiquity when literature was scanty and the Aryan could devote more time to memorize the very words, instead of only the substance and purport which he commenced to do as soon as his memory became loaded with the fast accumulating traditions of custom and conduct, which knit together the ancient Aryas in spite of their scattered settlements and lengthening distances. These were the *Smritis* which represented the substance though not the text of the compiler.

(1) Gibbon's *Decline and Fall of the Roman Empire*, Ch. 45 ; (Virtue's Ed.). Vol II, pp. 128, 129.

44. All laws of the Hindus are nominally traceable to the Vedas which are the only records of direct revelation. ⁽¹⁾ Originally there was only one Veda—the Rig Veda; but later on it put forth other *sakhhas* or offshoots due to differences in ceremonial observances and readings of the original unwritten Veda after the introduction of writing, and the three main branches became known as (1) the Rig Veda Sanhita, containing now 1,017 verses, (2) Yajur Veda Sanhita, (3) Sama Veda Sanhita, to which was subsequently added, (4) the Atharva Veda. These main branches put forth other offshoots which were designated either *Sakhhas* or *charanas*, each in turn giving rise to a collection of its hymns, tradition and precepts as understood by the schools, which have come down to us as the Dharma Shastras ascribed either to some god, or sage, or a princely patron, or to the school of which it was the approved manual. The Vedas contain a collection of hymns in two parts, one teaching the sacrifice, the other teaching the Supreme being or Brahma. The latter portion is called the Upanishad, and appears to have been added after the ceremonial section later on. As there are three branches of the ceremonial, the Veda is, for the better performance of the sacrifices divided into three: the Rig Veda, Yajur Veda, and Sama Veda which were really the records of ceremonies as performed by three priestly families, namely, Hotri, Adhvaryu and the Udgatri. The Atharva Veda is not used for solemn sacrifices and is very different from the others, as it teaches only expiatory, preservative, or imprecatory rites.

45. Rig Veda is the oldest Veda and judging from its allusions to scenery near Ambala, it is said to have been compiled there. Professor Max Muller computes its age to be above 1200 B.C. It is a compilation which manifests differences of thought, style and poetical ability, though hardly any difference of dialect. It is divided into ten books of which the general character is not identical. "Six of them ⁽²⁾ are homogenous. Each of these, in the first place, is the work of a different seer or his descendants according to the ancient tradition, which is borne out by internal evidence. They were doubtless long handed down separately in the families to which they owed their being. Moreover, the hymns contained in these 'family books', as they are usually called are arranged on a uniform plan differing from that of the rest. The first, eighth and tenth books are not the production of a single family of seers respectively, but consist of a number of groups based on the identity of authorship. The arrangement of the ninth book is in no way connected with its composers; its unity is due to all the hymns being addressed to the single deity *Soma*, while its groups depend on the identity of metre. The family books also contain groups, but each of these is formed of hymns addressed to one and the same deity."⁽³⁾ The Rig Veda contains 1,028 hymns which equal the surviving poems of Homer. The tenth book ⁽⁴⁾ is distinctly a later addition. The rest were compiled or collected during a period extending over some centuries.

46. The Yajur Veda as its name implied is a book of sacrificial prayers (*Yajus*). It comprises verses borrowed from the Rig Veda to which are added original prose formulæ. It is sub-divided into two parts, ⁽⁵⁾ the black (*Krishna*) in which the text is accompanied by explanatory commentary and the white (*Sukla* or

(1) Consequently they alone constitute the *Śruti* (or what was directly heard i.e., revelation), as distinguished from the *Smṛiti* (or what was remembered i.e., tradition.) Even the Vedic Sūtras belong to the

latter class—Max Muller's A. S. Lit.—49

(2) Books II to VII

(3) MacDonnell, S. L. 41.

(4) Each book is called the *Mandala* or cycle.

(5) MacDonnell, S. L. 180, 181.

clear) which contains only the hymns to be recited at the sacrifices without any explanatory matter which is relegated to the Brahmanas. It is a later recension than the back Yajur Veda on whose confused arrangement it is a distinct improvement. Internal evidence discloses that at the time of its compilation the Aryan settlement had extended further east to what is now the modern district of Sirhind. This Veda was the prolific source of new schools into which its adherents split up and which were widely diffused in India. The Kathas and Kalpas were two of its best known schools whose doctrines according to the grammarian Panini were proclaimed in every village. Those schools were highly honoured in Ajudhia (Oudh) itself till they were superseded by the two younger schools—the Taittriyas to be found only south of the Nerbudda and the Hiranyakesins to be found still further south. The Apastambas are a new offshoot of the Taittriyas to be found in the Godavari region; while the school of Vajasaneyas having spread towards the south-east down the Gangetic Valley are now to be found in the North-east and Central India.

47. "The Yajur Veda resembles the Sama Veda in having been compiled for application to sacrificial rites only. But while the Sama Veda deals solely with one part of the ritual, the Sama sacrifice, the Yajur supplies the formulas for the whole sacrificial ceremonial. Like the Sama Veda, it is also connected with the Rig Veda, but while the former is practically altogether extracted from the Rig Veda, the Yajur Veda though it borrowed many of its verses from the same source is largely an original production." (1) This Veda marks a new epoch in the social evolution of the Aryan people. "The relative importance of the gods and of the sacrifice in the older religion has now become inverted. For while the Rig Veda places the gods above all sacrifices, the Yajur Veda places sacrifices above the gods. In the one the gods are omnipotent; in the other the sacrifice is all in all. It compels the gods to obey the officiating priest who holds them in the hollow of his hand. This Veda represents the cult of symbolism in which the form and the formula, the rites and the ritual, are held to control all the forces of nature, can secure victory and obtain rain."

48. The Yajur represents an age when the office of the priest which was previously purely personal had become hereditary and when not only the system of caste had become firmly established but its many sub-divisions had become well recognized. It marks a distinct advance in the enslavement of the people in the net work of caste and canonical ceremonies.

49. As previously remarked (§ 44) the Sama Veda has no independent value, as it consists entirely of stanzas (except only 75) taken mainly from the eighth and ninth books of the Rig Veda and arranged solely with reference to their place in the Soma sacrifice. This sacrifice goes back to the Indo-Iranian age. Its hymns were chanted by the special class of Udgatri priests who performed these sacrifices. It contains 1,549 stanzas divided into two books called *Archikas* or collection of *rikh* verses.

The Samavedis founded two schools—the Kauthumas and the Ranayaniyas—the one still exists in Guzerat and the other in Eastern Hyderabad.

50. The Atharva Veda is the latest of the four Vedas and has attained to that position after a long struggle. It is a heterogeneous collection of spells, incantations, and witchcraft derived from an immemorial antiquity. As the Rig Veda deals with the

higher gods so the Atharv is almost exclusively devoted to the demons and the lower grades of the spirit world. It teems with charms and cures (1) against diseases (2) death, noxious animals, demons wizards, foes and oppressors of Brahmins, though it also contains many spells to secure harmony in family and village life, the reconciliation of enemies health, long life and prosperity, besides prayers for a safe journey and for luck in gambling which was the favourite pastime of the Aryan settlers. "In its main contents the Atharva Veda is more superstitious than the Rig Veda. For it does not represent the more advanced religious beliefs of the priestly class, but is a collection of the most popular spells current among the masses, who always preserve more primitive notions with regard to demoniac powers. The spirit which breathes in it is that of a prehistoric age. A few of the actual charms date with little modification from the Indo-European period, for as Adalbert Kuhn has shown, some of its spells for curing bodily ailments agree in purpose and content, as well as to some extent even in form, with certain old German, Latic, and Russian charms. But with regard to the higher religious ideas relating to the gods, it represents a more recent and advanced stage than the Rig Veda. It contains, indeed, more theosophic matter than any of the other samhitas. For the history of civilization it is on the whole more interesting and important than the Rig Veda itself." (3) But the lawyers of the day condemned this Veda as calculated to compass harm to the enemy by its sorcery. Its practices were consequently pronounced impure and on that account the Veda itself was regarded as inferior to the other Vedas. Such was the view of Apastamb (4) and Vishnu (5) though many others thought it as a powerful weapon of the Brahmins against their enemies. (6)

The Atharv Veda is really a cyclopædia of medicine and charms, though blended with it are a miscellaneous collection of the then current folklore assiduously collected, to which are added the Brahmanas and the Upanishads, breathing perhaps the loftiest sentiments to be found in all the Vedas. (7)

51. No description of the Vedas would be complete without a passing reference to two supplementary treatises appended to them—the Brahmanas (8) and the Upanishads. (9) The former are ritual text-books explanatory in prose of sacrificial ceremonies, while the latter are philosophical dissertations intended for a post-graduate course of select pupils at the end of their ordinary term of apprenticeship. The first was intended to make the pupil an intelligent priest, the second a thoughtful one. These latter are known as the vedanta (10), i.e., those learnt at the end of the Vedas. As the Brahmanas taught the ritual, so the Upanishads taught the dogma—the doctrines as to the nature of the Atma or Brahma, the supreme soul. Both these appendices are later additions made about 800-500 B. C. They are more interesting to the student of ethnology and metaphysics than to the student of law. Of these Yadnyavalkya is the hero of the most important Brahmana called the *Satapatha Brahmanas* or the "Brahmanas of the

(1) The charms are accompanied by the use of appropriate herbs.

(2) Such as fever, leprosy, jaundice, dropsy, scrofula, cough, ophthalmia, impotency, fractures and wounds, snake-bite and the bites of other insects and the effect of poison, mania and other ailments.

(8) MacDonnell, S. L. pp. 185, 186.

(4) II.11.29; 2 S. B. E., p. 169.

(5) VIII.8; XXXI.7; LV.10.

(6) MacDonnell, S. L. p. 186

(7) Cf. eg. IV.16—the hymn to Varuna.

(8) Literally "priestly ceremonies."

(9) Literally Skt. *upa* near, *nishad* to sit—sitting down beside," i.e., confidential session. Secret or esoteric doctrine.

(10) *Veda-anta* "end of the Vedas."

hundred paths" so called because it comprises one hundred lectures delivered somewhere in Ajudhia. The key-note of the Upanishads is pantheism. The part of the Veda more interesting to the lawyer is that which contains the *Dharma Sūtras* which deal with the customs of every-day life. Three such Sūtras attached to the Taittiriya division of the Black Yajur Veda are extant. Of these the most important are the Sūtras of the *Apasthambas* to be presently considered. (§§ 88-90) Next in importance is the Dharma Sūtra of Baudhayana (§§ 92-101) which appears to be earlier than the Apasthambas. The third such sūtra of *Hiranyakesin* is a branch of the *Apasthamba* and represented the doctrine of Hiranyakeshin's school founded in the Konkan country on the south-west near Goa in about 500 A.D.

52. The Sūtras or legal aphorisms of Gautama (500 B. C.) and Vashistha also claim a vedic connection. Of these the former is composed in prose while the latter is not available to the student. A bald manuscript text without the explanatory commentary is stated to be extant to preserve the views of the Northern India schools. It is composed partly in prose and partly in verse, and has been translated in "The Sacred Books of the East." (1)

53. From their very nature the Vedas cannot be expected to contain any legal precept, nor in fact do they contain any. They may, therefore, be dismissed from consideration. But the following ethnological facts deducible from them are interesting to the lawyer presenting as they do a vivid portrait of ancient manners which constituted the then laws, regulated the lives of the people and which are the parent of all laws of the present day.

54. An examination of the four Vedas brings to light the following facts.

Vedic Society.

The oldest of them all, the Rig Veda, was composed when the Aryan immigrants had settled down in the Punjab and had reached as far south as Ambala. They were struggling for mastery of the Gangetic plain which they obtained by the time the Atharva Veda was composed. It mentions the Provinces of Magadh (Behar) and the Angas (Bengal). The Rig Veda mentions "the five tribes" which though in political alliance with one another did not always preserve their amity. The tribe was the political unit scattered over a number of settlements comprising an aggregate of villages and ruled by a king, who was ordinarily hereditary, though occasionally elected by the districts of the tribe. There were no taxes, the king being maintained by voluntary offerings by his people. The basis of Vedic society was the patriarchal family. The Indian patriarch (*Grihapati*) wielded the same power over his family as did the patriarch in Rome. His power was strictly limited by the will of the people expressed in the tribal assembly (*Samiti*). As such he possessed no greater power than the pre-republican Roman King.

55. The social life reflected in the Vedas is closely analogous to the contemporary life of the western settlers. The patriarchal family was well established. The father possessed the right to sell or kill his sons. The price of a son was a hundred cows. Adoption was legal. So Viswamitra had adopted Ajigarta who had left his home owing to parental cruelty. He adopted other sons as well. Polygamy was practised then as now. Viswamitra had a hundred sons. Education was confined to the *Aryas* who afterwards comprised the three higher castes. Women were left in ignorance. The practice of *Sati* was common and extolled as the highway to heaven. (2) The education

(1) Vol. XIV.

(2) Rig Veda cited in I. Cole. Mis. Essays, p. 116.

was purely religious. The Aryans were harassed by the *Dasyas* who stole their cattle and plundered their grain. They even stole their women. Life was otherwise simple and uneventful. The Arya was religious first and religious last. His government was a theocracy. Consequently, his leisure and spare wealth were spent in elaborate sacrifices, some of them lasting a whole year. Cattle were killed in sacrifice and their flesh eaten. There are traces of the practice of Niyog which was common to all ancient Aryan races.

56. The earlier Vedas contain no reference to any caste. They only refer to the *Aryas* and the *Dasyas*, the former being the Aryan immigrants and the latter the aboriginal natives of the country. The latter are also at times described as Shudras. The Vedas were composed when the Brahmanical ascendancy over the people had not only become established in India (1) but when his lust for pelf and political power had also been gratified. So it is stated in the Rig Veda : " Breath does not leave him before time, he lives to an old age ; he goes to his full time, and does not die again, who has a Brahmin as guardian of his land, as Purohit. He conquers power by power ; obtains strength by strength the people obey him, peaceful and of one mind. " (2) " Unopposed he conquers treasures, those of his enemies and his friends, himself a king, who makes presents to a Brahmin ; the gods protect him. " They had already obtained precedence over the *Kshatriya* kings : " The king before whom there walks a priest, lives well-established in his own house ; to him the earth yields for ever, and before him the people bow of their own accord. " (3) There is a whole class of hymns in praise of gifts (called *Dan stuti*) received from princely patrons.

57. The gods of the Vedic pantheon were the *Varun*, (Rain) (4), *Agni* (fire) (5), *Indra* who " is greater than all " (6) *Soma* the king of the world (7), *Mitra* (8), *Aryaman* (9) and the other forces of nature ; but above them all stood the Supreme God whom the Vedic sage invokes as " my father. " " That One breathed breathless by itself ; other than it nothing since has been ". " That One breathed and lived, it enjoyed more than mere existence ; yet its life was not dependent on anything else, as our life depends on the air which we breathe. It breathed breathless ". " They call Him Indra, Mitra, Varun, Agni ; then He is the well-winged heavenly Garutmat ; that which is One the wise call it in many ways ; they call it Agni, Varun, Matarisvan ". (10) As Max Muller observed : " Even in the invocation of their innumerable gods the remembrance of a God, one and infinite, breaks through the mist of an idolatrous phraseology, like the blue sky that is hidden by passing clouds ". (11) " Language blushes at such expressions, but her blush is a blush of triumph. " (12)

58. The code of Manu is the first and foremost repository of Hindu Law. It is not a work of any single author, but rather a compilation used as a text book of the school of Manavas held in high reverence from all time. Even the Veda declared that " whatever Manu pronounced was a medicine for the soul. " From the fact that many passages are quoted by later writers from what is called Vrihat (or great) Manu and Vrida (or old) Manu it is surmised that

(1) Max Muller's, A. S. L. it. 242.

(2) Rig. Veda, IV. 50-7.

(3) *Ib.*

(4) *Ib* II 2710.

(5) *Ib.* II-19

(6) *Ib.* X-86.

(7) *Ib.* IX-59.

(8) *Ib.* I-162.

(9) *Ib*

(10) *Ib.* VI-164, 46.

(11) A. S. L. 288

(12) *Ib* 289,

the code now extant is only one of the many, probably successive, redactions. The laws of Manu reflect the customs and practices of the society then extant but which have long since become obsolete, though technically the work still remains a standard authority upon the unchangeable laws of the Hindus. They show the fast grip of the sacerdotal influence upon the community. The four castes had already become well established but they had not as yet crystallized into their latter rigour. For instance, while a Brahmin is recommended to take for his first wife a woman of his caste ⁽¹⁾ for subsequent marriages he is permitted to marry of the next lower twice-born order ⁽²⁾; but the marriage of a twice-born with a Sudra woman is strongly reprobated, but should such marriage take place then the progeny is degraded to the status of Shudra, ⁽³⁾ while the marriage itself is denounced as an inexpressible sin, ⁽⁴⁾ which suggests that such alliances were becoming so common as to menace the purity of the Aryan race. But many probably knew that no amount of denunciation could effectively restrain the strongest of human passions in a community where female infanticide was in vogue, and there was no other means of adjusting the balance between the two sexes; and it is safe to suspect that such misalliances continued despite the sacerdotal sermon. As between the twice-born the term marriage was used in its loosest sense comprehending as it did "the reciprocal connection of a youth and a damsel with mutual desire" which is denominated Gandharv ⁽⁵⁾ "while the seizure of a maiden by force from her house, while she weeps and calls for assistance after her kinsmen and friends have been slain in battle, or wounded, and their houses broken open, is the marriage styled Rakshas. ⁽⁶⁾ After this who would doubt the legality of the rape of the Sabine women? Even "when the lover secretly embraces the damsel either sleeping or flushed with strong liquor, or disordered in her intellect, there results that most sinful marriage called Pishach which is the eighth and the basest." ⁽⁷⁾ But it is nevertheless a marriage.

59. Manu describes these eight kinds of marriages; but of these he regards **Marriages in Manu's** the first four as approved in the case of Brahmins. ⁽⁸⁾ The **time** rest he reprobates. These are:—

Approved marriages.

1. **Brahma**
2. **Daiva**
3. **Arsha**
4. **Prajapatya**

Disapproved marriages.

5. **Asur**
6. **Gandharv**
7. **Rakshas**
8. **Paishach**

60. In short, the first four are godly, the last four, demoniac. There was a difference of opinion whether the fifth should go into the first class or be relegated to the second, and Manu cuts the gordian knot by holding it legal or not according to the caste of the husband. The difference between the first four lay in the price paid for the bride. The first two were marriages without consideration; the third and the rest were less meritorious, because they were marriages for a price or were otherwise non-consensual.

61. Wives in Manu's age enjoined considerable liberty. The marriage itself was not a mere contract but a sacrament. ⁽⁹⁾ To the wife is assigned the duty of the hostess. ⁽¹⁰⁾ A man is recommended to consult his guide before

(1) **Manu. Ch III v 12.**
 (2) **Ch III v. 12.**
 (3) **Ib. v. 15**
 (4) **Ib. v. 19.**
 (5) **Ch. III v. 32,**

(6) **Ib. v 33.**
 (7) **Ch III v. 34.**
 (8) **Ib v 24**
 (9) **Ib v. 18**
 (10) **Ib. v. 4**

marriage. (1) All men are enjoined to honour women : "Where females are honoured, there the deities are pleased ; but where they are dishonoured, there all religious acts become fruitless." (2) The married man is to dispense hospitality with a lavish hand—an injunction which is to this day obeyed and is one of the sweetest phases of the Hindu religion.

62. Manu disapproves of widow marriages (3) likening it to a "practice fit only for cattle," (4) but he allows the deceased husband's brother to espouse his virgin widow. (5)

Child marriages appear to be common ; girls below 8 are mentioned as possible brides, (6) and the following verse is suspiciously suggestive of the union of December and May. "A man aged thirty years, may marry a girl of twelve, if he finds one dear to his heart ; or a man of 24 years a damsel of 8 ; but if he finish studentship earlier, and the duties of his next order would otherwise be impeded let him marry immediately."

63. Manu and the later text writers do not regard marriage as an end in any sense, but only as a means to the sole end of securing the male issue to pull the begetter out of the torments of hell. (7) Consequently, as Manu treats every alliance between a man and a woman as marriage, he regards the son anyhow procreated, whether by the procreator or not, as a legitimate son. He classifies the following twelve as sons (1) son by married wife of the same caste, (2) son by married wife of a lower caste than the husband, (3) by a wife two or more degrees lower, (4) by twice-born who have not assumed the sacred thread, (5) by a wife who had conceived and delivered of a son before her marriage, (6) son purchased, (7) son of an appointed daughter, (8) son of an impotent or ailing husband born of his wife by another with his permission (a case of Levirate or Niyog), (9) son of a woman pregnant with or without the knowledge of the bridegroom, (10) adopted son—the latter being of the same caste as the adopter, (11) any boy deserted by his parents and received as such by the putative father, (12) son of a remarried woman.

64. Of these twelve the Hindu had brought with him the practice of Niyog and adoption from his ancestral Aryan home. The practice of Levirate or Niyog and arrogation or adoption was quite established in Greece and Rome. If it fell into disuse it was because of the early establishment of settled Governments and the absence of caste which soon restored the equilibrium of sexes so seriously deficient in the case of oriental settlers, in whose case the necessity of combined and corporate existence continued down to very recent times and in whose case the interwelding of law with religion with the attendant horrors of hell presented to the sonless man, created a thirst which could only be gratified by begging, borrowing or stealing a son. The practice of early marriage was probably also traceable to the same source. And the little scrutiny exercised in obtaining a son appears to have been due to their great scarcity and the high prices claimed for obtaining them.

65. The slaughter of cattle bulls, buffaloes, cows and horses for food or sacrifice was permissible even to Brahmins (8) while the Aswamedh or horse

(1) Manu. Ch. III 56 c.f. v., 55, 62.

(2) III-56.

(3) IX-65, 68

(4) IX-65.

(5) IX-59.

(6) IX 88

(7) IX-188.

(8) V 22.

sacrifice is spoken of as specially meritorious (1) ; and a human sacrifice was not unknown. But Manu is not consistent with himself. In some places he condemns flesh-eating altogether ; (2) in another place he exalts both the beef-eaters as well as the slaughtered cattle to the summit of beatitude ; (3) but probably the latter verses were penned after a delicious dish off a fatted calf.

66. The age of Manu was the age of pastoral life. All the goods and chattels that the Aryan had, consisted of cattle, goat and sheep.

67. These records of contemporary customs fell into desuetude in later times. In the western countries where they had received legislative authority that authority revised and repealed such customs according to the force of altered public opinion, but in India the laws had been placed above the reach of secular authority, and the secular authority was in the hands of the priest for their interpretation. The rest of the proletariat never rose above their rustic occupation. They continued to remain uneducated and untrained in public affairs. In Rome, even in the days of the pre-Republican kings, their authority was defined to be derived from an assumed contract with the people and the *comitia curiata* closely scrutinized their procedure ; as for Greece, it could endure no kings or wielders of irresponsible power whom it denounced and dethroned as tyrants. In India the Divine right of kings was acknowledged, and so long as they remained, which they continued to do, under the tutelage of their priests, there was the combination of spiritual and temporal power against which the poor Aryan semi-nomad could not hope to make a stand. Any progress in the infiltration of new ideas into a society so constituted must of necessity have been hesitatingly slow. But nevertheless there was a little progress and some change, and these had to be explained away without shaking the authority of the Divine Law. The explanation was that the laws of Niyog, widow remarriage, the slaughter of bulls and the indiscriminate recognition of sons were suited to the first three ages and not to the *Kaliyug* (4), *i.e.*, the present age of sinfulness, falsehood and deceit—which seems true enough at times.

68. The Code commends strict conjugal fidelity. It prohibits polyandry, a practice which appears to be of later growth. Of course polygamy was then, as it is now, legal. References such as, "If two sons begotten by two successive husbands who are both dead" (5) are of course to widow remarriage. (6) The right of a married woman to her separate property was recognized in verses which will have to be considered in another place. (7)

69. As might be expected, the Government was on a par with the rest of the ordinances of Manu. Brahmins were wholly exempt from the payment of taxes, and kings even though dying were bound to see that the Brahmins were neither taxed nor left hungry. (8) Not only Brahmins but their benefactors were free from having to bear the burden of the State (9) which was thrown on the rest of the community. In times of prosperity 1/12th of the crops and 1/50th of the personal effects to be enhanced to 1/8th of crops and 1/6th or even 1/4th of the personal effects in times of distress, was the rate : "but a

(1) V. 53.

(2) V. 87, 47 56.

(3) V. 41-42.

(4) Vrihaspati ; Parasar, Narad ; See *post* ; Hindus divide time into four ages (1) *Satya*, (2) *Dwapur*, (3) *Treta*, and (4) *Kaliyug*, the first three being ages of purity and piety

while the fourth—the present—is stated to be one of sinfulness, falsehood and deceit

(5) IX-191.

(6) IX-190

(7) IX-194, 197.

(8) VII-133

(9) VIII-394.

twentieth of their gains on money and other moveables is the highest tax." (1) In another place it is stated that taxes are to be assessed only on saleable commodities. (2) They were levied in specie (3) and the king's share was fixed in the following ratio: "Of cattle, of gems, of gold and silver, added each year to the capital stock, a 1/50th part may be taken by the king; of gram a 1/8th part, a 1/6th or 1/12th according to the difference of the soil and the labour necessary to cultivate it. He may also take a 1/6th part of the clear annual increase of trees, flesh-meat, honey, clarified butter, perfumes, medical substances, liquids, flowers, roots and fruit, of gathered leaves, pot-herbs, grass, utensils made with leather or cane, earthen-pots and all things made of stone." (4) The taxes are computed *in specie* though fines are payable in coins of which gold, silver and copper pieces were well established. (5)

70. Justice was administered by the king with the assistance of three Brahmin assessors. (6) Law could, however, be interpreted by any of the twice-born. (7) The procedure is elementary and for the most part fair. Indeed, Manu is fair in other respects except where his judgment is warped by prejudice or prepossession. And even as regards Brahmins, while they are singled out for every privilege they are also enjoined to practice severe austerity—the only difference in practice being that while the one is real the other is ideal. "A Brahmin should constantly shun worldly honour as he would shun poison; and rather constantly seek disrespect, as he would seek nectar; for though scorned he may sleep with pleasure; with pleasure may he awake; with pleasure may he pass through life; but the scorner utterly perishes." (8)

71. Only Brahmins are to be appointed as Judges (9) "The very birth of Brahmins is a constant incarnation of *Dharma* (10) for the Brahmin is born to promote justice and to procure ultimate happiness". (11) He is exalted to the status of the gods but not yet above them. Later on he rose above them; and the gods in the heavens lived by his sufferance. Manu's rules on the law of inheritance call for detailed examination and refer as they do to a subject which is still technically the current law. Their examination must be reserved for the ensuing commentary dealing with the subject.

72. All transgressions are punishable by Manu but the difference between punishment and penance is not yet discerned. Even murder may be atoned for by penance and amercement regulated according to the caste and kind of the murdered. The fine was the delivery of cattle.

73. The first written characters devised by the Hindus were the Devanagiri alphabet adopted from the Hebrew script which in its turn was an adaptation of the Egyptian hieroglyphics. It is difficult to judge with any measure of certainty when writing first became known in India. The earliest written records do not go back beyond the 9th or 10th century. But from the fact that writing was made on Bhoj leaves or birch bark and these materials are perishable, shows that the scarcity of earlier records does not prove that writing was then unknown. At first it was naturally known only in the

The Script of the Hindus.

- (1) X 120.
- (2) VII-127.
- (3) VII-130.
- (4) VII-180 182.
- (5) VIII-181-188
- (6) VIII 10-11.

- (7) VIII-20.
- (8) II 162-168
- (9) VIII-11.
- (10) God of Justice.
- (11) I-98.

towns, hence the word *Nagari* ⁽¹⁾ while the prefix *Dev* is merely euphemistic and intended to emphasize that it was the script of the gods.

74. Archæologists compute the date of the introduction of writing in India at about the third century A. D. It must have taken several centuries for the script to become settled and sufficiently popularized to embody the floating matter which was recorded in the memories of generations of professional reciters whose duty it was to remember and recite the sacred classics. Max Muller thinks that the end of the nemonic Sanskrit literature marks the birth of the *Sutras* (or aphorisms) to which all the earliest *Smritis*, such as those of Manu, Apastamb, Baudhayan, Vashisth and others were reduced. The advent of writing tended to fix the texts of the early scriptures but the old difference between matter of which the form and substance, and of that of which only the substance was preserved still remained, and has in fact become stereotyped in the history of Sanskrit literature. At all this period usage was slowly growing up and modifying the established practices. And with the invention of writing the literature grew apace, necessitating its classification and codifications. This may be called the third stage of *Samhitas* or compilations of which the first fruit was the *Dharm Shastras* which were merely codified treatises dividing the subject into three parts, that is those which dealt with rituals, duty, and penances.

75. The transition from the age of *Samhitas* to that of commentaries was a natural one. As the *Samhitas* tended to crystallize the law, the commentaries tended to enlarge it. All these constitute the *Codex Juris* of Hindu Law of which the following tabular statement is an attempt to fix both their age and place in the *Corpus Juris* of Sanskrit Law. ⁽²⁾

76. The table gives a short synopsis of the works ordinarily regarded as the source of Hindu Law. There are no certain data to ascertain their date, and even as regards their order, scholars differ. From internal references, Mandlik places the leading *Smritis* in the following order:—

Mandlik's Order of Smritis.

Manu	Apastamb
Atri	Prajapati
Gautam	Harit
Vyas	Yadnyavalkya
Vasissth	Yama
Katyayan	Sankha
Parasar	Bhrigu
Brihaspati	Narad
Usanas	

77. But in view of the fact that names such as Manu, Gautam, Vyas and the rest did not signify the same person, being assumed by several writers at various epochs whose works are now not all traceable, internal evidence is by no means a reliable guide for determining order. The ensuing table is an attempt in the same direction.

(1) From Skt. *Nagar* = town.

(2) Six systems of Indian Philosophy, p. 6.

Serial No.	Name of the work	Name of author.	Probable age	Remarks.
<i>I. The Shrutis or the Vedas.</i>				
1	Rig Veda	... Vyas (nominally) but really by various writers.	1800 B. C.	<p>There was originally only one Veda. Vyas is said to have divided it into four portions.</p> <p>Moral and religious Code. No legal value. Original prose-work lost. Metrical abridgment extant. Cited in Apastamb, Gautam and Vashishth. From internal evidence the Vedas appear to have been composed while the Aryan immigrants had settled down in the Punjab in the neighbourhood of Ambala and were still struggling for mastery over the people of the Gangetic plain. (See MacDonnell's History of the Sansk. Lit. pp 141, 142).</p> <p>"Rig Veda" lit "The Hymn book" (From Skt-Rik hymn and Ved (Lat) <i>Vedic</i> to know.</p> <p>The Rig Veda is the oldest. The Sama contains hymns taken from the Rig while the two Vedas are its intermediate reductions</p>
2	Sama Veda (1549 stanzas).		1000 B. C.	<p>Sama contains hymns for sacrifices, while the Rig Veda, which is the foundation of them all, contains mainly hymns and prayers to the deified forces of Nature, such as the Sun, Moon, Wind, Fire, Indra, Mitra, and the like. All the Vedas have two treatises supplemental to them called the Brahmanas (which are ritual text books written in prose) and the Upanishads which deal with metaphysics.</p> <p>Rig Veda composed near Ambala, the Yajur near Kurukshetra near Delhi.</p>
3	Yajur Veda (a) black, (b) white	Katyayan	... 1000 B. C.	<p>Yajur Veda is white (<i>Sukla</i>) or clear, i.e., free from explanatory text and black (<i>Krishna</i>) because interspersed with explanatory matter.</p>
4	Atharva Veda ...	...	800 B. C.	<p>The <i>Atharva Veda</i> contains a collection of charms and cures.</p>

Serial No	Name of the work.	Name of author.	Probable age.	Remarks.
5	Upanishads	... Vyas	.. 1600 B C	Moral and religious Codes. No legal value. Original prose-work lost. Metrical abridgment extant. Cited in Apastamb, Gautam and Vashisth. From internal evidence the Vedas were composed while the Aryan immigrants had settled down in the Punjab in the neighbourhood of Ambala and were still struggling for mastery over people of the Gangetic plain (See MacDonnell's H. S. L. pp. 141, 142)
<i>II. The Smritis.</i>				
6	Manu	.. Was the text book of the Manava School.	800 B. C.	There are four versions of Manu <i>i.e.</i> , (1) Bhṛigu Saṁhita, (2) Nārada, (3) Bṛihaspati and (4) Angiras. In sanctity the work is regarded by the Hindus as next only to the Vedas.
7	Harit	... Harit : a teacher of the Black Yajur Veda.	850 B. C.	In this and subsequent entries up to No. 11 the name of the work is the " <i>Smṛiti</i> " of the authors mentioned in the second column, though for the sake of shortness the works are now so called; <i>e.g.</i> , Shakespeare—meaning Shakespeare's work. The only version of Harit available is that translated by Manmath Nath Dutt. It has no legal value, being entirely devoted to rituals.
8	Gautam	... Gautam : a teacher of the Sama Veda School.	750 B. C.	Cited both in Baudhayana and Apastamb. Gautam cites only "many" and "some" without name showing that though old, there were older <i>Smṛitis</i> . Gobindaswami the commentator of Baudhayana says that Gautam was the text book of the Chhandogas or followers of the Sama Veda. Translated in 2 S. B. E.
9	Baudhayana	... Yajur Veda School ...	650 B. C.	Translated in 14 S. B. E. Pt. 2. As to age see <i>Ib.</i> Intr. p. XXIV. Govindaswamin has written a commentary on this <i>Smṛiti</i> .

Serial No.	Name of the work	Name of author.	Probable age.	Remarks
10	Apastamb ...	Yajur Veda School. Author's patronymic "Apastamb", probably a native of the "Andhra" Province of South India	500 B. C.	See 2 S. B. E. Intr. Apastamb XVIII. The whole Smṛiti is translated in that volume. The school of Apastambs flourished in South India (i.e., India south of the Nerbudda river---both the Bombay and Madras Presidencies.)
11	Hiranya Kesin ...	Do.	...	8, 9, 10, and 11 composed in Southern India.
12	Vashishth ...	Composed in Northern India for followers of the Rig Veda School.	...	Translated in 14 S. B. E. Pt. 2. Probably named after Vashishth, a Rishi mentioned in the Rig Veda. Existing text, probably a restoration.
13	Kasyayan ...	...	400 B. C.	
14	Vishnu ..	Text book of the Katha School of the Black Yajur Ved: was probably composed in the Punjab	300 400 B. C.	Date relates to the existing recension. Has 160 slokas in common with Manu, with which the original work was intimately allied. By subsequent editing, the work has been altered out of recognition. A commentary on <i>Vishnu</i> called <i>Vaijayanti</i> was composed by Nanda Pandit of Benares (in 1622 A. D.) He is also the author of the well-known work on adoption called the <i>Dattak Mimamsa</i> .
15	Katyayan ..	}	...	All fragmentary extracts from larger works. Of no legal value.
16	Kasyap ...			
17	Usanas Sutrās Budha.			
18	Bhrigu Sanhita Katyayan.	...	200 A. D.	
19	Bṛhaspati ...	...	200 A. D.	It is the oldest of the memorial laws. Though much of the work is obsolete the pious explain it away on the ground that it was not written for Kali Yug.
20	Yadnyavalkya ...	Author's name unknown, but from Mithila, capital of Tirhut.	350 A. D.	Contains 1,009 slokas. Probably based on a Dharm Sutra of the Vajasn̄yī priests following the white Yajur Ved, but its third section is unmistakably connected with the Black Yajur Veda compiled by a follower of Yadnyavalkya

Serial No.	Name of the work.	Name of author.	Probable age	Remarks.
20	Yadnyavalkya ...	Author's name unknown, but from Mithila, capital of Tirhut.	350 A D	(Mandlik's Hindu Law Intro. Li.) This work is better known in its annotated edition by Vidyaneshwar called the Mitakshara (1150 A. D.) See <i>post</i> . Yadnyavalkya's institutes have been translated by V. N. Mandlik in his Hindu Law (pp. 157-274). Yadryavalkya like Janak is not the name of any person but is rather the title or surname of a class (Mandlik Intr. lii).
21	Narad	Narad	400 A. D.	Contains 12,000 slokas. First to limit Dharam to law Complete work extant and translated in 38 S.B.E.
22	Brihaspati	Brihaspati	500 A. D.	Only fragments extant His enlightened views on the subject of women's rights and the advanced character of his teaching generally mark a distinct advance on Narad Translated in 38 S.B.E.
23	Angiras	...	1000-1100 A D.	Secondary redactions being abridged compilations from earliest works. Incomplete and of no legal value. Angiras is translated by M. N. Dutt.
24	Atri	...	...	Translated by M. N. Dutt. Mandlik places Atri next only to Manu.
25	Daksha	...	...	Do.
26	Devala	...	...
27	Prajapati	...	...
28	Yama	...	...
29	Likhit	...	...	Translated by M. N. Dutt
30	Vrihaspati	...	...
31	Vyas	Veda Vyas	...	Translated by M. N. Dutt. The author was a hermit resident in Benares. Vyas v. 1. Mandlik places Vyas next to Gautam and before Vashishth, Katyayan, Parasar and Brihaspati.

Serial No.	Name of the work.	Name of author.	Probable age.	Remarks.
32	Sankha ...	...	...	Translated by M. N. Dutt.
33	Sankha Likhit ...	..	...
34	Vridha Satatap...	...	...	Translated by M. N. Dutt.
35	Parasar ..	..	...	Enlarged edition. Contains 8,800 slokas against 581 or 592 of the older book.
36	Asvalayan ...	...	
37	Brihat Shaunak	A Vaishnava follower of the Ramanuja sect.	...	
38	Sankhyayan ...	..		Translated by M. N. Dutt.

III. Pious Forgeries.

39	Vrihat Harit	A Vaishnava follower of the Ramanuja sect	...	Forgeries of the Vaishnavas propounding their doctrines under old honoured names.
40	Gautam ...	...	...	Do.
41	Vashishth. ...	...	...	Do.
42	Apastamb, the second Amarta.	...	...	Do.

IV. Commentaries on Manu.

43	Medhatithi ...	...	900 A. D.	
44	Dharmidhar ...	.	...
45	Govind Raja	..	...	Is a mere plagiarism of Gobind Raja, a commentator of the 12th century.
46	Bharuchi ...	Lost	...	
47	Srikar	Lost	...	
48	Kulluk Dharma sar	Kulluk Bhatt Benares	of 1400 A. D.	Was a native of Gour in Bengal but migrated to and lived in Benares Sir William Jones printed it with his translation of Manu and commends it in his preface "as the shortest, yet the most learned, the deepest, yet the most agreeable commentary ever composed on any author ancient or modern, European or Asiatic," p. xvii.

Serial No.	Name of the work.	Name of author	Probable age.	Remarks.
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V. Commentaries on Narad.

49	Ashahaya's Narad Bhashya.	Ashahaya	...	Only a recast by Kalyan Bhati preserved. The original is lost. See Narad, 33 S. B. E., Intr xix-xx.
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VI. Commentaries on Yadnyavalkya.

50	Visvarup	
51	Mitakshara	...	Vidyaneswar	1150 A. D.
52	Aparark	..	Aparark or Aparaditya Dev.	1187
				There are numerous commentaries upon this commentary, such as Subodhini by Visveswara Bhatt and Balam Bhatt Tika by Laxmi Devi Payagunde.
				Author belonged to the Konkun branch of the princely house of Silaras

VII. Digests.

53	Dayabagh	...	Jumutavahan	...	1400	Is a chapter on inheritance of the work "Dharma Ratna," which is not a commentary on any work but is a Digest of laws. There are several commentaries on this commentary, that by Srinath Acharya being considered the best. Other commentaries are those by (1) Sri Krishna Tarkalankar; (2) Achuta Chakravarti; (3) Maheshwar.
54	Daya Vibhag	...	Madhav	...	1450	
55	Sarasvati Vilas...	Pratap Rudra Deo.	King of Orissa.		1500-1524 A. D.	Of authority in Orissa.
56	Vivad Chandrika	Kara Vira	..		1550	
57	Vivad Ratna Kar.	Chandeswar Thakur...			1500	Probably based on Parijat cited in <i>Ratnakara</i> and other early works.
58	Vyavahar Mayukh.	Nilanth	...		1600	' Mayukh ', (i. e.) ray or division. The chapter on inheritance of the work composed under the auspices of King Bhagwant. Nilant; (author of Mayukh) born in Benares of Deshasth Mahratha parentage and wrote under the patronage of Yuddhashur—a Rajput Prince of the Sargara tribe who ruled over the town of Bharcha near the confluence of the Shambal and the Jamna.

Serial No.	Name of the work	Name of author.	Probable age.	Remarks.
59	Vitamitrodai ...	Mitra Misra ...	1700	The work was composed by order of Mir Singh, a Bundela King of Orchha who murdered Abdul Fazl, the author of <i>Aini Akbari</i> , and a minister of Akbar.
60	Kalpa Taru ...	Lakshmidhar ...	1180	
61	Vivad Chintamani	Vachaspati Misra ...	...
62	Vyavahar Chintamani	Do. ...	...

78. The *Smriti* of *Harit* has not been translated in the Sacred Books of the East. But a translation of a work of that name appears in the "Twenty Samhitas." If this be the entire *Smriti* it is devoid of any legal or ethnological significance. The work contains seven short chapters in which the four stages are defined. They merely show that Hindu society had become divided into four castes according to their occupations but there is no indication of their inter-relation, while *Harit* entirely omits to allude to the *Dharma* or civil duties which in the earlier and later Codes embody the laws of family relations and inheritance.

79. Next to Manu, Gautam is the oldest Dharm Shastra extant. But it was not the only work composed since the Code of **Gautam, 700-800 B. C.** Manu, since Gautam refers to other writers whose opinions he quotes without naming them. ⁽¹⁾ The work belongs to the followers of the Sama Veda. Its age cannot be ascertained but it appears to be older than Baudhayana by several generations, as the customs in vogue in his time appear to have died out when the Baudhayana school was founded just as the customs current in Baudhayana's time had disappeared when the Apastamba school was founded.

80. The dominating note of the Aryan society in the days of Gautam was the same as in the days of Manu. Some changes were no doubt creeping into society. Caste was becoming a trifle more rigid but it was still in a fluid condition as before. For instance, Gautam allows the student to accept alms from men of all castes, ⁽²⁾ and a Brahmin may eat food given by any twice-born man, ⁽³⁾ and in case of necessity even that given by a Shudra. ⁽⁴⁾ He must not eat the flesh of "milch cows and draught oxen" but he was otherwise free to partake of that and other meat. ⁽⁵⁾ Society is divided into four orders—that of the student, the householder, the ascetic (*Bhikshu*) and that of the hermit in the wood (*Vaikhana*s). Only the householder can marry; the others are consigned to lifelong celibacy ⁽⁶⁾ The householder must marry in the caste a woman not related to him within six degrees on the father's side, ⁽⁷⁾

(1) By use of the expression "Some declare" as in II-9, 34, III-1, 19, VI-6, X-52 : XVI-14, XVIII-7
 (2) II-36
 (3) XVII-1

(4) XVII-5
 (5) XVII-27-38
 (6) III 8
 (7) IV-1-3,

or within four degrees on the mother's side. (1) It recognizes the eight forms of marriages described in Manu (2) including capture (3) and embracing an unconscious female. (4)

81. Inter-caste marriages were customary and their offspring are declared legitimate. (5) But as was the view of all ancient laws, the wife was merely a means to an end. She was married for the sole purpose of procreating a son. If her husband dies sonless she may procreate up to two sons (6) by his brother, (7) or a sapinda, a sagotra, a samanapravar or one belonging to the same caste. (8) The practice of Niyog is preserved in the following verse: "And the child begotten at a living husband's request on his wife belongs to the husband," (9) but if it was begotten by a stranger it belongs to the latter (10) or to both the natural father and the husband of the mother. (11) Another means of raising an issue was to obtain a son by an appointed daughter. (12)

Girls were married off before they attained puberty. (13) "Some declare that a girl shall be given in marriage before she wears clothes" (14) which shows that a tendency had then become established in favour of child-marriages, though Gautam appears to have been comparatively a rationalist. Polygamy was then naturally customary. (15)

82. Gautam's law of inheritance recognizes the rule of primogeniture (16) as the rule of succession, but the rule on that point was fluctuating and the tendency was towards the equality of shares amongst all the sons, the eldest being given two shares. (17) "A legitimate son, a son born secretly, and a son abandoned by his natural parents inherit the estate of their fathers." (18) "The son of an unmarried damsel, the son of a pregnant bride, the son of a twice-married woman, the son of an appointed daughter, a son self-given, and a son bought" (19) receive one-fourth on failure of the other sons. (20)

Idiots and eunuchs were disinherited but the disqualification was personal and they were entitled to maintenance. (21) Cases of inheritance not covered by the express texts were to be decided by the committee (*parishud*) of ten Brahmins learned in law.

83. Hospitality is enjoined, but Brahmins are to be fed first, Kshatriyas next, and men of other castes are to be fed with one's servants for mercy's sake. (22) Reverence is due to age and "even a Shudra of 80 years or more must be honoured by one young enough to be his son." (23) But an Arya though he be younger must be respected by a Shudra. (24) Prestige!

84. No Arya should grow a beard without a sufficient reason. (25) But the Vedic Arya grew beards as a rule and hid his long hair in a conch-like

- (1) IV-5.
- (2) IV-6 18.
- (3) IV-12.
- (4) IV-13
- (5) IV-16, 17
- (6) XVIII 14.
- (7) XVIII 14.
- (8) XVIII-6.
- (9) XVII-11.
- (10) XVIII-12
- (11) XVIII-18.
- (12) XXVIII-18.
- (13) XVIII-21.

- (14) XXVIII-21.
- (15) XXXVIII-14.
- (16) XXVIII 3
- (17) XXVIII-9.
- (18) XXVIII 32.
- (19) XXVIII-33.
- (20) XXVIII-34.
- (21) XXVIII-43.
- (22) VI-43.
- (23) VI-10.
- (24) VI-11.
- (25) IX 7.

pyramidal chignon arranged to the right. The student is now enjoined to shave off his head but merely maintain a pigtail. (1) They walked bare-headed during the day (2) covering their heads only at night. (3) The Arya should not take water offered by a Shudra (4)—a notable restriction on the older law when the Shudra was vigorously anathematized but not yet ostracized.

85. The Aryan ate meals twice a day—morning and evening (5) but unlike that of the Romans, it savoured of the Spartan simplicity. The three duties enjoined on all Aryans are the study of the Vedas, the offering of sacrifices and the giving of alms (6) the additional duties of the Brahmin being to receive them and teaching the making of sacrifices. (7) The payment of taxes follows the rules stated in Manu. (8)

86. The origin of *bhet bigar* is to be found in Gautam "Each artizan shall monthly do one day's work for the king." (9)

87. The duties of a king are set out in much detail: (10) "The king is master of all, with the exception of Brahmins." (11) "All excepting Brahmins shall worship him...(12)... The Brahmins also shall honour him." (13) "He shall administer justice according to the laws of countries, castes and families which are not opposed to the sacred records." (14)

88. The Apastamb Sutra, the youngest of the trio, represents the doctrines of the school of that name which flourished in South India (15) and whose founder according to tradition, was a native of the Andhra country. As compared to Gautam and Baudhayan it records a change in the Aryan customs which is in many respects modern. In their general structure the three works agree, containing as they do, many verses in common, and setting out only some additional clauses which had forced themselves into the forefront by reason of their acceptance as the acknowledged tenets of the people. For instance, with the growing rigidity of caste, he prohibits intercourse, dining and inter-marriage with those whose great-grandfather's, grand-father's and father's initiation is not remembered. (16) If a Shudra touches him then he shall leave off eating. (17) He shall not eat in a ship (18) or ready-made food purchased in the market (19) but "the meat of milch cows and oxen may be eaten". (20) "Bull's flesh is fit for offerings." (21) But a Brahmin shall not eat in the house of people of the three other castes, (22) but on this point there was still dissent. "According to some, food offered by people of any caste, who follow the law prescribed for them, except that of Shudras may be eaten." (23) Even the Shudra's food may be eaten in times of distress. (24) Apastamb affects puritan piety in forbidding food given by a physician (25) or one who lives by the use of arms, excepting a Kshatriya (26)

- (1) I-27
- (2) IX 35.
- (3) IX-36.
- (4) IX-10.
- (5) IX 59
- (6) X-1.
- (7) X 2
- (8) X-24-80
- (9) X-31.
- (10) XI
- (11) XI-1.
- (12) XI-7.
- (13) XI-8.
- (14) XI-20.
- (15) In a work called *Maharnava* India is

divided into two equal halves by the river Nerbudda and the School of Apastamb prevailed in the country to its south up to the mouth of Godavari.

(16) 2 S. B. E. vv. 5, 6.

(17) *Ib* p 61 v. 1.

(18) 2 S. B. E. v 6

(19) *Ib* v. 14.

(20) *Ib* p 64 v. 80.

(21) *Ib* v. 31.

(22) *Ib* p 66 v 9

(23) *Ib* p. 67 v. 18.

(24) *Ib* p. 67 v. 14.

(25) *Ib* p. 67 v 21.

(26) *Ib* p 67 v. 19.

and several others which, if strictly obeyed, must have left the Aryan very hungry. Niyog had by this time died out and is forbidden. (1) So is the delivery of widows for procreation to the agnatic kinsmen of her deceased husband. (2)

89. Apastamb's law of inheritance follows the beaten track except that allows the daughter to take after the pupil—a very remote chance. (3) The wife's stridhan is better defined as comprising her ornaments and the wealth received from her relations. (4) The doubtful equity in favour of the eldest son is now positively swept away. "Preference of the eldest son is forbidden by the Shastras". (5) It is allowed for a Shudra to prepare the food under the superintendence of men of the three higher castes. That Shudra cooks were employed is apparent from an allusion to that effect. (6)

Baudhayana allowed traffic in sons—Apastamb forbids it. (7)

90. Of the rest of the productions of this age Apastamb occupies a prominent place not only because a comparatively authentic version of this *Smṛiti* is extant but also because it is an excellent compendium of the followers of Yajur Ved originally compiled for the benefit of the Adhvaryu priests and their acolyte pupils.

**Harit, Baudhayana,
650 B. C., Apas-
tamb, 500 B. C.**

The term "Apastamb" is the name of the school like Asvalayan, Baudhayana, Bharadwaj or Gautama. It was one of the five branches of Khandikiya school which again was a branch of the Taittiriya, a section of the Brahmanas who studied the Black Yajur Veda.

91. Apastamb and Baudhayana belong to the same school, but of these Baudhayana is about 100 to 150 years older. If therefore Apastamb was compiled in 500 B. C. Baudhayana which portrays customs of a ruder age must have been composed about 650 B. C. Older than both is the work of Harit but though a copy of this work exists, it has no practical value to the lawyer as its Dharma Sutras are meagre and incomplete. So are those of Baudhayana as compared to those of Apastamb though in this case later glossators have performed the work of restoration according to their own ideas. (8)

92. Nevertheless, the following facts may be gleaned from what remains, which has been translated, with an Introduction in the Sacred Books of the East Series. (9) Both Baudhayana and Apastamb originated in the Deccan (10) and both probably belonged to the Andhra country. (11) As to the age of Baudhayana it is manifestly older than Apastamb as it recognizes several customs reprobated in the later work. It is computed that the Apastambs flourished about 500 B. C., probably more but not less. (12) The Criminal Law is draconian in its severity against Shudras. There was one law for the Aryan—another for the Shudra.

(1) 2 S. B. E. p. 180, 181 v. 7. Niyog is a child are not recognized."
definitely prohibited *Ib.* p. 164 v. 2-5.

(2) *Ib.* p. 164 v. 5

(3) *Ib.* p. 188 v. 4.

(4) *Ib.* p. 184 v. 9.

(5) *Ib.* p. 184 v. 10-14.

(6) *Ib.* v. 6

(7) *Ib.* p. 18 v. 11. "The gift or acceptance of a child and the right to sell or buy

(8) 11 S. B. E. XXXIII

(9) XIV Translated by G. Buhler

(10) India South of the Nerbudda—the Bombay and Madras Presidencies—See S. B. E. XX XIV Intr. XLII.

(11) *Ib.* XLIII.

(12) *Ib.* XLIII.

93. The outstanding features of Gautam are the recognition of family relations in their widest sense, the growing cleavage between the different castes and their tendency to follow their hereditary occupations. Like the older writers Gautam enters into the trivial details of life and prescribes a mode of living which must have reduced men to mere automata. Women were pre-ordained for procreation. They have no other function. They are excluded from education and inheritance and though Gautam combats the view that they should be married off as they emerge from their cradle he supports their marriage before puberty. Niyog was still in vogue ⁽¹⁾ and sonship used in the same large sense as before. ⁽²⁾

94. These peculiarities of Hindu society became accentuated with time and the writings of later sages only voice the growing tendency of the time when they applied the cardinal doctrines of their race to the practical problems of sociology.

95. Baudhayana even justifies divorce on the part of the husband: "Let him abandon a wife who does not bear children in the tenth year, one who bears daughters only in the twelfth, one whose children all die in the fifteenth, but her who is quarrelsome without delay." ⁽³⁾ With the last sentiment every one from Socrates downwards will agree.

Baudhayana prefaces to his Smṛiti a long dissertation on personal purity in which he follows Manu, Gautam and other sages of his time.

96. His law of inheritance is contained in the following seven verses ⁽⁴⁾ :—

"Moreover, the great-grand-father, the grand-father, the father, oneself, the uterine brothers, the son by a wife of equal caste, the grandson, and the great-grandson—these they call Sapindas, but not the great-grandson's son :—and amongst these a son and a son's son (together with their father) are sharers of an undivided oblation.

The sharers of divided oblations, they call Sakulyas.

If no other relations are living, the property of a deceased male descends to them after the Sapindas

On failure of them, the teacher who holds the place of a spiritual father, a pupil, or an officiating priest shall take it.

On failure of them, the king Let him give that property to persons well-versed in the three Vedas.

But the king should never take for himself the property of a Brahmin."

97. In Baudhayana's time the law of co-parcenership had not yet developed. There could be no partition during the father's life-time except with his permission. ⁽⁵⁾ The rights of the younger sons to an equal division with their eldest brother was now recognized. He still received an additional 10 per cent. or the most excellent chattel, but it all depended upon the father's volition ⁽⁶⁾

98. Baudhayana's catalogue of edibles is the same as Gautam's. He believes in limited polygamy allowing four wives to a Brahmin, three to a Kshatriya, two to a Vaisya and only one to a Shudra. ⁽⁷⁾ Inter-caste unions are discussed without being condemned. Their offspring are treated as legitimate. ⁽⁸⁾ His criminal law is hard on the Shudra. The murderer of a Shudra being liable to the same fine as for killing a dog, a crow, an owl, a frog or a musk-rat. ⁽⁹⁾

99. There was a growing sense of the dignity of marriage. Though he recites the eight forms of marriage, he reserves the Gandharv and the

(1) 14 S. B. E. p. 226-v. 17.

(2) *Ib.* p. 227, 228, vv. 20-33

(3) II-6.

(4) 14 S. B. E. 178, 179.

(5) 14 S. B. E. 224.

(6) *Ib.*

(7) 14 S. B. E. 196.

(8) 14 S. B. E. 197, 198.

(9) *Ib.* 202

Pisach forms for Vaisyas and Shudras—a departure which was not universally acclaimed since “some recommend the Gandharv rite for all castes because it is based on mutual affection.” (1)

The right of women to acquire property was now recognized. Though women possess no independence and are never fit for it, (2) nevertheless “the daughters shall obtain the ornaments of their mother, as many as are presented according to the custom of the caste, or anything else that may be given according to custom.” (3)

100. Baudhayan strikes the dominant note of the time to obtain a son by marriage if you may—by Niyog if you must—but get a son, for “through the procreation of a virtuous son he saves himself”. (4) “Therefore, he should sedulously beget offspring.” (5)

101. The work concludes with a chapter on adoption, (6) in which occurs the text prohibiting the giving and taking of an only son in adoption (7) which is no longer the law and prescribing the following ceremony, the substance of which is still essential, to constitute the giving and taking in adoption.

9. “Then he . . . goes to the giver of the child and should address this request to him : ‘Give me the son.’

10. The other answers ‘I give him.’

11. He receives the child with these words : “I take thee for the fulfillment of my religious duties ; I take thee to continue the line of my ancestors” (8)

If a legitimate son is afterwards born the adopted son gets a fourth of the legitimate son’s share.” Thus says Baudhayan. (9)

102. After the two exponents of the Southern School, Vashishth which belongs to the Northern School, that is to say the school **Vashishth, 400 B. C.** founded in the country north of the Nerbudda river and the Vindhya mountain, presents some interesting and instructive features.

This Dharma Shashtra was composed by the sage Vashishth, or at any rate by the pupils of his school who followed the *Rig Veda*.

There are no data to ascertain the age of this work though internal evidence shows it to belong to a period long past the age of Baudhayan.

The author defines Aryavart to be a country between the Himalaya and the Vindhya ranges limited on the east and west by the ocean. (10) The law prevailing there is authoritative.

103. It will be observed that while Apastamb has limited polygamy to four wives for a Brahmin, three for a Kshatriya, two for a Vaisya and only one for a Shudra, Gautam improves on Apastamb by reducing the Brahmin’s allowance only to three, Kshatriya’s to two and one each to the Vaisya and Shudra. (11) Gautam reproduces many aphorisms of Baudhayan and Apastamb ; but they are better arranged and brought up to date. From its general structure it would show that it was written after the rise of Buddhism in India and when the hatred it had aroused amongst the priestly classes was keen. It refers to them as “Atheists” service with whom entails forfeiture of caste. (12) Consequently it would not be far wrong if the age of Vashishth is

(1) 14 S. B. E. 207.

(2) *Ib.* v. 44-45.

(3) *Ib.* v. 48

(4) *Ib.* 272 v. 8.

(5) *Ib.* 272 v. 11.

(6) *Ib.* 884-886.

(7) *Ib.* 884-v. 1.

(8) *Ib.* 885 v. 9-11

(9) *Ib.* 886-v. 16.

(10) 1-8, 9

(11) 1-24

(12) 1-23

placed in the fourth or fifth century before Christ. Vashishth denounces the prevailing, though perhaps decadent custom of a Brahmin marrying a Shudra. (1)

104. In regard to the marriage rites, Gautam only recognizes six forms against the eight of his predecessors, namely:—

(1) Brahma (Supreme Spirit). (2) Daiva (Gods). (3) Arsha (Sages). (4) Gandharva (Love-match). (5) Kshatriya (Warrior). (6) Manush (Man). Of these the last two are new though they bear the old meaning, the Kshatriya marriage being seizure by main force, while the Manush marriage is purchase pure and simple. (2) The dependence of women upon men is again insisted on. (8) He allows the widow after six months of widowhood to be appointed to raise an issue to her deceased husband (4) from whose estate she is to be maintained. (5) A woman may marry of her own accord three years after attaining puberty (6) but with Gautam he counsels marriage before puberty (7) and permits re-marriage of virgin widows (8) and of deserted wives to one of the husband's kinsmen, (9) failing him to a stranger. (10) The meat of domestic animals was still eaten and Vashishth adds the interesting fact that camel flesh was equally served at the Aryan table. (11)

105. The law of adoption is a reproduction of the older texts, in places revised, as for instance, the following: "Let a woman neither give nor receive a son except with her husband's permission". (12) "He who desires to adopt a son shall assemble his kinsmen, announce his intention to the king, make burnt-offerings in the middle of the house, reciting the Vyahritis, and take as a son not a distant kinsman, but the nearest among his relatives". (13) This would compare favourably with the Roman Law of adoption, but the oburgation does not appear to have ever attained the dignity of an indispensable condition.

106. Vashishth is quite modern in his law of property. Ten years' continuous adverse possession destroys the owner's right to property. (14) He recognizes possession as evidence of ownership. (15) He entrusts the minor's property to the king. (16) His ideal for the king is noble: "A king will be superior even to Brahmins if he lives surrounded by servants who are keen-eyed like vultures". (17) "Let him live surrounded by servants who are keen-eyed like vultures. Let him not be a vulture surrounded by vultures." (18)

107. Vashishth had an idea of contracts againsts public policy. (19)

He still recognizes the twelve kinds of sons. (20) Sons by inter-caste marriage are still legitimate. (21) But he reverts to the double share allowed to the eldest son on partition. (22) He disinherits eunuchs, madmen and out-caste sons but allows them maintenance. (23) He recognizes the right to self-

- (1) 1-25, 26
- (2) I-34, 35.
- (8) V. 1, 2
- (4) XVII 57.
- (5) XVII 62.
- (6) XVII 67, 68.
- (7) XVII-69, 70 Gautam, XVII-23
- (8) XVII-74
- (9) XVII-78-80.
- (10) XVII 80.
- (11) XIV-40, 45 46
- (12) XV-5.

- (18) XV-6.
- (14) XVI-17
- (15) XVI-10.
- (16) XVI-9.
- (17) XVI-21.
- (18) XVI-25.
- (19) XVI 31, o f. Manu, VIII-169, Vishnu, VI-41; Yagnyavalkya, II-47.
- (20) XVII-12-39.
- (21) XVII-47-50.
- (22) XVII-42.
- (23) XVII-52-54.

acquisition, but allows the acquirer only a double share. (1) In other respects he follows the traditional law of inheritance.

108. In his closing exordium in support of liberality, Vashishth promises beatitude to him "who gives a house obtains a town" (2) and "he who gives a pair of shoes obtains a vehicle." (3) "Practice righteousness, not unrighteousness; speak truth, not untruth, look far not near; look towards the Highest, not towards that which is not the Highest." (4) "Happiness is the portion of him who relinquishes all desires which fools give up with difficulty, which does not diminish with age, and which is a life-long disease." (5)

109. The Dharma Shashtra which passed under the name of the God Vishnu is for its size equal to the Code of Manu from **Vishnu, 300-400 B C.** which its contents are largely borrowed. This is, indeed, the leading feature of all Dharma Shashtras the text of which is mainly borrowed from the earlier Codes, only in parts added to or modified to represent the views of the writer of the age. This Smriti contains over 160 slokas from Manu, and it appears that an old recension of this work was older than Baudhayan and Vashishth, for both have borrowed from it. But this recension has been edited by subsequent glossators out of recognition so that the text translated in the Sacred Books of the East Series is comparatively a modern work. (6) It is now impossible to separate the old from the new and the work now extant may then be taken as the only work known to us and which might have been 300 or 400 years old at the birth of Christ.

110. The Smriti belongs to a school studying the Black Yajur Veda but there are passages therein showing the writer's leanings towards the Sankhya philosophy of Buddhism. For instance, in the concluding praise of Vishnu by the Goddess of the Earth for his enlightening discourse, she addresses him as "the Lord of the principle of Mahat (Greek Entity)." (7) Thou art the sage Kapil: (8) thou art the teacher of the Sankhya." (9) As Buddhism was at the zenith of its power in the third and fourth century B. C., and the orange-coloured robes of its monks were a frequent sight in the towns, Vishnu regards it as a good omen that one should come across them.

111. Leaving out of account the ceremonial and penitential matter in which Vishnu does not differ from the earlier sages, his dissertation on the family relations and the law of inheritance call for a passing notice. Vishnu like his predecessors recognizes inter-caste marriages and the legitimacy of offspring. He enumerates twelve kinds of sons the last of whom is a son born by any woman whomsoever. (10) He recognizes the eight forms of marriage, but adds that the first four are only legitimate for a Brahmin while these and the Gandharv are legitimate for a Kshatriya, (11) but this restriction counts for nothing in view of the laxity he observes in counting the sons. In other respects Vishnu voiced the Orthodox Hindu sentiment as to women's dependence upon men (12) and the like. He is the first to regard *Suttee* or self-immolation with her husband's corpse as a wifely duty (13) but this is regarded as a later interpolation. He recognizes the right of the wife and the daughter to inherit to her husband and father in the absence of male issue. (14) He also allows

(1) XVII-51.
(2) XXIX-14.
(3) XXIX-15.
(4) XXX-1.
(5) XXX-10.
(6) Vol. VII.
(7) CVIII 26.

(8) XCVIII-85.
(9) XCVIII-86.
(10) XV-27.
(11) XXIV-27, 28.
(12) XXVI-13.
(13) XXVI-14.
(14) XVII-4, 5.

the mother to succeed to her son. ⁽¹⁾ He moreover enlarges the scope of stridhan ⁽²⁾ and prescribes the mode of its devolution. ⁽³⁾ He gives mothers and unmarried daughters a share on partition. ⁽⁴⁾ Niyog appears to have fallen into disuse and so also the employment of widows to raise offspring to their deceased husbands.

112. Most of Vishnu's law of inheritance has become obsolete with the discontinuance of inter-caste marriages. He apportions the share of each son according to the caste of his mother. ⁽⁵⁾ The balance is in consonance with modern law and will be set out in the ensuing commentary.

Vishnu differs from all the previous sages in expressly prescribing the law of the mortgage of land. ⁽⁶⁾ He allows mortgage of only a bull's hide ⁽⁷⁾ of land at a time. If the mortgagor mortgages more without redeeming that previously mortgaged he shall be whipped or imprisoned. ⁽⁸⁾ In a dispute between two mortgagees the one with possession has priority. ⁽⁹⁾

113. In his exposition of Criminal Law Vishnu is equally modern. He recognizes the right of private defence ⁽¹⁰⁾ and punishes adultery, ⁽¹¹⁾ defamation ⁽¹²⁾ and insult ⁽¹³⁾ while his refined moral sense does not suffer bestiality to go unpunished. ⁽¹⁴⁾ A tooth for a tooth and an eye for an eye is his standard of punishment for many other offences.

114. The Dharma Shastra of Narad bears so close an affinity to the Code of Manu as to be regarded as one of its versions. From **Narad, 400 A. D.** references to the Roman gold coin *Dinarius* which was introduced into India about the first century, the Smriti must have been compiled after that date. But inasmuch as it agrees on many points with the *Smritis* of Yadnyavalkya, Vishnu, Katyayan, Brihaspati and Vyas and reflects a more developed stage of judicial procedure, it may be safely assigned to the fourth century A. D.

115. In his own preface to the Smriti Narad admits that his work is no more than an abridgment of Manu made for the convenience of study by those who should find Manu unmanageably bulky. But if Narad is an abridgment of that work it is also an improvement thereon in many respects. The opening chapters deal with judicial procedure, the plaint, pleadings and judgment, the constitution of the Courts. He then deals with the subject of debts and pledges which appear to have tormented the old world as it torments the new. He then deals with evidence and ordeals, deposits, the resumption of gifts, breach of a contract of service, rescission of purchase, trespass and boundary disputes which are followed by the law of impotency and marriage.

116. Narad allows the wife to divorce her husband for impotency. ⁽¹⁵⁾ "Women have been created for the sake of propagation, the wife being the field and the husband the giver of the seed. The field must be given to him who has seeds. He who has no seeds is unworthy to possess the field." ⁽¹⁶⁾ Narad permits an engagement to be broken in favour of a better suitor. ⁽¹⁷⁾

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| (1) XVII-7. | (8) V-181. |
| (2) XVII-18. | (9) V-184. |
| (3) XVII-19-28. See this subject discussed in the Commentary, post. | (10) V-189, 190. |
| (4) XVIII-84, 85. | (11) V-40, 41. |
| (5) XVIII. | (12) V-27-29. |
| (6) V-181-184. | (13) V-81-86. |
| (7) "Bull's hide." That land whether little or much, on the produce of which one man can subsist for a year is called the quantity of a "bull's hide."—v. 188. | (14) V-42, 44. |
| | (15) XII-16, 18. |
| | (16) XII-19. |
| | (17) XII-30. |

He regards Niyog as still customary. (1) The sonless widow must have intercourse with her husband's brother till she has begotten a son after which the brother is enjoined to let her go. (2) A married woman could re-marry if her husband does not return after a stated number of years. (8)

117. Narad's law of partition is indistinguishable from that of Manu but most of it is now obsolete. For instance, he concedes to the father the right of partition when he is stricken in years, (4) or when the mother had ceased to menstruate. (6) He allows the eldest son a larger share. (6) His allotment of share amongst the subsidiary sons is, of course, equally obsolete.

But on many other points of partition and inheritance Narad's rules are still in force.

118. Comparing Narad with the older sages, it is evident that the distinction between Duty (*Dharma*) and Law was becoming more perceptible though it was not so clear as it had become to the contemporary Roman jurists. Narad was probably the contemporary of Justinian and if the two works are compared—they present a contract which is only explicable on the assumption that while the sacerdotal law was still struggling for emancipation from its close confines, the secular law had already assumed a vigorous shape and form in the clear atmosphere of a thinking democracy. (7)

119. Of Brihaspati we have merely a fragment, but its value is held to be in the fact that it affords a key to the age of Manu. **Brihaspati, 450 A. D.** Brihaspati is, indeed, regarded as one of its many versions—its other versions being those by Bhrigu, Narada and Angiras. Brihaspati mentions the *Dinar* (*Denarius*) as a current coin which was a copy of the Roman Denarius introduced into India in the first century A. D. The outstanding feature of Brihaspati is his definite pronouncement against Niyog. On "account of the successive deterioration of the four ages of the world" it must not be practised by mortals in the present age according to law. (8) He also advocates the custom of *Sati* holding that "whether she ascends the fire after him, or chooses to survive him leading a virtuous life, she promotes the welfare of her husband." (9) It does not appear when and how this custom arose. But one would not be far wrong in ascribing it to the cruelty of the husband's relations, to the contempt with which she was universally regarded and the persecution which was her lot as one whose very sight and presence was unlucky to the beholder.

120. Inter-caste marriages were still legal (10) and the shares of sons are consequently apportioned according to the caste of their mothers, (11) but the tendency to restrict the sonship is outlined in the view that out of the thirteen sons (12) "the legitimate son of the body (*Auras*) and the appointed daughter (*Putrika*) continue the family." (13) Brihaspati allows the wife to inherit to her husband's moveable but not to his immoveable property. (14) But he allows the daughter to inherit all property in default of the wife. (15)

(1) XII-58.

(2) XII-80, 81.

(3) XII-98, 99.

(4) XIII-4.

(5) XIII-3.

(6) XIII-1, 13.

(7) Translated in 33 S. B. E., pp 271-890.

(8) XXIV-12.

(9) XXIV-11.

(10) XXV-14.

(11) XXV-27, 28, 29.

(12) Brihaspati adds the appointed daughter as equal to a son, and she with the 12 sons already enumerated make thirteen.

Ib. XXV-95, 99 S. B. E. 375

(13) XXV-33.

(14) XXV-54 but see *contra* *Ib.* 65, 66 XXV-35

(15) XXV-55.

Brihaspati for the first time enunciates the condition and the law of re-union, (1)

He cites Manu as having prohibited gambling (2) but the spirit of gambling was abroad and Brihaspati allows it "under the superintendence of keepers of gambling-houses, as it serves the purpose of discovering thieves." (3) For the rest Brihaspati voices the stereotyped views of his predecessor.

121. The Smṛiti of Yādnyavalkya (4) is stated to rank next only to the Code of Manu in its authority. It owes its added importance to one of its commentators Vidyāneshwar, whose commentary thereon called the *Mitākshara*—is nominally still the current law of the land though in reality most of it has naturally been buried under the dust of ages, and what remains can only be safely relied upon if it is supported by the judicial commentary of the ultimate Court of appeal. But so long as the *Dharma Śāstras* still adorn and diversify the text of legal treatises both the Smṛiti of Yādnyavalkya and the commentaries thereon must remain the texts round which all law must cluster.

122. The Institutes of Yādnyavalkya are probably a versification of a *Dharma Sūtra*—or a set of aphorisms on *Dharma* (or Duty)—belonging to a school of the white *Yajur Veda* which flourished in the third and fourth century A.D. Internal evidence points to the author being a native of Mithila, the capital of Tīrhut.

123. The work is divided into three parts: the first deals with *Achar* (or the rules of conduct); the second with *Vyavahar* (or domestic law); and the third with *Prayaschit* (or penances). As usual the subject is throughout dealt with in a series of incomplete and often unintelligible aphorisms drawn up for justifying a crop of commentaries to be presently noticed (§ 139). These commentaries possess the leading characteristics and the defects of all commentaries noticed later (§ § 199, 200). As, moreover, these commentaries reflect the view of a later age, it would perhaps be useful, if following the method hitherto adopted, the Institutes are perused without their attendant commentaries.

124. As regards marriage, Yādnyavalkya still allows inter-caste marriages. (5) But he limits with Vāśiṣṭh the three regenerates to three, two and one wife respectively. *Niyog* is modified but not abolished. The wife is required to co-habit with the husband's younger brother during his absence and failing him with a *sapinda* or *sagotia* till a son is born (6). Her perpetual dependence on men is again insisted on (7) but in some minor respects her lot appears to have improved by such allusions as that one should not take food before one's wife. (8)

125. The second chapter deals with legal precepts and procedure. As regards debts Yādnyavalkya enacts the rule of *Damdupat* (9) whether on secured or unsecured debts. His conception of a mortgage is one with possession, (10) but he attaches special value to writing, holding that "a loan contracted by a written document is re-payable in three generations." (11) He prescribes rational rules for its execution and attestation by an even number of witnesses who must write in their own hands mentioning first the names of their respective fathers: "I am such and such a person, a witness in this document." (12)

(1) XXV-72, 73-77.

(2) XXV II.

(3) XXVI 2.

(4) Translated by Mandlik, (II L.), pp. 167, 274.

(5) I-57.

(6) I 68, 69

(7) I-85.

(8) I 181.

(9) II 62, 65.

(10) II-65.

(11) II 92.

(12) II 89.

A document is of no value if it is obtained by force or threat. ⁽¹⁾ "A debtor must enter on the back of the deed the payments he makes or the creditor should grant receipt in his own handwriting for the money received." ⁽²⁾ "After the discharge of the debt the deed should be destroyed; or for the validity of the transaction, a deed of release executed. What is paid before a witness must be re-paid before another witness." ⁽³⁾

126. Yadnyavalkya's law of partition provides for the shares of different sons; but it is in principle equitable. It is left to the father to either give his eldest son a larger share or to make all the shares equal. ⁽⁴⁾ He allows the wives possessing no stridhan of their own to share equally with the sons. ⁽⁵⁾ The rest of his rules on the important subjects of partition and succession are still authoritative and will have to be set out in the ensuing commentary.

127. Yadnyavalkya lays down detailed regulations for the maintenance of gambling-houses. ⁽⁶⁾ His Smṛiti is interspersed with the usual rules about ordeals, ⁽⁷⁾ disputed boundaries, ⁽⁸⁾ trespass by cattle, ⁽⁹⁾ sale of stolen goods, ⁽¹⁰⁾ gifts, ⁽¹¹⁾ return of articles purchased and the conditions of its return. ⁽¹²⁾ The chapter relating to master and servant opens with a generous clause for the emancipation of slaves obtained by force or of those who from starvation have delivered themselves into slavery or those who being slaves save their master's lives. ⁽¹³⁾ But a higher caste could still enslave one belonging to a lower caste. ⁽¹⁴⁾

128 Yadnyavalkya prescribes punishment for abuse, insult and defamation, in which aggravation or mitigation of the offence is measured according to the relative castes of the parties. ⁽¹⁵⁾ He awards fine as a punishment for petty offences the nature of which was probably determined by their frequency. Murderers were to be impaled, ⁽¹⁶⁾ women causing abortion were to be drowned ⁽¹⁷⁾ and those who kill their husbands, children or spiritual guide were to be trampled to death by oxen after having their ears, fingers, nose and lips cut off. ⁽¹⁸⁾ The punishment for adultery varies with the caste of the offender, varying from a small fine to death. ⁽¹⁹⁾ Unnatural offence on the wife cost 24 panas. ⁽²⁰⁾ The plea of the thief that he had entered the house at the invitation of one of its inmates is ordinarily as false as it is unquestionably ancient. The plea cost the accused 50 panas. ⁽²¹⁾ The king was intolerant of the seditious. "One who indulges in talks affecting the interests of Royalty, one who villifies the king, or one who discloses his secret counsels should have their tongues cut off and be banished". ⁽²²⁾

129. The age of Yadnyavalkya was the age of literacy and co-operative industry. The former is manifest from the provision relating to written instruments while the latter is manifest from a short Companies Act incorporated in the Smṛitis. ⁽²³⁾ But it does not appear that such companies were anything more than trading partnerships from whose profits the king received 5 per cent. as royalty. ⁽²⁴⁾

(1) II 91.
(2) II 95.
(3) II 96.
(4) II-116.
(5) II-117.
(6) II-202,206.
(7) II-97,116.
(8) II-153,161.
(9) II-162,170.
(10) II-171,177.
(11) II-179.
(12) II-180,184.

(13) II 185
(14) II-186.
(15) II-207,232.
(16) II-276.
(17) II-202.
(18) *Ib.*
(19) II-286.
(20) II-296.
(21) II-804.
(22) II-805.
(23) II-262, 268.
(24) II-264.

130. The third chapter relating to *asouch* or impurity deals with the obsequial rites and winds up with an epilogue on the origin of man from the Great Soul and his final absorption therein. (1)

131. The Samhita of Angiras is an anathema on the use of indigo-dyed cloth and the eating of food touched by low caste people. This marks yet another step in the growth of caste rigour. But the twice-born were yet mutually tolerant of one another. They were only arrayed against the Shudra. "One may always take a Brahmin's food; a Kshatriya's on parva days; a Vaishya's in times of calamity; but never a Shudra's". (2) The protection of cows was also the special solicitude of Angiras who prescribes various penances for striking or maiming a cow. (3) Angiras' excursion into medical science is wild: "Milk and curds are digested within a month; and clarified butter within six months. It is doubtful if oil is digested in the stomach within a year." (4)

132. Yadnyavalkya was followed by a succession of minor Smritis all of which deserve only a passing notice, as they are either mere reproductions or abridgment of the earlier Smritis. **Minor Smritis.** The introduction of writing into India by the adaptation of the 22 Semetic ideographic letters into the 52 Devnagri alphabets had given a great impetus to the production of new works modelled upon the old which were copied and put into circulation with great facility. But the hasty production of these works left much to seek. They are all dissertations on rituals, penances and penalties with an occasional fling at the Shudras and women. They, however, record the persistence of old customs, Niyog, for instance. "For knowing a woman brought by another for the purpose of procreating a son one becomes purified by bathing in the water of a river and drinking clarified butter." (5) Caste was growing apace with the diversified occupations. "A washerman, a cobbler, an actor, a *varud*, a kaivarta, a meda and a Bhilla,—these seven are known in the Smritis as degraded castes." (6) But the house of the twice-born was not as yet divided against itself, though the tendency was to caste exclusiveness. "If a twice-born person drinks water touched by Chandal he becomes purified by a Krichhrapad. So the ascetic Apastamb has said." (7) But "raw-meat, clarified butter, oil and oily substances obtained from fruits even when kept in vessels of degraded castes attain to purification when brought out." (8) Raw meat was not yet taboo to the Aryan table, though the eating of beef had by now become sinful. (9) Most of the work of *Atri* deals with the penance attending on a connection with a Chandal or Shudra woman. But despite recorded penances and penalties such connections grew apace and they account for the large and aried population of the Indian continent. Vyas regards such marriages as perfectly lawful: (10) and in his time Shudra men appear to have taken to marrying Brahmin girls though Vyas damns the offspring of such unions as Chandals and as devoid of any religious merit. But Vyas was reflecting only the social disgrace implied in such unions.

133. The patriarch Daksha has some excellent advice for the house holder

(1) III-118, 385.
(2) M. N. Dutt's Trans., p. 272, §§ 29-31
(3) *Ib.* § 47.
(4) M. N. Dutt's Trans S. 55.
(5) *Atri*, 182
(6) *Atri*, 195.

(7) *Atri*, 201, 248.
(8) *Atri*, 247; *Likhita*, 89.
(9) *Atri*, 310.
(10) *Vyas*, *Samhita*, 7.
(11) *Vyas*, 9.

who must rise early and take a bath following his minute directions. He must not eat his meal alone but must extend his hospitality to all comers. (1)

134. How to be happy though married is an eternal problem, and the sage Daksh devotes a whole chapter to connubial canons, (2) amongst which occurs his exhortation in favour of suttee: "A woman who after the demise of her husband ascends the funeral pyre, becomes of good conduct and lives gloriously in celestial regions." (3)

135. The Smriti of Sankha is short and there is nothing to distinguish from the rest of its kind.

136. The sage Likhit idolizes the Ganges, (4) counsels the planting of trees, the excavation of wells and tanks, the letting loose of a bull as an obsequial gift on the eleventh day. A daughter may still be appointed to beget a son. (5) "The sin tantamount to an act of procuring abortion is committed, if through the negligence of her giver a girl menstruates before her marriage. He who does not give away a daughter in marriage before she attains her puberty becomes degraded." (6)

137. This is a favourite exhortation backed up by the same simile throughout the *Smritis*. Vyas recognized inter-caste marriages. Exalted position is assigned to the wife as the better half of the man: "The God of Brahma cleft his body into two, of yore. Out of one part sprang the husband, out of the other the wife. This is what the Sruti relates." (7) But the daily duties of the wife as stated by Vyas are to rise before her husband, take a bath, clean the pots, cook his food and manage the household. He is to eat first. She is to live upon his offals. (8) A change in the Aryan dietary was made by Vyas. "A twice-born one, by eating a cooked flesh of an animal wantonly slaughtered (not killed in any sacrifice) suffers the pangs of hell for eternal time, or as long as the sun and stars would shine in heaven. A Brahmin by abjuring meat acquires the merit of a horse sacrifice, all his desires are fructified and he becomes an emancipated self even though he be a householder." (9) This is then the commencement of pure vegetarianism. The tendency is noticeable in the earlier Smritis but a bold bid for a vegetarian diet enjoined on not only the Brahmins, but all twice-born is for the first time made by Vyas who restricts the Aryan diet to merely boiled rice and milk. (10) There is now a definite and distinct cleavage amongst the twice-born themselves. "He who dies with the boiled rice of a Brahmin in his stomach acquires nectar after death. Dying with that of a Kshatriya in his stomach he is punished with indigence in his next birth; with that of a Vaishya in his stomach he is consigned to the vile necessity of eating a Shudra's boiled rice again; and with that of a Shudra's boiled rice in his stomach, he is consigned to the torments of hell in his next life. (11)

138. About the middle of the twelfth century A. D., the sect of Vaishnavas was founded by one Ramanuj Acharya. He taught the supremacy of Vishnu as the Supreme God—superior to Shiva—at Conjeeveram and commenced his preaching and a converting crusade against the older sect of Saivites who paid their last homage

Plous Forgeries.

(1) Daksha, 49, 51.

(2) *Ib.* Ch. IV.

(3) *Ib.* Ch. IV, 19.

(4) Likhit, 7.

(5) Likhit, 52, 53.

(6) Vyas, 7.

(7) Vyas, 14.

(8) Vyas, 29.

(9) Vyas, 58.

(10) Vyas, Ch. III.

(11) Vyas, 66.

to Shiva. For twelve years Ramanuj lived in Mysore owing to the persecution of the Saivite King of Sri Ranga, after which he returned to the latter place. The sect has many followers in the Deccan where several hundred monasteries are said to have been founded but of which only four now exist. The worship of Ramanuj followers is confined to Vishnu and his consort Lakshmi. The teachers are Brahmins though all Hindus are equally admitted to the sect. The cardinal canon of the creed is the supremacy of Vishnu over all other gods of the Hindu pantheon. He is to be worshipped in five ways corresponding to his five incarnations, such as Krishna, Bhairav and the rest, and in order to popularize this sect by establishing its antiquity and superior sanctity, a number of new Dharma Shastras were forged which though bearing old and honoured names such as those of Harit, Apastamb and Gautam were written with the object of propounding the doctrine of the newly founded sect. They call for no further comment.

139. The tenth and later centuries are remarkable for their output of commentaries on the old Smritis. As previously observed
Commentaries. though in form commentaries they were independent works written to embody the law then current. Of the several commentaries on Manu that were written that by Kulluka Bhatt a native of Gour, the ancient capital of Bengal, is commended by Sir William Jones to be "the shortest, yet the most learned, the deepest, yet the most agreeable commentary ever composed on any author ancient or modern European or Asiatic." (1) Sir William Jones has incorporated this commentary in his translation of Manu.

140. Next in importance is the commentary of Gobind Raja. But this and all other commentaries have but little value now, as most of Manu is obsolete and whatever of it survives has been reproduced in the Mitakshara (§§ 145—150). The same remark applies to the commentaries of Narad and other sages.

III

141. Of all commentaries that by Vidyāneshwar called the Mitakshara (2)
on the Institutes of Yādnyavalkya has obtained the fore-
Mitakshara, 1150 most place and is now acknowledged to be the most authori-
A. D. tative record of the Laws of the Hindus. All over India
its supreme authority is acknowledged, though in Bengal
and Bombay it is more revered than followed.

142. Of Vidyāneshwar little is known beyond the fact that he was the son of Padmanabha Bhatt of the Bharadwaj Gotra and that he lived at Kalyan, probably now Kalyani in the Nizam's Dominions, and was attached to the Court of King Vikramarka Vikramaditya VI who reigned between 1076-1127 A.D. (3) Vidyāneshwar quotes Bhoje and Dhara who flourished in the first half of the same century, and from which his commentary may safely be assigned a date about the middle of that century. He was an ascetic (Paramhans) and belonged to the Vaishnav sect to whose activity in fabricating Dharma Shastras reference has already been made. Vidyāneshwar was thus a native of Deccan and his book consequently obtained great vogue in the western and southern India from where its authority and fame spread to the Gangetic valley and the rest of India.

(1) Intro. Manu, XVII

(3) V. A. Smith's Early History of

(2) Lit. Skrt. mit short Akshara letters (i.e.). India, (3rd Ed.), 432,
short abridgment, compendium, epitome.

143. Though itself a commentary Mitakshara has found other commentators. Consequently, we have first the text of Yadnyavalkya, then its explanation by Vidyaneshwar and then other explanations of his explanation. Now as it is a cardinal rule of all commentators that the Smritis are all consistent and reconcilable with one another, and can in no case contradict one another, whereas in fact they do contradict one another, sometimes hopelessly, the commentators have no light task in setting out the altered law while still conforming to the canon of their creed that they shall never depart from the text which being divinely inspired is above human censure.

144. The two commentaries on the Mitakshara are the *Subodhini* by Visveshwar Bhatt and the Lakshmi Vyakhyan or Ballam Bhatt Tika by a lady author by name Lakshmi Devi whose patronymic was Payagunde. According to tradition this lady was a victim to early marriage and enforced widowhood. As a child widow she commenced to while away her time in the study of Sanskrit under her father and though adopting the traditional method of interpretation she strives to the utmost to enlarge the rights of her sex, but which unfortunately could not penetrate the iron conservatism of the age which was too well agreed on the ruthless subjection of women. Visveshwar's comments explain only selected passages but Lakshmi Devi gives a full and continuous verbal interpretation of the Mitakshara accompanied by lengthy discussions. She generally advocates latitudinarian views, and gives the widest interpretation possible to every term of Yadnyavalkya. Her views are held in comparatively small esteem and are hardly ever cited by the Shashtris. ⁽¹⁾

145. The Mitakshara follows the Institutes of Yadnyavalkya in its tripartite division of the work into, ⁽¹⁾ Achar, ⁽²⁾ Vyvhar and ⁽³⁾ Prayaschit parts and contains 1,185 *slokas* (couplets). Of these only a section of the second division treating of partition and inheritance has direct legal value. Its opening *slokas* 1-9 deal with invocation and the difference between *Dharma* (duty) and *Adharma* (sin). In *slokas* 4-5 Vidyaneshwar mentions the following 20 *Riksis* whose works must be studied :—

- | | |
|------------------|-----------------|
| 1. Manu. | 11. Katyayan. |
| 2. Atri | 12. Brihaspati. |
| 3. Vishnu. | 13. Parasar. |
| 4. Harit | 14. Vyas. |
| 5. Yadnyavalkya. | 15. Shankha |
| 6. Ushana. | 16. Likhit. |
| 7. Angira. | 17. Daksh. |
| 8. Yam. | 18. Gautam. |
| 9. Apastamb. | 19. Shatatap. |
| 10. Samvart. | 20. Vashishth. |

146. He says that all these works are authoritative and they only supplement one another, and both must be regarded as authoritative even when they contradict each other but then one is free to follow the one or the other. ⁽²⁾

147. He then enters into the discussion of a Brahmachari, classifying all society into (i) Brahmin, (ii) Kshatriya, (iii) Vaishya, and (iv) Shudra, of whom the first three are Dwija (twice-born) whose life is regulated by the Vedic ritual. ⁽³⁾

(1) W and B. H. L. 17.

(2) Mit. vv. 4-5.

(3) Ib. S. 10.

He then sets out the rituals to be followed in securing impregnation, and the periodical rites to be performed till the child is six months old when it is to be given food. (1) A Brahmin boy should be invested with the sacred thread in his eighth year from the time of conception, a Kshatriya in his 11th and a Vaisya in his 12th year. (2) The remaining few verses detail the mode of cleaning the body and the like and the study of the Vedas. (3) The next few verses deal with marriage. (4) Vidyāneshwar expressly dissents from the view of Manu and the rest permitting inter-marriage between the twice-born and the Shudra. (5) He repeats the earlier text in favour of limited polygamy permitting the Brahmin three wives, the Kshatriya two and the rest one wife each. (6) He recites the usual eight forms of marriages, reprobates re-marriage of widows or their duty to procreate a son to their deceased husband (7) and does not omit to emphasize the woman's perpetual dependence on man. (8) Inter-caste marriages were still in vogue but they were only confined to the twice-born (9) though popular opinion increasingly disfavoured such marriages. (10) The rest of the chapter repeats the old rules relating to ritual and the duty of each caste. The second chapter relating to Vyavhar (or social duty) commences with the rules of common morality, duty of the king, the law of mortgage, the rate of allowable interest, the rules of evidence and the appraisement of oral evidence. (11) His rules about written deeds (12) are mere reproductions of the earlier sages, already mentioned. So are his rules about ordeals. (13) His subsequent sections on partition and inheritance, comprising 307 verses being his commentary on Yādnyavalkya's 36 verses on the subject, have been translated by Colebrooke and are the foundation of the modern Hindu Law of partition and inheritance. As such they will be referred to in the ensuing commentary.

148. The rest of his Smṛiti has no present value. It deals with the subject of boundary disputes, (14) delicts, (15) bailments, (16) contract of service, (17) duties of a king, and an unclassified miscellany of precepts, principles, duties and penalties which must, if ever literally enforced, have made the life of the bewildered Aryan intolerably hard and mechanically monotonous.

149. The third chapter relating to ceremonial purity and impurity closes the work. It has no immediate value to the lawyer. As previously stated what is now accepted by the Courts as the Mitakshara is a translation of Vidyāneshwar's comments on Yādnyavalkya, chapter ii (Dayabhag section) and on this meagre foundation the vast superstructure of the Hindu Law of Partition and Inheritance has been reared by the Courts.

150. The Mitakshara has gained its present ascendancy merely through the accident of its first discovery by the European scholars and the translation of its 'dayabhag' portion by Colebrooke in 1810 under the patronage of Government which obtained wide currency and readily secured the *imprimatur* of the courts who held it to enshrine all the sacred laws of the Hindus regulating the succession and inheritance to their property. (18) Hindu writers wrote their Dharm Shastras either in the form of *Nibandhs* (i.e., treatises or

(1) Mit S. 12.

(2) *Ib.* S. 54.

(3) *Ib.* Ss. 15-44.

(4) *Ib.* Ss. 45-75.

(5) *Ib.* S. 56.

(6) *Ib.* S. 57.

(7) *Ib.* S. 75.

(8) *Ib.* S. 87.

(9) *Ib.* S. 88.

(10) *Ib.* S. 90.

(11) Ss. 241-457.

(12) Ss. 458-477.

(13) Ss. 478, 492.

(14) Ss. 602, 625.

(15) Ss. 626-676.

(16) Ss. 669-676.

(17) Ss. 677-687.

(18) See Mandlik's Hindu Law, Intr XLIX, *et seq*

digests) or *Tikas* (i.e., commentaries) but whether they were one or the other in form, they were usually both alike in substance, since they were both founded on old texts, in which the writers incorporated or interpolated all the accepted usages then current. How far this was done in each case naturally depended upon the idiosyncrasy of the writer. If he was one with a conservative trend of mind disapproving all new fangled innovations he rigidly excluded them from his text or only alluded to them with a view to condemn them. If on the other hand, he was a reformer he readily welcomed the changes and thus gave them wider currency by according them his support. The authors of the *Dayabhog* and *Mayukh* belong to the latter class, while the author of the *Mitakshara* belongs to the former. He was an erudite pandit but a stern and unbending Tory who overruled all encroachments upon established usages •being of opinion that nothing that is tried by time can fail to be good for the people.

151. The *Dayabhog* of Jimut Vahan which rules Bengal is only a chapter on Partition and Inheritance of a general work or Digest of religious and civic duty called the "Dharma Ratna."

The Dayabhog.

This work, like the *Mayukh* and *Smriti Chandrika*, is in the form of *Nibandhs* or Digests rather than commentaries and their purpose is to expound the law, and at the same time to inculcate and lay emphasis on the special doctrines which their author specially favoured. The common characteristic of them all is that they quote the same text but draw their own deductions therefrom by a process of reasoning and reference to the rules of construction which are said to justify the gloss. Hindu writers make no distinction between Digests and commentaries and they speak of them both as commentaries.

152. Of Jimut Vahan nothing is known beyond his name, and that he was a Brahmin of the *Paribhadriya* class and was the author of another work "Kalavivek," a copy of which in the Library of the Asiatic Society of Bengal, bears on it the date 1417 Shak, which corresponds to 1495 A. D. Even his age is a conjecture, though it marks an advance upon the development of Hindu Law as portrayed in the *Mitakshara* from which it differs upon many essential points on the subject of inheritance. It appears that the works that held the field prior to his appearance were those of Nalayudh, Kulluka Bhatt, and Shulapani. Nalayudh was a Judge of Lakshman Sen the last Hindu King of Bengal, who flourished about the end of the twelfth century, and whose work is lost, though from quotations made from it by other writers it appears to have attained some degree of eminence amongst its contemporaries. Kulluka Bhatt is the celebrated commentator of Manu. He and Shulapani applied the doctrines of the *Mitakshara* to Bengal till they were overthrown by the *Dayabhog* of Jimut Vahan. Jimut Vahan quotes the earlier writers, such as Bhoj Deva, (1) Gobind Raja, (2) Chandeswar, (3) and Vachaspati Misra, (4) which furnish data for a rough computation of his own age. The freedom with which Jimut Vahan discusses the doctrines of Vachaspati Misra as contained in his treatise, *Vivad Chintamani*, is stated to show that the two writers were contemporaries. Jimut Vahan professes to base his treatise on the precepts of Manu which he says, have not been fully comprehended. He then cites Manu, Narad, Gautam, Baudhayan, Sankha, Likhita, Yadnyavalkya and other older sages and upon their authority refutes the doctrines of the Benares and Mithila school, supporting his own by an appeal to reason oftener than to precepts and

(1) *Dayabhog* XI-2, 22; XI-2, 29

(2) *Ib.* XI-2, 28; XI-2, 29.

(3) *Ib.* 11, 27; IV, 3, 23; XI-14; XI-4, 3.

(4) *Sarv. Inh.*, p. 402.

precedents. The fact that Jimut Vahan frequently states and refutes the Mitakshara doctrines clearly shows that after obtaining ascendancy in Bengal they were in a decadent state and Jimut Vahan who voiced the popular view tries to explain them away without directly condemning them as based on fallacious reasoning.

153. The Dayabhag like the Mitakshara became the text for several commentaries, the earliest of which was composed by Srinath, himself an author of a work on Inheritance. The Dayabhag appears to have had its early struggle for fame. Till the early part of the sixteenth century it is mentioned by no other writer. Mr. Ghose opines that Jimut Vahan was attached to the Court of the King Jalaluddin Shah, a Hindu convert to Mahomedanism, who despite his conversion continued to patronize pundits and he thinks that the fact Jimut Vahan strives out for individual rights in property with the power of alienation refuting the old notions of co-parcenary rights with its consequent survivorship is due to the influence of his patron. To it he ascribes also the inclusion of females and the sister's son amongst heirs. This argument would have been plausible if Jimut Vahan had made any effort at the secularization of law. At the same time he has striven to modernize and reform the Orthodox doctrines of the Mitakshara which probably accounts for its neglect for about 200 years till its doctrines were vigorously inculcated and given vogue by Raghunandan and other pundits of Navadwip who were formally consulted and influenced the decisions of the Mahomedan Courts. On the establishment of the British Courts these pundits continued to be consulted and Warren Hastings commissioned them to compile a code which was translated and become known as Halhed's Gentoo Code. As such Jagannath who was a pundit of the old Sudder Court compiled a Digest which became currently known as "Colebrooke's Digest." For long these compilations held the field as original copies of the Sanskrit works were as rare as they were unreliable.

154. Jimut Vahana's Dayabhaga is to Bengal what the Vyavhar Vyahar Mayukh. Mayukh is to Bombay, an authority modifying the Mitakshara wherever it expressly differs from it. In form it is an encyclopædia of the sacred law and ethics of the Hindus which its author Nilakant Bhatt dedicated to his patron King Bhagwant Deo by whom it was inspired. The work as a whole is named after the patron, the "Bhagwant Bhaskar," that is "the sun of Bhagwant." This "Sun" consists of twelve Mayukhs or "rays" dealing with twelve different topics as follows :—

- (1) Samskar Mayukh (Sacraments)
- (2) Achar Mayukh (Rituals)
- (3) Samay Mayukh (Festivals and religious rites)
- (4) Shradh Mayukh (Obsequies)
- (5) Niti Mayukh (Polity)
- (6) Vyavhar Mayukh (Social duty comprising civil and criminal law)
- (7) Dan-Mayukh (Gifts)
- (8) Utsarg Mayukh (Dedication of tanks, wells, etc.)
- (9) Pratishth Mayukh (Consecration of idols and temples)
- (10) Prayaschit Mayukh (Penance)
- (11) Buddhi Mayukh (Purification)
- (12) Santi Mayukh (Propitiation of evil spirits).

155. Of all these rays the sixth is the one which deals with law and as such possesses a direct legal value. This, like the rest of the rays, is merely a

compilation based on ancient texts interspersed with explanations, both original and borrowed from other writers, on law.

156. Of the author of Mayukh all that is known is that he was a Deshasth Maratha Brahmin born in Benares about 1600 A. D., and wrote his work under the patronage of Bhagwant Deo or Yuddha Sur, a Rajput Prince of the Sangara tribe who ruled over the town of Bhareha near the confluence of the two rivers Chambal and Jamna, whose obligations are thus acknowledged in his concluding verse :—

“ Thus ends the Vyavhar Mayukh of the Bhagwant Bhaskar composed by Bhatt Nilkanth, son of Shankar Bhatt who was the jewel of learned men, the head of those who have travelled over the Mimansa (ocean) from one end to the other, and compiled under the orders of Sri Bhagwant Deo, the protector of the whole world, who is the Lord of Kings, and an ornament of the progeny of Sagar ”. (1)

157. In the previous verse he describes his patron Bhagwant Deo as the reigning King of Bhara town situate in the vicinity of the confluence of the rivers Charmanvati and the Jumna. It is needless to add that this tract was then as it is now dominated by the Orthodox Mitakshara school.

158. Hindu writers wrote their Dharmashastras either in the form of *Nibandhs* (i.e., Treatises or Digests) or *Tikas* (i.e., Commentaries) but whether they were one or the other in form, they were both alike in substance since they were both founded on the old texts in which the writers incorporated all the accepted usages then current. Vyavhar Mayukh is in form a Nibandh and though it is independent of the Mitakshara, it differs from it but little, except that it recognizes the sister as heir to her brother (2) and treats the estate inherited by the daughter as her *stridhan*. It also prescribes a special rule of succession to *stridhan* technical and non-technical, following the Mitakshara as regards the devolution of the former but providing for the inheritance of the non-technical stridhan by the male issue in preference to the female issue. (3) While the Mitakshara is nominally paramount in the Bombay Presidency it is subject to the Mayukh which is the accredited work in that Presidency to interpret and supplement it; but only so as to harmonize the doctrines of the two so far as that is reasonably possible. (4)

159. The four marginally-noted works are those which are regarded as possessing special authority in the Madras Presidency. (5)
(1) Dayavibhag Of these the Dayavibhag was written by Madhaviya in the latter half of the fourteenth century. He was a minister of several kings of the Vijaynagar dynasty. The author of Saraswati Vilas is said to be Pratap Rudra Deo a king of Orissa, who was a contemporary of Chaitanya and reigned between 1503-1524 A. D. The work was probably composed by one of his court pandits. It is not only an authority in the Madras Presidency but also in Orissa.

The Smriti Chandrika was written by Devanna Bhatt in the middle of the 13th century; while of Varad Raja, the author of Vyvhar Nirnay, all that can be conjectured is that he was probably a Tamil and lived at the end of the 16th or beginning of the 17th century.

(1) Postscript to Mayukh. Ch. XXII-2-7 (Mandlik H. L., p. 166)

(2) Mandlik H. L., p. 81

(3) Dayal Das v. Savitri Bai, 34 B 385 (387).

(4) Vasudeo v. Venkatesh, 10 B. H. C. R. 139; Krishnaji v. Pandurang, 12 B. H. C.

R. 65; Gajabai v. Shahajirao, 17 B 114 (118);

Kesser Bai v. Hunsraj, 30 B 481 (442) P.C.

Bhagwan v. Waru Bai, 52 B. 800 (812);

Dayal Das v. Savitri Bai, 34 B. 385 (387)

(5) Collector of Madura v. Muttu Rama-linga, 12 M. I. A. 897; 10 W. R. 17 P.C.

160. Vivad Chintamani, and Vyvhar Chintamani written by Vachapati Misra are held in special esteem in the Mithila country. So are the other two works, Vivad Chandra, and the Ratnakar. Vivad Chintamani was probably composed about the middle of the fifteenth century. The Ratnakar was composed under the superintendence of Chandeshwar minister of Harsingh Deo, King of the Mithila in 1314 A. D. Chandeshwar is also the reputed author of other tracts.

But Colebrooke considers Lakshmi Devi to be the author of the works though she published them under the name of her nephew. The name "Vivad Chandra" owes its title to the tenth reigning prince Chandra Singh, grandson of Harsingh Deo.

161 Two special prose works on adoption, the Dattaka Chandrika ⁽¹⁾ and Dattaka Mimansa ⁽²⁾ hold a high place in the estimation of Hindu lawyers in all parts of India. But of these the former work as now extant is said to be a forgery prepared by one Raghumani, Mr. Colebrooke's Sanskrit tutor to support the claim of the plaintiff, an adopted son to share equally with an after-born son in the case of one *Gopi Krishna v. Radha Kant* which was then pending in the Supreme Court at Calcutta but which was compromised before proceeding to trial. The parties were Kayasths and the property in dispute a valuable Zemindari. According to the older authorities the adopted son gets only a fourth of the estate ⁽³⁾ but Dattak Chandrika allows him a moiety.

162. There is a long but by no means an illuminating discussion on the subject in the Dattak Mimansa ⁽⁴⁾ in which however the *Chandrika* is cited. ⁽⁵⁾ The latter admits the old rule but excepts the Shudras in a long argument, ⁽⁶⁾ which considering its undue length and emphasis is out of all proportion to its usual succinctness, and might be, probably was, an interpolation but it does not prove that the entire work is a forgery as is contended for by several writers on Hindu Law. ⁽⁷⁾ Indeed, it is of the essence of literary forgeries of this character that something new should be inserted into what was old and venerated as such and there was little risk of detection at a time when all such works circulated in manuscripts and the text of no two manuscripts agreed. The work bore for its author the fictitious name of Kuver.

The Dattak Mimansa is written by Nanda Pandit who is the author of other legal works of which his commentary on the Institutes of Vishnu called *Vijyanti* and that on the Mitakshara called *Pratit Akshara* are still extant. The *Dattak Mimansa* has been treated by the Privy Council as a work "which has had a high place in the estimation of Hindu lawyers in all parts of India, and has become embedded in Hindu Law, but that caution is required in accepting the glosses of Nanda Pandit in the Dattak Mimansa where they deviate from or add to the Smritis". ⁽⁸⁾

(1) *Bhagwan Singh v. Bhagwan Singh*, 21 A. 41, 2 P.C.; *Damodajir v. Collector*, A. L. J. 927 (931); *Nagvidas v. Bachoo*, 40 B. 270 P.C.; *Asita Mohan v. Nirode Mohun*, 20 C. W. N. 901 (910) In *Bowbay* the Dattak Chandrika and Dattak Mimansa are taken to supplement the Mitakshara and the Mayukh-Laxmipati v. Venkatesh, 41 B. 315 (337).

(2) *Bhagwan Singh v. Bhagwan Singh*, 21 A. 412 P.C.; *Radha Mohun v. Hardar Bibi*, Ib. 460 P.C.; *Puttulal v. Parbati*, 37 A. 359 (367) P.C. as to which see post;

Buddha Singh v. Laltu Singh, Ib. 604 (618.)

(3) Vashishth, XV.9; Mitakshara 1—11.

(4) Section, VI 15-7.

(5) Ib. 8

(6) Dattak Chandrika, V. 29-34.

(7) Sarkar's Adoption, (2nd Edition), pp. 124, 125, Ghose's Hindu Law (3rd Edition) 664.

(8) *Bhagwan Singh v. Bhagwan Singh*, 21 A. 42 P.C.; *Radha Mohun v. Hardar Bibi*, Ib. 460 P.C.; *Puttulal v. Parbati*, 37 A. 359 (367) P.C. in which the gloss of Nanda Pandit was not followed.

163. Two other works the Dattak Tilak and Dattak Siddhant Manjari on the same subject bear similar stamp of suspicion, being, it is said, prepared to support the validity of the simultaneous adoptions of two sons, then questioned in a case in the Supreme Court before whom they were cited. (1) Other special works on the same subject such as Dattak Nirnaya, Dattak Didhiti, Dattak Darpana, and Dattak Kaumudi are also not free from the same suspicion. But with the exception of the Mimansa and the Chandrika they have all passed into oblivion and even their survival is not due to their merit but to the fact that they happened to be the first to fall into the hands of an English translator, Mr. J. C. Sutherland, who in his preface dated 1st July 1819, admits having completed it in his leisure moments in five years. Both these works are written in a style which renders them of little practical value, while what is not obscure is obsolete, as for instance, the view of Mimansa that a widow cannot adopt at all even though she might possess the express authority of her husband, (2) or that a woman cannot adopt her brother's son. (3) On several other points set out in the sequel these books have ceased to count.

164. The age of the Mimansa cannot be ascertained but they both belong to the same critical age when legal texts appealed to divine sanction rather than to human reason for their authority. Of the two the Chandrika preceded the Mimansa.

165. This closes the first period of Hindu Law. Its second stage is one of elucidation and exposition by European writers who charged with the duty of administering the Hindu civil law in determining their personal relations were naturally first anxious to know something of that law at first hand.

166. It is a general principle that the private law of a community is not to be affected by a change of rulers, except on points upon which it conflicts with the public law. The mere establishment of a court to administer the law "according to justice and right" does not of itself imply any change in the law to be thus administered. (4)

167. Both the Hindu and Mahomedan rulers of India followed the same policy, but they mostly left its elucidation to the Shashtris who were not above moulding their opinions to suit the requirements of their patrons. But even the native rulers felt the necessity of a compact and codified statement of Hindu Law and the Emperor Aurangzeb had one such digest compiled by one Raghunandan, a learned Shashtri of Bengal, who divided his work into 27 books comprising every branch of Hindu Law. This work obtained publicity under the title of *Fatwai Alamgiri*. Sir William Jones possessed a copy of the five large volumes but he evidently regarded the work as too diffuse to be of much value to the courts.

IV

168. The first European settlers who interested themselves in India were the Dutch East India Company which though incorporated in 1602 had really commenced its existence in 1595. Four years later a similar company was formed in England and in the following year it received its charter from Queen Elizabeth. It conferred on the company a trade monopoly for

(1) *Monmotho Nath v. Onanthmath*, 1 J. (N.S.) 24.

(2) Dattak Mimansa, Ss. 1, 27, 28.

(3) *Ib.* 34, 35.

(4) *In re, Khandas*, 5 B 154

fifteen years which was made perpetual by James I in 1609. It conferred on it the power to make laws and ordinances for the government of factors, masters, mariners and other officers employed on their voyages and to punish offenders by fine or imprisonment. These laws and ordinances originally consisted mainly of regulations for the guidance of its factors and apprentices. This charter was renewed from time to time with ever-increasing powers till by the charter of 1661 they were given "power and command" over their fortresses and were authorized to appoint governors and other officers for their government. The Governor and Council of each factory were empowered "to judge all persons belonging to the said Governor and Company or that shall be under them, in all causes, whether civil or criminal, according to the laws of this kingdom, and to execute them accordingly." The first settlement of the company was at Madras and it had been constituted a presidency in 1651. Prior to 1878 petty cases against persons belonging to the settlement were disposed of by two or more officers of the company who sat in the "choultry". But in that year the agent and council at Madras decided that under the charter of 1661 they had the power to judge all persons living under them in all cases, whether civil or criminal, according to the English Laws and in accordance with the decision the Governor and Council commenced their sitting in the fort chapel every Wednesday and Saturday to hear and judge all cases. But this High Court did not supersede the justices of the choultry who continued to decide petty cases. This procedure became a model to be followed in the other settlements of the company.

169. In 1661 the port and island of Bombay was ceded to the British Crown as a part of the dowry of Catherine of Braganza and it was leased to the East India Company on an annual rent of £10, while in Bengal the battle of Plassey in 1757 turned the tide in favour of the company which secured the *Divan* or the revenue administration of Bengal and Behar by a grant dated 17th August 1765 though the native officials continued actually to collect the revenues till 1772. But though the servants of the company amassed fabulous fortunes during their short stay in the country, the company itself became financially involved. In 1773 it applied to Parliament for pecuniary assistance. It passed two Acts one to relieve it out of its financial embarrassment and another to control its management. This was the Regulating Act of 1773. ⁽¹⁾ It declared the supremacy of Bengal over the other presidencies and confirmed the appointment of Warren Hastings who had already been appointed Governor-General of the company's territories. It reserved to the crown the power of establishing a Supreme Court of Judicature at Fort William which was constituted by a charter dated 26th March 1774 till its suppression by the establishment of the High Court in 1861. It conferred plenary jurisdiction on the Supreme Court over all the inhabitants of Calcutta "provided that their inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party, shall be determined in the case of Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentus by the laws and usages of Gentus; and where only one of the parties shall be a Mahomedan or Gentu by the laws and usages of the defendant". ⁽²⁾ This was, however, a mere legislative expression of Warren Hasting's plan for the determination of justice proposed and adopted by the company in 1772 who provided that "Moulvies or Brahmins" should respectively attend the courts

(1) 18 George, III. Ch. 68. In its "short title" this Act is described as an Act of 1772 because Acts then dated from the beginning

of the Session in which they were passed.

(2) 1b, 8s. 18, 14.

to expound the law and assist in passing the decrees. (1) Subsequently when the Parliament invested the Governor-General in Council with the power of making regulations, the exact words of Warren Hastings's plan were incorporated into the first regulation (2) enacted by the Bengal Government on the 17th April 1780, S. 27 of which provided "that in all suits regarding inheritance, marriage, and caste, and other religious usages or institutions, the laws of the Koran with respect to Mahomedans, and those of the Shaster with respect to Gentus, shall be invariably adhered to". This section was re-enacted in the following year, in the revised code with the addition of the word "succession" and was repeated in the Parliamentary statute passed in 1780 known as the East India Company Act (3) and numerous subsequent enactments. (4)

170. No sooner were these provisions placed on the statute book than Sir William Jones, then a Judge of the Supreme Court felt the necessity of Digests and authentic translations. For in an address delivered by him on the 19th March 1788 as President of the Asiatic Society while commending the policy of administering their own laws to the conquered people he doubted the integrity of his pandit consultants and strongly advocated the preparation of reliable digests after the model of Justinian and the translations of authentic legal texts. Warren Hastings himself had a code compiled named the *Vivadarnav Setu* but it was too meagre to be useful. It consisted merely of assorted texts on various subjects of Hindu Law to which were added short notes taken from authoritative commentaries. It was translated by Hales from its Persian version. Another similar Digest was prepared by a lawyer of Mithila whose name Colebrooke gives as Suvern Trivedi. His work was named *Vivada Saranava*. This was followed by Jagannath's Digest composed in 1796 under H. T. Colebrooke's direction. It differed from Halhed's Digest only in degree, not in kind. It too was a collection of assorted texts on only the two subjects of contracts and succession to which Jagannath had added his own elucidatory gloss. It was named the *Vivad Bhangarnava* and was translated by H. T. Colebrooke who published it in 1796 in three volumes under the patronage of the Marquis of Cornwallis, then the Governor-General of India. This work is at times still quoted but it appears to have been intended as a practical manual rather than a learned treatise on Hindu Law. As it is, its part which deals with contracts is practically obsolete being superseded by the Statute Law and even as regards succession it has ceased to be a safe guide in view of the advance in research since made, and the many disputed points of Hindu jurisprudence being set at rest by the decisions of the court of ultimate appeal.

171. The next and last epoch in the development of Hindu Law may be said to open with the publication of independent treatises and of these the works of Sir Thomas Strange, Chief Justice of Madras, and Sir William Macnaughten may be regarded as the pioneers. Both these authors had collected all the materials then available to them for the purpose of compiling serviceable manuals for the use of courts. Macnaughten referred a large number of abstract questions to the Shastries and recorded their responses in his publication, while Sir Thomas Strange devoted his retirement from judicial office in compiling two volumes of Hindu Law in which he essayed the task of stating the leading

(1) Rule 23.

(2) Reg. 1 of 1781, Ss. 17, 21.

(3) 21 George, III C. 70.

(4) 37 George, III C. 142, S. 18; Bom.

Reg. LV of 1827, S. 26; Act, LV of 1872, S. 5 (Punjab Laws Act) as amended by Act XII of 1878.

principles of law in his own language. The courts were meanwhile engaged in the solution of such questions as came before them and the Privy Council equally solicitous of grappling with its numerous complicated problems delivered considered judgments which have gone far to set at rest the legal logomachies with which the Hindu text books teem and which like the figure of the Sphinx equally favour opposing views.

172. Sir William Hay Macnaughten was born in 1793. He came to India as a cavalry cadet on the Madras Establishment and used his ample leisure in acquiring the Persian and other Oriental languages. In 1822 he was appointed Registrar of the Sudder Diwan, and while serving in this capacity, he published three volumes of the Reports of decided cases, his "Considerations on Hindu Law" and "The Principles and Precedents of Mahomedan Law." In 1829 he published his "Principles and Precedents of Hindu Law" in two volumes the first volume comprising a statement of primary rules relative to the doctrine of inheritance, contracts, civil procedure, evidence and ordeals while in the second volume he published a selection of legal opinions on the subject of Inheritance illustrative of his first volume. The next year Macnaughten was transferred to political service in which his distinguished career was cut off by his assassination by the Afghans in December 1841.

173. Most of the topics dealt with in his work, such as those relating to procedure, evidence and ordeals have since been superseded by the Statutory Law, while the remainder of his work would be now considered to be too meagre to possess any but historic interest.

174. For the same reason Sir Thomas Strange's work is equally out of date. Its first appearance in 1825 marked a departure from the conventional garb of commentaries and Digests in which garb all Hindu Law books had hitherto appeared. Sir Thomas Strange was the first to essay the task of stating the first principles in the more intelligible form of dissertations on the following leading twelve topics: (1) Property in general, (2) Marriage, (3) Paternal relations, (4) Adoption, (5) Slavery, (6) Inheritance, (7) Disabilities to inherit, (8) Charges upon the Inheritance, (9) Partition, (10) Widowhood, (11) Testamentary power and (12) Contracts.

175. Mr. Sutherland, the nephew of Colebrooke the Company's Judge at Mirzapur was at the same time busy in the field of translation. To him and Colebrooke Hindu lawyers must tender their acknowledgments for their earnest endeavours to first unlock the treasures of their legal literature. But the value of the sacred texts has never been more correctly appraised than by Sir Thomas Strange who truly observed in his addenda as follows: "To those who have made the Hindu Law any part of their study, it cannot appear strange that it is so unsettled and contradictory. Many of the opposing writers are, in point of credit, equal to each other; and, regardless of consistency, texts are adopted by each for the purpose of sustaining his own particular doctrine. The obsolete, is confounded with the acknowledged, law. The context is often omitted, and passages which ought to be relatively considered, are quoted as if they were absolute and independent in themselves. We cannot, therefore, wonder that so little satisfaction is to be obtained from authority;—nor can we but lament that some effort has not long since been made, to distinguish and separate those which are, from those which are not rules of action."

176. A large number of other books following the same model appeared from

time to time but they have long since gone out of print and are now impracticable. Mayne's Hindu Law which still holds the field as a standard work on the subject made its first appearance in 1878. In its preface he wrote "I have endeavoured in this work to show, not only what the Hindu Law is, but how it came to be what it is. Probably many of my professional readers may think that the latter part of the enquiry is only a waste of time and trouble, and that, in pursuing it, I have added to the bulk of the volume without increasing its utility. It might be sufficient to say that I have aimed at writing a book, which should be something different from a mere practitioner's manual." This is indeed true, only too true as every practitioner knows to his cost. The requirements of the court-room do not favour recondite antiquarian research nor will the antiquarian find in a law book sufficient details to satisfy his craving. However, this work set the pace for other works on the subject.

177. The executive and statutory declarations above referred to (§ 169) have not prevented the modification of Hindu Law by statute. **Hindu Law modified by Statute.** As a part of the religious system, Hindu Law, strictly speaking, could not be amended by the legislature which disclaims all authority to interfere with religion. But the slow evolution of Hindu society and the secularization of their law by its emergence from the thralldom of religion was the natural outcome of the social emancipation which followed the infusion of western ideas into a country to which all portals of knowledge not embedded in their Shastras had been closed. And as social ideas underwent a change a changed view was forced on the legislature, which though ever reluctant to pioneer social reform, is at times constrained to bow to the overpowering pressure of public opinion. Such has been the history of the two Acts—the Freedom of Religion Act, 1850 ⁽¹⁾ and the Hindu Widows' Remarriage Act, 1856. ⁽²⁾

178. Under the Shastric Law the loss of caste entails forfeiture of inheritance. So it is stated in the Mitakshara. "An impotent person, an outcaste and his issue one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others similarly disqualified must be maintained, excluding them however, from participation."⁽³⁾ The injustice of this rule was soon felt by the British Judges who being nurtured in an atmosphere of more tolerant jurisprudence could not understand why the mere forfeiture of caste should entail such dire penalty not only upon the apostate but on all his issue. The missionaries who were hampered in their evangelical enterprise equally pleaded for the removal of this disability. Consequently, in 1832 a Regulation of the Bengal Code enacted that "whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Mahomedan persuasion, or where one or more of the parties to the suit shall not be either of the Mahomedan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws they would have been entitled."⁽⁴⁾ As the territories of the East India Company expanded beyond the limits of the Bengal Code it became necessary to give the Regulation a wider operation; in 1850 an Act was accordingly passed ⁽⁵⁾ which extended its provisions to the whole of British India ⁽⁶⁾ declaring that no loss of caste shall involve forfeiture of any right to property.

(1) Act XXI of 1850.

(2) Act XV of 1856.

(3) Mitakshara, X—1.

(4) S-9 of Reg. VII of 1832 repealed by Act VI of 1871.

(5) Caste Disabilities Removal Act, (Act XXI, 1850).

(6) See Laws Local Extent Act, S-3 (XV of 1874).

179. This Regulation may then be regarded as the first modification not only of the Hindu Law by statute, but also of the declared policy of Government which had found expression in several legislative enactments both here and in England. It subordinates Hindu Law to the Legislature which has the power to amend it in whatsoever manner it deems expedient. But all the same it is slow to move, and its declared policy has been merely to correct outrageous abuses or flagrant injustice, and that only when the public opinion is sufficiently prepared for its favourable reception, and indeed, presses for it. This is illustrated by another Act passed six years later ⁽¹⁾ on the pressure of the Bengal social reformers, who headed by Ishwarchandra Vidyasagar started an agitation which culminated in the passing of the Hindu Widows' Remarriage Act ⁽²⁾ with a view to minimize the evils consequent upon infant marriage and its attendant infant widowhood. As previously remarked Hindu society enjoyed far greater liberty in its earlier stages than it has done since the growth of monasticism, with the result that in later years while marriage before puberty was enjoined remarriage after widowhood was strictly prohibited; the only course open to a widow being to immolate herself with the body of her deceased lord or lead the life of severe asceticism. The Hindu hierophant had never studied sociology and the evil which the Act was enacted to check, though it could not combat it, legalized the remarriage of Hindu widows. But despite the good intentions of its framers this piece of legislation was passed in advance of the times and it has practically remained a dead letter and is likely to so remain till the Indian womanhood is sufficiently educated to rise in revolt against the tyrannous custom which condemns her to an early marriage and consigns her to lifelong widowhood.

180. Another liberalizing inroad upon the orthodox view influenced by the Christian missionaries was effected by the Dissolution of Native Converts Marriage Act ⁽³⁾ which enables a Hindu convert to Christianity to obtain a dissolution of his or her marriage if in consequence either party deserts or repudiates the other. ⁽⁴⁾

181. The idea of a will is foreign to Hindu Law. It has become established by the force of judicial decisions on the strength of its affinity to a gift. ⁽⁵⁾ And as regards the wills of Hindus resident in Bengal and in the towns of Madras and Bombay or relating to property therein situate, ⁽⁶⁾ the Hindu Wills Act of 1879 assimilates the procedure for their execution, proof and construction to that contained in the Indian Succession Act. ⁽⁷⁾

182. Similarly the Indian Majority Act ⁽⁸⁾ overrules Hindu Law as regards the age of majority which is ordinarily now attained on completion of the 18th year. According to Manu majority was attained on completion of the 16th year. ⁽⁹⁾

183. Similarly, the Guardian and Wards Act ⁽¹⁰⁾ has to a certain extent superseded the provisions of Hindu Law. The inter-relation between the two will have to be discussed in the sequel.

(1) Hindu Widows' Remarriage Act, (XV of 1856).

(2) XV of 1856.

(3) XXI of 1866

(4) *Ib.* Ss. 4, 5.

(5) *Beer Pertab Sahee v. Rajendra*, 12 M. 1 A. 1

(6) XXI of 1870. See also Probate and Administration Act (V of 1851).

(7) X of 1865.

(8) IX of 1875.

(9) Manu VIII 27; *Himnauth*, 1 Hyde, 111.

(10) VIII of 1890.

184. Neither writing nor registration was obligatory under Hindu Law to complete a contract or effect a transfer. In this and other respects the Transfer of Property and the Registration Acts ⁽¹⁾ have superseded Hindu Law except as to matters referred to in sections 2 and 129. Even as regards S. 2 a recent amending Act ⁽²⁾ sweeps away the restriction of Hindu Law as propounded by the Privy Council ⁽³⁾ that the transferee must be in existence at the date of the transfer.

185. The Hindu Law of contracts has been superseded by the Indian Contract Act ⁽⁴⁾ the only survival of that law now being the rule of Damdupat which still obtains in the Presidency of Bombay, Berar and in the town of Calcutta.

186. The procedure and rules of evidence which the Hindu Law books describe with some particularity, and which accordingly found a prominent place in the works of Macnaughten and Strange have all been rendered obsolete by the new forensic forms forged by the statutory enactments on the subject. Hindu Law like the archaic laws of other nations set much store by the trial by ordeals, of which the only living vestige is to be found in the questionable provisions relating to special oaths embodied in the Oaths Act. ⁽⁵⁾

187. The Succession Certificate Act has had equally the effect of abrogating the Hindu Law in so far as it prescribes a procedure for the recovery of debts and the Stamp, Court Fee and the Registration Acts are innovations upon the bucolic simplicity of the Shastric jurisprudence.

188. The Hindu Criminal Law had ceased to be a living force after the decay of Hindu power. The establishment of the British rule did not revive its unequal provisions. Before the enactment of the Indian Penal Code the law administered in the country was the English Criminal Law supplemented in parts by local regulations. The Penal Code breaks in upon several cherished notions of Hindu Law. It abolishes the institutions of *Suttee* and suicide ⁽⁶⁾ against which as far back as 1830 a regulation was enacted ⁽⁷⁾ which declared *Suttee* illegal and punishable ⁽⁸⁾ and its abettors guilty of culpable homicide. ⁽⁹⁾ The Code punishes infanticide ⁽¹⁰⁾ abolishes slavery ⁽¹¹⁾ in which respect it merely codifies the pre-existing law passed in 1843 which had already abolished it. ⁽¹²⁾ It substitutes the crime for caste as the true measure of punishment.

189. Not only the legislature but the decisions of the court have tended to modify and modernize Hindu Law. The influence of judicial dicta and decisions upon Hindu Law is necessarily slow and piecemeal, and while the decisions determined by the Privy Council have set the seal of finality upon them, those of the High and other superior courts of India have given rise to a divergence of views which have not a little tended to make the confusion worse confounded. The process by which judicial dicta have modified the Hindu Law comprises (a) the enunciation of rules in accordance with the precepts of justice, equity

(1) IV of 1882 and XVI of 1908.
 (2) Hindu Disposition of Property Act (XV of 1916).
 (3) *Tagore v. Tagore*, 18 W. R. 359 P. C.
 (4) IX of 1872.
 (5) X of 1878, Ss. 8-12.
 (6) Ss. 306-309.
 (7) Mad. Reg. 1 of 1830.

(8) *Ib* S-2.
 (9) *Ib* S-4 (1), (2).
 (10) S-316
 (11) *Ib* S-370
 (12) 3 & 4 W. IV c-85-S. 88 ; 5 Geo. IV C. 114 ; 6 and 7 Vict. C. 93 Ss. 1, 3, 4 ; Act V. of 1843.

and good conscience upon points on which Hindu Law was wholly silent, or guided by the self-same principle (b) the interpretation of ambiguous or contradictory texts, (c) the application of the principle of analogy with (d) the consequent fertile deductions and corollaries. Up to 1861 when the Shastris were attached to the courts to expound the law, the courts were still dependent upon them for its exposition. But since that year the courts took upon themselves the duty of expounding it and it then marks an epoch when Hindu Law may be said to have become secularized with the result that though Hindu Law at the present day is still technically a part of the religion, it has in practice ceased to be so, though its previous association with religion and the fictions which still pervade its laws of partition and inheritance prevent its development by the legislature which watches its slow and measured progress with no uneasy feeling.

190. The growth of education and the accumulation of wealth have however shaken its foundation and even those born and brought up within the vinculum of Hindu society feel that a time has come when it should be codified and brought up to date. *Laissez faire* has its limits and the discontent and dissatisfaction felt by the wage-earning members of the family and the vanishing potency of the nucleus are an ever increasing source of the misery and embarrassment of which every well to do household is a living witness. The growth of individualism, the new gospel of wealth and the ever increasing results of personal effort have shaken the faith of the most devout adherents of the old order.

191. Another instance where the intervention of the courts or the Legislature was rendered necessary by the gross inequity of the rule which made the son and the grandson liable as a matter of pious obligation or religious duty to repay the debt of his ancestor is afforded by the primitive notion of law which underlies the sacred texts. In the view of the Hindu Law givers all breaches of contract were sins to be atoned for in the next world. Such was the fate of the debtor whose lot is thus depicted by Narad, "when a devotee or a man who maintained a sacrificial fire, dies without having discharged his debt, the whole merit of his devotion or of his perpetual fire, belongs to his creditor." (1) But this is not all. "He who having received a sum lent or the like does not repay it to the owner will be born hereafter in his creditor's house a slave, a servant, a woman, or a quadruped." (2) Sons are coveted to relieve the impecunious father from this torment. The grandson shall pay the debt of their grandfather, which having been legitimately inherited by the sons has not been paid by them; the obligation ceases with the fourth descendant. Fathers desire offspring for their own sake, reflecting—"this son will redeem me from every debt whatever due to superior and inferior beings." "Therefore, a son begotten by him should relinquish his own property, and assiduously redeem his father from debt, lest he fall into a region of torment." (3) This was the accepted doctrine, repeated and even emphasized by other writers. (4) The obligation to pay was, therefore, personal, and perpetual and it was independent of the existence of any paternal assets in his hands. He was bound to pay because it was his duty to pay and not because he had received any real or assumed benefit from the father. (5) But though this law was clear it was

(1) Narad, iii 10.

(2) 1 Dig. 334.

(3) Narad, iii 4, 6

(4) Katyayan, 1 Dig. 299, 301.

(5) *Hunoomanpershad v. Mt. Babooee*, 6 M. L. A 421; *Suraj Bansi Koer v. Sheo Prasad*, 5 C. 148 P.C. *Narayanamasami v. Samidas*, 6 M. 293; *Bhagbut v. Girja*, 15 C. 717 P. C.

equally unjust, and the courts from early times commenced to limit his liability to the extent of the debtor's assets in his possession. (1) But though this relieved the son in other Provinces the court in Bombay held the duty literally binding upon the son (2) till the Legislature had to intervene to limit it to the assets (3).

192. Another attack upon the orthodox doctrine is made by custom whose march, though slow and imperceptible, has nevertheless in course of years altered Hindu Law beyond all recognition. The force of custom as the precursor and progenitor of all laws is well recognized in the codes of all nations. "Immemorial custom is transcendent law" says Manu (4) Custom might owe its origin to any cause habit, convenience or convention, prejudice or predisposition, ignorance or human folly. In its inception custom is nothing but the mode of life adopted by one or more persons. It is copied by others who feel attracted to it by authority or by the community of thought or feeling. Where custom has not the backing of authority it may have to struggle long for its very existence. In this struggle it might be transformed, modified or destroyed. A number of customs which some time held the field are now treated as repellant to morality. Such is the custom of Niyog or the custom of polyandry, which though at one time popular in Malabar, is now fast disappearing under the self-revealing force of education. Hindu family law is mostly based on custom, the origin of which has been already traced to the primitive instincts of man.

193. Custom is unwritten law peculiar to particular localities. It ceases to be custom the moment it is embodied in law. Such law may be statutory or accepted by common consent in which case it becomes the common law of the land. Such is the common law of England which in its origin and continuance is purely customary (5) and has received, its authority as a law from long and immemorial usage, and its general acceptance throughout the realm

194. Though strictly speaking, this is nothing more than custom, still in legal parlance that term has been restricted in its use only to unwritten usage confined to a particular class or locality; when it becomes universal it passes out of the region of custom. The Greeks divided their laws into written (*Lex Scripta*) and unwritten (*Lex non Scripta*) the former being well ascertained and authoritative laws while the latter were customary laws which owed their authority to popular acceptance. This distinction between written and unwritten laws was borrowed by the Romans (6) and it has thence been transferred to English Law which, accordingly, defines custom as unwritten law sanctioned by immemorial usage. The distinction between written and unwritten law was, of course, always artificial and indefensible, and is now rendered the more so in view of the modern tendency to incorporate well established customs into the statute law and preserve in written records even those

(1) *Strange*, H. L. 167; 1 Dig. 320; *Aga Hajee Monte* 272, *Jamoonah v. Mudden* 26 227; *Dyanunee v. Brindabun*, (1856) S.D.A. of 1866, 97, *Kunhya v. Bukhtowar*, 1 N. W. P. S. D. 8; *Rayappa v. Ali Sahib*, 2 M. H. C. R. 396; *Ponnappa v. Pappuvayyanganar*, 4 M. 9 (21)

(2) *Narasimharao v. Antaji*, 2 B.H.C.R. 61.
(3) *Bombay Hindu Heirs' Relief Act* (Bombay Act VII of 1865). See this act

printed with the statement of objects and reasons in 2 B. H. C. R. 413-416.

(4) Manu 1-108; To the same effect *Apistamb*, ii, 11, 19, *Gutam*, IV. 20, *Vashishth*, 1-17; *Mitakshara*, I. S. 3 4; *Dayabag*, 1-33; *Mayukh*, I, S. 13.

(5) *Hale's History of Common Law*. c

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(6) *Institutes*, 1-1, T. 2 : *Sa.* 3, 9, 10.

which still stand outside the statute. But in the latter case the writing is still only evidence of custom. As a branch of Hindu Law custom plays an important part, and within the limits it is still administered, it modifies or supplements the written law however well established or ascertained, while in the Punjab custom is the first rule of decision in all questions relating to betrothal, marriage, divorce or dower, adoption, guardianship, minority, bastardy, succession, wills, legacies, partitions, gifts and family relations including religious usage or institution, and even alluvion and diluvion.⁽¹⁾ In the rest of India the law primarily applicable in these matters is the sacred law, but it is yet subject to the influence of custom. In the preceding pages an attempt has been made to trace its evolution in the light of custom which accounts for the variation of law and the verbal jugglery, interpolations and inventions to which an ancient text was subjected in order to accommodate it to the pressure of necessity. A detailed statement of the existing customs affecting the established Hindu Law will be made in the sequel. For the present it is necessary to state that the Hindu Law administered by the courts is not the law of the Shastras but the law as the people acknowledge and follow in their daily lives, that is to say the law as it is modified by custom or usage.⁽²⁾ The Shastric text is merely evidence of such law, but even so it has no more value than the statement of the English Law by Coke, Hale or Blackstone. As the Privy Council observed: "The duty of an European Judge who is under the obligation to administer Hindu Law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law."⁽³⁾ In other words, what the courts are pledged to administer is the living Hindu Law of the market place, and not the antiquated aphorisms of the epic era.

195. The Smritis follow the tripartite division of the Vedas⁽⁴⁾ but their three parts deal with three branches of Dharma or duty, viz., (1) Achar (*i.e.*, ceremonies), (2) Vyavahar (*i.e.*, Social duty which includes legal obligations) and (3) Prayaschit (*i.e.*, expiation). The society assumed and commended throughout including the Mitakshara is a society in which wealth counts for nothing and life of religious asceticism is all in all. All Hindu philosophy is pessimistic. Life is not a gift but an ordeal. It cannot be enjoyed but must be endured. Life is an evil and in the cycle of years the present age is the worst. The end of life is the end of all wordly torments and a step hastening to Nirvan or cessation of reincarnations and an absorption into the Divine Spirit which is the be all and end all of existence.⁽⁵⁾ It is the supreme beatitude.⁽⁶⁾ To quicken this state what is required is the practice of austerity.

196. The love of life prolongs life. Its prolongation lengthens the span that separates it from Nirvan. Life is an illusion (*Maya*). Who cherishes an illusion? The Aryan is, therefore, enjoined to divide life into four stages as a compromise between this stern doctrine and his mundane attachments. An Aryan boy is on birth no better than a Shudra. Before reaching a certain age⁽⁷⁾

(1) Reg. XI of 1825, S. 2; Art IV of 1872, S. 5

(2) *Krishnamamani v. S. Anando*, 4 B. L. R. (O. C.) 281 (287, 288).

(3) *Collector of Madura v. Mootoo Ramalinga*, 12 M. I. A. 397 (436).

(4) Divided into three parts, viz., Sambita, Brahmana and Aranyak

(5) Manu, VI-61; Ch. XII-1-126.

(6) Manu VI-81, 82; XII-1-126.

(7) Manu ii-38; Yādnyavalkya, 37; Brahmin before his 16th year, Kshatriya up to his 22nd year and Vaishya up to his 24th year.

he must undergo the Upanayan (1) ceremony which makes him a twice-born. He must then study the Vedas under his Guru. His pupilage lasts till then after which he attains the status of a householder. As such, he must strive for and accumulate no wealth. He must marry but the purpose of marriage is merely to raise a male offspring. For the rest he must adhere to, and perform his appointed duties: "Sacrificing, studying, and giving alms are appointed for the Vashyas and Kshatriyas, and to the Brahman there are in addition receiving gifts, assisting others to sacrifice and teaching the Vedas. To the Kshatriya is ordained the protection of their subjects as the chief duty, for the Vaishya lending at interest, agriculture, trade, and tending cattle are laid down. For the Shudras is laid down the service of twice-born (as the chief duty), or if he cannot thereby earn his livelihood he may become a trader, or studying the benefit of the twice-born, he may assist by various mechanical arts." (2) Even these circumscribed duties he could not perform for long: "When the father of a family perceives his muscles become flaccid and his hair gray and sees the child of his child, let him then seek refuge in a forest." (3) Manu then particularizes the life this hermit is to lead in the forest till he can get rid of life by torments and tortures, privations and self-denials, and even suicide if afflicted with any incurable ailment, when he should "advance in a straight path towards the invincible north-eastern point feeding on water and air till his mortal frame totally decay, and his soul become united with the Divine Essence." (4) The young Aryan becomes a householder from sheer necessity. He must leave that state as soon as he has begotten children from choice. Even as a householder he must abjure wealth. His grain store should be sufficient to last only for a year. If it exceeds that limit he must spend it on sacrifices. (5) In this scheme of life this world, its pleasures and passions, its occupations and attachments play a very subordinate part and legal obligations necessarily share the same fate. Even a casual glance at any Smriti will show that rituals loom large in the author's eye who adverts to legal matters as merely necessary for the guidance and government of the family.

197. Now this ideal of Aryan life has long since become obsolete. The scanty wealth comprising a few pots and pans, a few cattle and a little grain which was all that the Aryan householder was commanded to possess and for the disposal of which a few rough and ready legal rules were laid down is a striking anachronism in these days of growing industrialism and the vast accumulation of wealth. He has shaken off the rituals which fettered his enterprise in the days of Brahmanic supremacy because they were a part of his religion as to which the Government was pledged to be neutral.

198. But in administering the law it has by its declaration of following the sacred texts given them an importance which they had never before possessed and it has stereotyped a system and stunted its growth, which though slow, was yet steadily growing. But now like the law of the Medes and the Persians the laws of the Hindus change not. The joint family has all but ceased to exist but all the archaic rules relating to the joint family still apply. One brother earns the money and the rest share his earnings for the fiction of co-parcenership still dominates the courts.

199. The outstanding features of all these sacred compositions and Legal value of the compilations are:—(1) They are professedly and design-
Smritis. edly Moral Codes treating of civil obligations merely

(1) Lit. Going near Skt. *upa* near *Nayan* to go, i.e. going near his spiritual preceptor
(2) *Yadnyavalkya*, 118, 120

(3) *Manu*, ch-VI 2
(4) *Ib* 31
(5) *Yad.* 124, 125.

as a part of the moral duty of an ideal householder. (2) Wherever legal precepts occur they are consequently treated as rules of ethics and not as mandates of law. (3) The Books are sometimes regarded and spoken of as Codes but they are codes in no sense of the term inasmuch as they do not contain any systematic exposition of the legal doctrine. On the other hand, as already remarked (§ 39) they are a mere collection of aphorisms or Sutras intended to aid the memory in teaching and acquiring religious knowledge. (4) As such, unlike the Laws of Solon, of the Twelve Tables, or the Institutes of Justinian, the Smritis were written by private individuals for the edification of their pupils and generally of those who should care to refer to them but they had no binding force as enactments of a lawfully constituted authority. (5) Since the *smritis* stood upon their own merits they were mostly records of the prevailing customs accommodated in a certain degree to the idiosyncracies of the writer. (6) No *smritis* can be safely regarded as free from interpolations. There is, indeed, internal evidence in several of them that many of them were subjected to systematic interpolations at the hands of the glossators. (7) The interpolations were due to the desire of the later writers to popularize their own views by passing them off as the views of revered and established ancient authority. (8) Even whole works have been forged and made to bear the imprimatur of ancient sages. (9) On the whole, however the *smritis* reflected in the main the manners and customs of the times, modified only by the private opinions of the Brahmin writers who have given them a shape and character consistent with their self-interest as members of the priestly class and as such anxious to preserve their supremacy and power. As regards the titles of the several *smritis* it appears that some of them bear the names of the princely patrons to whose court the composer was for the time being attached. Some bear the names of the several gods of the Hindu pantheon while a few bear descriptive or fancy names or a combination of one or the other. All *smritis* claim a divine origin as calculated to insure implicit obedience and all disguise, as far as possible, any reference to their modernity.

200. But these Smritis are no more a legal Code than would be a collection of legal maxims or nemonics prepared by a teacher of mathematics or physics. The so-called codes are no codes at all. They are *sutras* or aphorisms or legal maxims compiled to aid the memory as aids to teaching and study in which a great deal was elliptical which the glossators have supplied according to their own views of what was left out or understood. Such sutras furnish an apt model for engrafting on them new fangled ideas upon the oldstock thereby insuring their acceptance without scrutiny on the accepted authority of revered antiquity. They in their turn were followed by a host of commentators who busied themselves to define the ambiguities, to curtail the latitude, to apply the principles, to extend the consequences, to reconcile the real or apparent contradictions. But while professing to define the ambiguities they created new ones, while applying the principles they enunciated entirely novel ones, while professing to extend the consequences they drew strange deductions, and in reconciling the contradictions they made them wholly irreconcilable.

201. With the growth of a considerable body of legal aphorisms—many of them chaotic and contradictory—some working rules for their interpretation had to be devised. It is not proposed to refer here to rules which are the negation of logic, such as for instance, the rule enunciated by Yadnyavalkya that where any two texts are contradictory they are both good law. In the sixth

or seventh century ⁽¹⁾ Jaimini collected this rule in his "Mimamsa Sūtras" with the object of introducing some critical insight into his students studying the revealed law. His work does not discriminate between civil law and religious duty, ⁽²⁾ the performance of which secures merit. ⁽³⁾ Jaimini's aphorisms are themselves highly artificial, and in their turn require voluminous commentaries to expound their meaning. An examination of his work discloses the scholastic method of interpretation—*obscurum ab obscurius*. For example, he postulates four methods of construction, namely (i) the Sruti; (ii) the Linga; (iii) the Vakya; and (iv) the Prakarna. The Sruti construction is stated to be that which discourages the giving of an unnatural meaning to words when their natural meaning makes the sense clear. Where however some word or words are to be understood to complete the sense—that is the Linga construction; and where one clause or sentence, though appearing isolated and independent, has to be read along with another which amplifies or qualifies it—it is the Vakya or syntactical construction; while a greater liberty taken in the same direction, that is to say, the reading of one text as a part of another text, though independent of it, and though it is, indeed, on quite a different topic, is the Prakarana rule of construction. These are the primary golden rules of Jaimini which he applies at his discretion to the construction of texts which supplied the pabulum for the legal logomachies of the learned of an earlier age, though they now carry but a limited conviction.

202. Jaimini, however, stands on surer ground when he enunciates the following rules which still stand as good to day as when they were originally enunciated :

- (1) Obligatory and non-obligatory texts must be distinguished.
- (2) Established and approved usage has the force of law without reference to the causes which brought it into existence ⁽⁴⁾.
- (3) Foreign words must be understood in the sense in which they are used in the language from which they are borrowed.
- (4) Every word and sentence must have some meaning and purpose attached to it—or as Karika more pithily puts it—"more words more meaning."
- (5) The construction which makes the meaning shorter and simpler is to be preferred; which is another way of saying that more should not be assumed than the words expressly convey.
- (6) No word or sentence should be ascribed a different meaning at one and the same place.
- (7) All words must be understood to bear their primary meaning.
- (8) An effort must be made to reconcile contradictions—or as the English lawyer would put it—Law favours benignant construction.
- (9) When contradictions are inevitable one has an option to adopt any construction.
- (10) All construction must be contextual.
- (11) All words should be given their natural meaning, unless the context justifies their use as terms of art.

203. To bring Jaimini up to date a great many rules which he regards as sacrosanct will have to be ignored, and many others which he omits, added. For example, when he declares that "Duty arises from Vedic commands, all outside the Vedas must be disregarded" ⁽⁵⁾ he contradicts himself for how can he reconcile it with the sanctity of custom and the whole of the *Smṛiti*: law which is outside the Vedas? And he ignores the facts which stared him in the face when he declaimed: "The Shishta (wise teaching) of Sruti and Smṛiti

(1) Not in the 18th century A. D., as assumed, for Jaimini's aphorisms are quoted in the *Mitākshara*—See Max Müller's *Six Systems of Indian Philosophy*, p. 118.

(2) Cf. "what is to be fulfilled as the object of a command is Dharma"—Jaimini 1-i-2.

(3) i.e., "Apurva"—lit. what one had not had before" (i.e.), merit or virtue, or divine approval.

(4) Jaimini i-iii-7.

(5) Jaimini 1-iii-1.

is that which is not contradicted by the latter" while his "matters sanctioned by the Shastras should have preference" is only a pious hope in view of the transformation which Hindu society underwent in spite of the Shastric inculcations.

204. However since Jaimini wrote, the following further rules have become well established :

(13) In case of two Shastras laying down different rules the latter supersedes the earlier rule.

(13) No rule is enforceable unless it is conformable to current custom.

(14) A judicial rule supersedes the Shastric rule.

(15) The legislature is supreme and it can make or unmake all laws.

The previous discussion will justify these rules. But a few pointed instances will further illustrate them.

205. The Shastras lay down (i) that the son is absolutely liable for his father's debts ; (ii) that a Hindu widow cannot re-marry ; (iii) that forfeiture of caste entails forfeiture of one's inheritance ; and (iv) that the adoption of an only son is invalid ; but the first three rules have been overruled by the legislature ; while the last has been equally overruled by the Privy Council. (1)

206. Hindu Law cannot be understood without reference to caste, (2) a division of the people into four graded classes which is determined by their birth and remains unaltered through life. Hindu Society is divided into two main castes (1) *Dwijas* or twice-born and (2) the *Shudras*, or the servile people. This distinction is observed throughout Hindu Law, both ancient and modern. There is often one law for the regenerate and another for the Shudra. But on many points the former are subject to many disabilities from which the latter are free. In the confusion of castes created by the policy of the foreign rulers, who for the first time established a secular rule free from the control of the hierarchy, the question of caste at times presents difficulties. It is specially so in view of the general social upheaval created by the impact of western thought and the consequent abandonment by the regenerates of the customary rituals, and the claim of some of the Shudra castes to the position of *Dwijas*. The question of caste has thus a place in the historical survey of Indian Law but it is a subject at once so stupendous and complicated that nothing but only a succinct *resume* can be attempted here.

207. A tribe in its original form is distinguished from a caste by the fact that its basis is political rather than economic or social. The members believe that they all have a common origin, but what holds them together is the community of interest and the need of mutual defence ; and aliens who are willing to throw in their lot with the tribe are usually freely admitted. The Hindu literature both legal and religious, teems with allusions to caste from very early times. The Vedas however, contain no reference to caste, though it is alluded to in the *Purushasukta* (3) which is considered, to be a modern interpolation and though the earliest *Sutras* of Apastamb and Baudhayan take its existence for granted. But caste in their time was in a fluid state. They mention only four castes which according to the Census Report of 1901 have now multiplied to nearly 2,400. In Burma caste is so

(1) *Sri Balusa v Sri Balusa*, 28 M. 898 P.C. (8) *Rig Veda* X.90.

(2) *Port. Castus pure*.

little known that the Burmese language possesses no word for it (1) while in the extreme west, Mr. Hughes-Buller records that when a Hindu in Baluchistan is questioned about his caste he "will often describe himself by the name of the tribal group to which he holds himself attached." (2) It may then be premised that caste as such is peculiar to the India dominated by the priestly Brahmins. Manu traces its origin to the *anima mundi* (the supreme soul) Brahma who "produced by a thought a golden egg," "in which" he himself was born as Brahma, who for the sake of the prosperity of the worlds, caused the Brahmin, the Kshatriya, the Vaishya and the Shudra to proceed from his mouth, his arms, his thighs and his feet and allotted to these their distinctive duties. The Brahman was enjoined to study, teach, sacrifice, and receive alms; the Kashatriya to protect the people and abstain from sensual pleasures; the Vaishya to tend cattle, trade, to lend money and to cultivate land, while for the Shudra was prescribed the duty of service of the three groups.

208. Modern ethnologists trace the notion of caste as borrowed from the sacerdotal literature of ancient Persia, (3) in which society is divided into four classes—priests, warriors, cultivators and artisans. "The conjecture is that the relatively modern compilers of the law books having become acquainted with the Iranian legend, were fascinated by its assertion of priestly supremacy, and made use of it as the basis of the theory by which they attempted to explain the manifold complexities of the caste system". (4) But whatever may have been the origin of the concept there can be no doubt that caste has always been and remains to this day a unique institution of India. It would seem that the fair-skinned immigrants through the north-western frontiers found themselves confronted with the aboriginal population of the continent who differed from them in colour, physique, religion and customs. Of these the difference in colour was all in all.

209. Indeed, the term *caste* is of Portuguese origin having been introduced by the adventurers who followed Vasco Da Gama to the west coast of India. (5) It does not really signify what the Sanskrit writers intended to emphasise by the use of the expression *Varnas* or colours according to which the Hindu society was classified. There can be no doubt that this superficial difference between the fair Aryan settlers and the dark-skinned aborigines first suggested the classification which, however, did not, as was to be expected, at once assume the rigidity which is its modern attribute. In this respect while the idea might have been borrowed from Persia, which appears again to have imported it from Egypt, it was adapted to new surroundings and in a form totally absent in the country of its birth. For while in Egypt and Persia the sub-division crystallized, the Indian system had its origin in the innate and ineradicable colour prejudice and racial antagonism (6) of which there is no trace in the ancient records of Persia and Egypt, but of which abundant evidence is furnished in the *Vedas* themselves where the antithesis between the white Arya and the black *Dasyas* had already assumed a suggestive significance. Thus a Vedic hymn thanks Indra for having killed the *Dasyas* and "protected the Aryan colour". (7) Other hymns contain invoca-

(1) I—Imperial Gazetteer of India—Ch 6 p. 880.

(2) Baluchistan Census Report, 1901, cited in 1 Imp. Gazetteer, Ch 6, p. 380: Risley's Census Report, 1901 § 851.

(3) Spiegel, *Iranische Alterthumskunde*, 111, 54-670.

(4) I—Imp. Gaz., Ch. 6, p. 395.

(5) Lat. *Castus*—purity of breed.

(6) Risley's Census Report, §§ 857-862. Contra Nesfield "Brief view of the caste system of the N.W.P." (1885) who traces caste merely to occupation, has been conclusively disproved. See Gait's 1911 Census Report, (1913) Vol. I, §§ 490-495.

(7) III-34, 9.

tions to destroy the black Dasyas. It would seem that the genesis for caste distinction was thus laid in the deep-rooted colour prejudice which has at all times animated mankind.

210. That the modern Shudra arose out of the Dasyas is equally apparent from the Vedic texts. For instance in *Vajasaneyi Samhita* ⁽¹⁾ we read the following: "Whatever sin we have committed against an Arya or against a *Shudra*." But this word does not occur in the *Rig Veda* where however Indra's thunderbolt is invoked to protect the Aryas and strike down the "Dasa fiends". The sub-divisions of the Aryas into the three regenerate castes is a later development, mainly the result of diversified occupations for there is nothing but laudatory allusions in the earliest sacred writings to the three twice-born castes. The shackles of sacerdotal creation become first apparent in the post-vedic writings—as for instance in the *Puranas* and the *Dharma Shastras*. "Yet in the stage of development portrayed in the law books, the system had not hardened into the rigid mechanism of the present day. It is still more or less fluid; it admits of inter-marriage under the limitations imposed by the rule of hypergamy; it represents caste in the making, not caste as it has since been made. This process of caste-making has indeed by no means come to an end. Fresh castes are constantly being formed. We can trace the origin of their evolution. They seem to proceed on the lines followed in the traditional scheme. The first stage is for a number of families who discover in themselves some quality of social distinction, to refuse to give their women in marriage to other members of the caste, from whom they nevertheless continue to take wives. After a time when their numbers have increased and they have bred women enough to supply material for a *jus connubii* of their own, they close their ranks, marry only among themselves; and pose as a superior sub-caste of the main caste to which they belong." ⁽²⁾

211. "The principle upon which the system rests is the sense of distinctions of race, indicated by differences of colour, a sense which while too weak to preclude the men of the dominant race from intercourse with the women whom they have captured and enslaved, is still strong enough to make it out of the question that they should admit the men whom they have conquered to equal rights in the matter of marriage." ⁽³⁾

212. But while caste in India has owed its origin to the differentiation in colour, many causes have contributed to multiply it, so that at the Census of 1901 no less than 2,300 distinct castes were recorded ⁽⁴⁾ and there can be no doubt that the number now cannot be far short of 3,000. The causes that are stated to have contributed to this appalling multiplication, are differences due to (i) the tribal groups, (ii) functions or occupation, (iii) sects comprising a small number of castes which commenced life as religious sects founded by philanthropic enthusiasts proclaiming the equality of their followers, (iv) cross-breeding, (v) racial tradition, (vi) migration as where two persons of the same caste migrating to different localities become members of distinct castes discontinuing all connubial connection with each other, (vii) changes of custom; to which might be added, (viii) language, (ix) the worship of different gods, (x) the eating of different food, (xi) other social or religious habit; (xii) pride or prejudice; and (xiii) totemism. "The growth of the caste instinct must have been greatly promoted and stimulated by certain characteristic peculiarities of the Indian intellect—its lax hold of facts, its indifference to action, its absorption in dreams, its exaggerated reverence for tradition, its distinctions, its pedantic tendency

(1) S. 20, 17.

(2) Imp. Gaz. I.Ch. VI, p. 386.

(3) Risley's Cens. Rep. (1901), § 873.

(4) Ib. (1901) 821, 822.

to press a principle to its furthest logical conclusion, and its remarkable capacity for imitating and adopting social ideas and usages of whatever origin." (1)

213. The nature and evolution of the institution of caste is thus described by Sir Denzil Ibbetson in his Census Report on the Punjab: (2) "Thus we see that in India, as in all countries, society is arranged in strata which are based upon differences of social or political importance, or of occupation. But here the classification is hereditary rather than individual to the persons included under it and an artificial standard is added which is peculiar to caste and which must be conformed with on pain of loss of position, while the rules which forbid social intercourse between castes of different rank render it infinitely difficult to rise in the scale. So, too, the classification being hereditary, it is next to impossible for the individual himself to rise; it is the tribe or section of the tribe that alone can improve its position, and this it can do only after the lapse of several generations, during which time it must abandon a lower for a higher occupation, conform more strictly with the arbitrary rules, affect social exclusiveness or special sanctity, or separate itself after some similar fashion from the body of the caste to which it belongs. The whole theory of society is that occupation and caste are hereditary; and the presumption that caste passes unchanged to the descendants is exceedingly strong. But the presumption is one which can be defeated, and has already been and is now in process of being defeated in numberless instances. As in all other countries and among all other nations, the graduations of the social scale are fixed; but society is not solid but liquid, and portions of it are continually rising and sinking and changing their position as measured by that scale; and the only real difference between Indian society and that of other countries in this respect is that the liquid is much more viscous, the friction and inertia to be overcome

(1) *Ib* § 874 Though out of the 4 castes numerous castes and sub castes have sprung up, the Smritis still recognize only the 4 original castes and as they draw the broad division between the *Dwijas* and the *Shudras*, there being one law for the former and another for the latter, the question whether a person belonging to any of the 3,000 castes or sub-castes is a *Dwija* or not, is often one of great practicality, though it is by no means always easy of solution. As affording some help to the solution of this question the Ethnographic appendices to the Census of India published in 1903 trace the history of the following castes:—

Caste	Classed as	Authority.	Caste.	Classed as	Authority.
Jat ...	Kshatriyas ...	Ethnographic App p. 74	Bhills ...	Shudras ..	162-164
Rajputs ...	Do ...	81-84	Khanger ...		165
Prabhu ...	Twice-born, of Kshatriya origin.	86-91	Raj-khangars.		166
Marathas ...	Better class as Kshatriyas rest as Shudras being Kunbis.	92-10	Chamar ...		167-175
Nayars ...	Twice born, but doubtful.	131-140	Bahhan ...		176-180
Izhavas ...		141-142	Bagoli ...		181-184
Santal ...		143-146	Baidya ...		185-187
Bhunjioj ...		149-154	Bengal Brahman		188-197
Munda ...		155-161	Khasi ...		198-200
			Lumbu ...		201-206
			Angamis ...		207-210
			Aos ...		211-213
			Wa ...		214-221
			Lusheis ...		222-229

(2) Now reprinted in the Census of India, Vol. I, Ethnographic Appendices (1903), pp. 234, 248,

infinitely greater, and the movement, therefore, far slower and more difficult in the former than in the latter. The friction and inertia are largely due to a set of artificial rules which have been grafted on to the social prejudices common to them in the centre of the Punjab, while they can now hardly be said to exist on the purely Mahomedan frontier; and I think that we shall see a still more rapid change under the influences which our rule has brought to bear upon the society of the Province. Our disregard for inherited distinctions has already done something, and the introduction of railways much more, to loosen the bonds of caste. It is extraordinary how incessantly in reporting customs, my correspondents note that the custom or restriction is in fact dying out. The liberty enjoyed by the people of the Western Punjab is extending to their neighbours in the east, and especially the old tribal customs are gradually fading away. There cannot be the slightest doubt that in a few generations the materials for a study of caste as an institution will be infinitely less complete than they are even now.

214. Thus, if my theory be correct, we have the following steps in the process by which caste has been evolved in the Punjab:—(1) the tribal divisions common to all primitive societies; (2) the guilds based upon hereditary occupation common to the middle life of all communities; (3) the exaltation of the priestly office to a degree unexampled in other countries; (4) the exaltation of the levitical blood by a special insistence upon the necessarily hereditary nature of occupation; the preservation and support of this principle by the elaboration from the theories of the Hindu creed of a purely artificial set of rules, regulating marriage and intermarriage, declaring certain occupations and foods to be impure and polluting, and prescribing the conditions and degree of social intercourse permitted between the several castes. Add to this the pride of social rank and the pride of blood which are natural to man, and which alone could reconcile a nation to restrictions at once irksome from a domestic, and burdensome from a material point of view; and it is hardly to be wondered at that caste should have assumed the rigidity which distinguishes it in India."

215. The Vedas (1) contain frequent references to the Aryas who are contrasted with the *Dasyas* and in the oldest of them the word "Aryapatni" is used to designate the wife of an Arya as distinguished from "Dasa Patni" "the wife of a Dasa." But of course at this time caste had not become established. As soon, however, as it began to be recognised, the term Arya became transferred to the three upper castes, viz., Brahmins, Kshatriyas, and Vaishyas who were admitted to the innerfold of Hinduism, the rest of the Hindus being designated Sudras and all non-Hindus as Mlechchas—a term which occurs in Manu in which they are described "as those who speak barbarously" (2). Manu calls India "Aryavarta" or the land inhabited by respectable people. (3)

216. Manu calls people belonging to the three upper castes as *Dwijas* or twice-born, but he does not refer to them by the term "Aryas" or "Hindus". The Aryan fugitive from arid plains and decimated crops was spell-bound by the sight of the mighty Indus rustling down in torrential stream which he commemorates in one entire hymn. (4) He called it the "Sindhu" (Skr. for river) *par excellence*. It was the western natural boundary of the

(1) MacDonnell in his *Sansk Lit* thinks "Aryans" means "kinsmen" as opposed to "Dasyas" or "fiends" also called "Anaryas" or non-Aryans, p 152.

(2) Manu, Ch. 2 v 28.

(3) *Ib.* Ch 2 v 22.

(4) Rig Veda X-15,

Aryan settlement. It was corrupted into "Indus" by the other nations of antiquity and the Greeks called the land of the Indus as "India". The Persians corrupted it into "Hindu" a term which was at first used to designate the land and not its people. Later on the term "Hindusthan" ⁽¹⁾ more correctly described the country ⁽²⁾ while the term "Hindu" became attached to its people. ⁽³⁾

217. The term "Hindu Law" is consequently comparatively new. In the classic texts the term "Hindu" is not to be found. It appears to have been introduced by the Persian invaders who called India "Hindu" and its residents "Hindus." The Vedas refer to the new settlers in India as *Aryas*—a word which bears a close etymological affinity to the Zend *Arya* both derived from the Sanskrit word *ar*, the earth, ⁽⁴⁾ which gives the term *Arya* the meaning of one ploughing the earth, a land-holder or a settled farmer as distinguished from a nomadic wanderer. The term is used in later Sanskrit to mean one belonging to a good family. As some of the Aryan emigrants settled down in Persia that country was given the name of *Iran*, and the same element determined the name of Armenia. In the Zend the term "Arya" is used to describe the people and means venerable. ⁽⁵⁾

218. The present state of Hindu Law constitutes an anomaly unparalleled in the history of the world. The Hindu Law as expounded by the text writers and commentators has been declared to be the law of the Hindus. Though the Legislature possesses the authority to interfere, it is pledged to leave it alone. The old race of commentators who by interpretation, annotations and analogy brought that law in line with the altered social conditions is extinct, and their occupation gone. Their place is now assumed by the Judges of the British courts who are all subordinate to the Privy Council sitting in London. That high tribunal does not contain a single Hindu Lawyer. It is manifestly out of touch with the current of Hindu opinion. Nevertheless it interprets, applies and at times modifies or extends the law, though it is in fact presumed to do no more than administer it. If in doing so it conforms to the altered opinion it is by a mere accident. If it departs from the accepted view the Legislature has rendered itself powerless to correct it. But nevertheless the slow evolution of human thought is proceeding apace even in the unchanging East. Western education and the adoption of western institutions and standards of life and comfort, the establishment of new industries and the amassing of wealth as a result of individual effort and enterprise have created new problems for which the sacred texts afford no satisfactory solution. For as the Privy Council recently observed: "In construing the texts of the Mitakshara which their Lordships have quoted, it is necessary to bear in mind that education beyond that of a very elementary kind must have been limited to very few of the people for whose guidance the Mitakshara was written, and that for that limited few there could have been then no education attainable in the arts, sciences, and professions of that time comparable with

(1) From *Hindu* and Skr. *sthan*—abode.

(2) The term "Hindustan" more appropriately applies only to that part of the peninsula which lies between the Himalaya and the Vindhya ranges, which is the Aryavarta of the classic Hindu writers [Vashishth, 18, 9, 14 S. B. E. 2]

(3) MacDonnell. Sankr Lit. pp 140, 141.

(4) Lat. *Arto* to plough which occurs in all Indo-European languages.

(5) MacDonnell in his Sanskrit Lit. thinks "Aryans" mean "kinemen" as opposed to "Dasyas" or "fiends" also called "anaryas" or non Aryans, p. 152.

the education now obtainable and necessary for a successful career in the arts, sciences, and professions of the present day. It may be assumed that the author of the Mitakshara who was construing and explaining the more ancient texts of the Hindu Law for the benefit and guidance of the Hindu community, could not have intended to penalise an education which was not in his contemplation and of which necessarily he knew nothing. Nor can it be assumed that his intention was to penalise and discourage self-acquired skill, or the exercise of high mental abilities or great individual effort in winning success in an art, or science, or a profession. He must have been writing of education—learning—such as he knew it to be, and when he laid down that the gains obtained from an education received at the expense of a joint family should be partible, he could not have intended that such gains should include the gains which were the result, not of the education received at the expense of the joint family, but of the peculiar skill, mental abilities and individual effort in applying and improving such education exercised by the person who had been educated at the expense of the joint family. Their Lordships cannot find in the texts of the Mitakshara any authority for the contention in this case that the gains made as a clerk, as a broker, or as a money-lender, personally and without the aid of the joint funds by a member of a joint family who received an ordinary education suitable to his position as a member of the family to which he belonged, should in law be regarded as partible and not as his self-acquired property. (1)

219. Despite the avowed policy of *Laissez faire* adopted by the Legislature, Hindu Law has been in some respects modified, though in doing so it has naturally followed the policy of tinkering rather than of reconstruction. But even in rectifying its glaring defects or enlarging its liberties, its policy has been timid and hesitating and it has at times refused to respond to the volume of public opinion as in the instances when it refused to regulate the Hindu religious endowments or empower the celebration of inter-caste marriages. Even upon the questions of vital importance on which the courts are sharply divided the Legislature has manifested a philosophic indifference leaving the chaos to rule till some one more aggrieved than the rest ventures to take up his appeal to the Privy Council who as often as not strive to steer clear of all knotty questions until they can circumvent them no more. Even then their pronouncement might not be certain and unambiguous or even if certain and unambiguous, it might not cover all the issues upon which the courts here have been at variance.

220. It will thus be seen that Warren Hasting's plan of 1772 did not long survive the shock of Western jurisprudence despite all the efforts made by European scholars, philologists and judges to reduce Hindu Law into a system. Its inherent defects soon became too glaring to remain unremedied. In 1833 an enquiry preceding the Charter Act of 1833 elicited a strong note from the Judges of the Calcutta Supreme Court who complained of the chaotic confusion in the state of the law they had to administer. They complained of the difficulty of ascertaining the law and where it was to be found. This led to the appointment of an Indian Law commission under the Charter Act, 1833 with Macaulay at its head. This commission sat for many years and produced several volumes of report, which in some cases supplied the basis of Indian Legislation. The procedure of the Civil Courts was unified by the Code which

(1) *Meiharam v. Rewachand*, (1917) 45 C. 666, 688, 684 (P. C.)

became law in 1859 ⁽¹⁾ and two years later the first Code of Criminal Procedure was enacted. ⁽²⁾ The Indian Penal Code ⁽³⁾ was passed in 1860 and the Law of Evidence was enacted in 1872 ⁽⁴⁾ the Negotiable Instruments Act in 1881 ⁽⁵⁾ and the Transfer of Property Act and the Trusts Act in 1882. These with the Contract Act ⁽⁶⁾ the Specific Relief Act ⁽⁷⁾ and numerous land and local Acts have eaten into the Hindu Law confining its operation to the domain of family law, such as adoption, marriage, partition and inheritance.

221. Even on these subjects its leading principles, so far as they are now settled, do not all coincide with the sacred texts, while in **Its hope for the future.** many cases in which they do, they tend to perpetuate a system which has long outlived its popularity and the society to which it was adapted and applied.

There is no hope for the Hindus unless a new avatar rises to simplify their religion and codify their laws.

(1) VIII of 1859.
 (2) XXV of 1861.
 (3) XLV of 1860.
 (4) I of 1872.

(5) XXVI of 1881.
 (6) IX of 1872.
 (7) I of 1877.

THE HINDU CODE.

CHAPTER I.

OPERATION AND EXTENT OF THE HINDU CODE.

Short title. 1. (1) This Code may be cited as the Hindu Code.

Local extent. (2) It extends to the whole of British India :

And except as provided by this Code or by any other law or custom for the time being in force, the rules herein contained are applicable to all Hindus and such other persons as may have adopted them.

Meaning of "Hindu." (3) The term "Hindu" in this connection includes not only those who are Hindu by religion but also those who are commonly known as such.

Hindu Law personal. 2. (1) Hindu Law is personal and is not affected by a change of domicile.

Law of origin. (2) All Hindus are primarily governed by the law of their origin.

Explanation.—The "law of origin" means and includes the law established in the original domicile of the ancestors of the family, and not merely of any members thereof, as determined by the caste, race and language of the family before its migration and the connection since maintained therewith.

3. In the absence of anything appearing to the contrary the natives of each of the following provinces are governed by the schools of law noted against them :—

- i. Bengal and Assam ... Dayabhag, supplemented by the Mitakshara.
- ii. United and Central Provinces ... Mitakshara.
- iii. Mithila ... Mitakshara, supplemented by Vivadchintamani and Vidvadratnakar.
- iv. Bombay Presidency, Berar and Guzerat ... Mitakshara, modified by the Mayukh.
- v. Madras Presidency ... Mitakshara modified by (1) Smriti Chandrika (2) Parasar Madhav (3) Virmitrodaya.
- vi. The Punjab ... Customary law supplemented by the Mitakshara.

CHAPTER II.

CUSTOMARY LAW.

Custom defined. 4. Custom is an established practice at variance with the general law.

Nature of custom. 5. (1) A custom varying the general law may be a general, local, tribal or family custom.

Explanation 1.—A general custom includes a custom common to any considerable class of persons.

Explanation 2.—A custom which is applicable to a locality, tribe, sect or a family is called a special custom.

6. (1) Custom has the effect of modifying the general personal law, but Custom cannot override express law. it does not override the statute law unless it is expressly saved by it.

(2) Such custom must be ancient, uniform, certain, peaceable, continuous and compulsory.

Invalid Custom. 7. No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy.

Pleading and proof of Custom. 8. (1) He who relies upon custom varying the general law, must plead and prove it.

(2) Custom must be established by clear and unambiguous evidence.

Proof and disproof of Custom. 9. A custom may be proved or disproved in any of the following ways :—

(1) judgments, orders and decrees relating thereto.

(2) entries in any public document made—

(a) by a public servant in the discharge of his official duty, or

(b) by any other person in performance of a duty especially enjoined on him by the law of the country in which the public document is kept.

(3) a published work dealing therewith,

(4) any transaction by which the custom in question was created, claimed, modified, recognised, asserted or denied or which was inconsistent with its existence.

(5) particular instances in which the custom was claimed, recognized, exercised or in which its existence was asserted, disputed or departed from.

(6) opinions of.—

(a) persons knowing of its existence or non-existence ;

(b) persons likely to have known of the custom, given before any controversy as to the custom had arisen, and who are either dead or cannot be called without unreasonable expense or delay ;

(c) a number of persons

(d) experts.

(7) previous deposition of witnesses examined *inter partes* who cannot be called for reasons stated in clause (6) (b).

(8) admissions of persons adversely affected thereby.

(9) acts and conduct which make the existence or non-existence of the custom highly probable or improbable.

10. Usage is a practice at variance with the general law, and differs from custom in that it need not possess the antiquity, uniformity or notoriety of custom, provided it is well known

Usage defined. and acquiesced in by the community to whom it is made applicable.

CHAPTER III

MARRIAGE.

Marriage defined. 11. Marriage is an alliance between a man and a woman recognized by law.

12. A contract to marry cannot be enforced by specific performance or an injunction, but a party suffering loss thereby may recover damages for a breach of contract.

Effect of a breach of contract to marry.

13. Every man has a right to marry, and such right is not affected by infancy or infirmity.

Right to marry.

14. No prescribed ceremony is necessary to constitute marriage, provided that if any ceremony is customary and regarded by the caste as essential, then it must be performed.

Prescribed ceremonies unnecessary.

Explanation I.—The ceremony of Saptapathi is necessary to complete a marriage performed according to the orthodox rites, and that of Vivah Hom is also usually performed, but their non-performance does not invalidate a marriage, if otherwise completed.

Explanation II.—A marriage celebrated with due ceremony is not invalid by reason of the fact that a party thereto was then an outcaste.

Explanation III.—Co-habitation is not necessary to complete a marriage.

15. The marriage expenses of all members of an undivided family are a legitimate charge on its property.

Marriage expenses.

16. Every marriage is subject to the following conditions, namely:—

No valid marriage within prohibited degree.

(a) That the parties thereto must not be within the prohibited degree of relationship; and

(b) that if the parties thereto are *Dwijas*, they must be of the same caste.

Explanation I.—The prohibited degree of relationship for the purpose of marriage is regulated by custom.

Explanation II.—A person shall be deemed to be within the prohibited degree of relationship whose marriage is opposed to common morality.

Illustrations.

(a) The Shastras prescribe that *Dwijas'* sons who are *Sapindas*, *Gotrajs* or who belong to the same *Pravar* should not intermarry. A *Dwija* wishes to marry *B*, who is related to *A*. The validity of their marriage depends upon the usage of the caste.

(b) *A* has married *B*, who is his own sister's daughter. The marriage is valid as it is sanctioned by custom.

(c) **A Kshatriya marries B who is the illegitimate daughter of a Kshatriya father. The caste people recognize it as a valid union. The marriage is valid.**

Invalid marriages. **17.** A marriage may be rendered invalid for any of the following reasons :—

- (1) because the parties were related within the prohibited degree,
- (2) because they were of different non-inter-marriageable castes,
- (3) because they did not observe the essential ceremonies,
- (4) because their marriage was brought about by force or fraud.

Marriage by force or fraud

18. A marriage brought about by force or fraud may be avoided by the party affected thereby.

19. Where remarriage is lawful, the wife may remarry, if her husband after leaving her, has not been heard of for seven years, by those who would naturally have heard of him if he had been alive.

Presumption of the death of husband.

Mutual rights and obligations upon marriage.

20. The following rights and obligations arise upon marriage :—

(a) *As to the husband.*—

1. He is his wife's natural guardian during her minority.
2. He is entitled to her conjugal society.
3. He is bound to maintain her.
4. He cannot divorce her unless he is allowed to do so by custom.
5. Should she predecease him, he is entitled to inherit her property.
6. He has no right over her Stridhan, which he may, however, use in a time of great distress.

(b) *As to the wife* :—

1. She is bound to live with her husband unless he is guilty of cruelty or misconduct.
2. She is entitled to retain her Stridhan as her separate property.
3. She is entitled to sue, and is liable to be sued, in respect of her Stridhan, as if she were a *feme sole*.
4. She cannot divorce her husband unless she is allowed to do so by custom.

5. Should her husband predecease her, she may be entitled to inherit his separate property : otherwise she has the right of maintenance and residence in the family dwelling house.

6. She has no right over her husband's property during his life-time beyond the right of maintenance and residence.

21. (1) In a case relating to conjugal rights there must be, except as **Proof and presumption of marriage.** otherwise expressly provided, proof of the performance of marriage and its validity.

(2) In other cases marriage may be presumed from continuous co-habitation, conduct and repute.

(3) Such presumption of marriage cannot be rebutted by mere proof of its improbability.

(4) When the fact of marriage is proved, it will be presumed that it was performed:—

- (a) in the approved form,
- (b) with due ceremonies and was otherwise a valid marriage and that
- (c) it continued during the life-time of either party.

CHAPTER IV

AFFILIATION AND LEGITIMACY

Children defined. **22.** (1) Children may be natural or adopted. Of these the former may be legitimate or illegitimate.

(2) A legitimate child is one begotten by a person on his lawfully married wife.

(3) An illegitimate child is one begotten by him on one who is not lawfully married to him.

A lawfully begotten son is called *Auras putra*

(4) An adopted son is one legally adopted by or to a man as his son.

A son taken in adoption is called *Dattak putra* or adopted son.

Presumption of legitimacy

23. The legitimacy of a child born of a married wife of a person is conclusively presumed in the following cases, namely:—

- (a) where it was born during the continuance of the marriage
- (b) or within 280 days after its dissolution, the mother remaining unmarried, unless it is proved that the parties to the marriage had no access to each other at any time when it could have been begotten.

Illustrations.

(a) *A* had validly married *B* in the morning. *B* was delivered of a child in the evening. The child is the legitimate child of *A* and *B*, and evidence cannot be given to disprove it.

(b) *A* had validly married *B*. After his marriage *A* became an ascetic. He visited *B* casually now and then. *B* was delivered of a child. It is the legitimate child of *A* and *B*, and evidence cannot be given to prove that by reason of his vow *A* could not have begotten it.

(c) *A* validly married *B*. *A* was then aged 10 and *B* aged 14. A few months after the marriage, *B* was delivered of a child. The child is the illegitimate child of *B* since *A* could not have begotten it.

(d) *A* aged 30 married *B* aged 15. *B* subsequently gave birth to a child. It is the legitimate child of *A* and *B*, and evidence cannot be given to disprove it.

(e) *A* had validly married *B*. A child was born to them in wedlock. Evidence is led to prove that *B* was congenitally impotent. The evidence is admissible as proving sexual non-access.

24. Every child, whether legitimate or illegitimate, possesses the right of Children's right of maintenance against its father or his estate. Provided that maintenance. in a family subject to the Bengal School, such right, in the case of an illegitimate child, ceases upon its attaining majority.

CHAPTER V.

ADOPTION.

Adoption defined.

25. (1) Adoption is a formal recognition of a person as the son of another.

(2) No adoption is valid unless it is made in conformity with law.

(3) Any Hindu, not having a son, grandson, or a great grandson, alive at the time of adoption, may adopt a son to himself, and his wife or widow may, with his consent, do the same.

Adopter must be
issueless

26. No one can adopt a son unless at the time of adoption he had no living son, grandson, or great grandson.

27. Save as provided by any law for the time being in force, every Hindu who may adopt, has the right to adopt a son provided—

(a) he has attained the age of discretion ;

(b) and has no son, legitimate or adopted, or grandson or great grandson in the male line then living ;

(c) is possessed of sound mind ;

(d) and is not suffering from any mental or physical disability which disqualifies him from inheritance.

Explanation 1.—The facts that the adopter is a bachelor or a widower, or that his wife is pregnant or opposes the adoption, are immaterial to the validity of adoption.

Explanation 2.—A son mentioned in clause (d) does not include a son who suffers from any of the disabilities which disqualify him from inheritance.

Illustrations.

(a) A is a Government ward subject to an Act which prohibits A from adopting without the consent of the Local Government. A adopts. The adoption is invalid unless consented to as provided in the Act.

(b) An eunuch registered under Act (XXVII of 1871) is declared by S. 29 thereof incapable of adopting a son. A cannot adopt.

(c) A suffers from virulent leprosy which disqualifies him to inherit. A cannot adopt.

(d) A has turned a Sanyasi and so renounced the world. A cannot adopt.

(e) A has a son who is deaf and dumb, or suffers from any of the disabilities mentioned in *ills. (c) and (d)*. A can adopt.

(f) A who has an adopted son B adopts C. The adoption is invalid, for a Hindu cannot have two adopted sons at the same time.

Adoption by wife. **28.** A wife may adopt a son to her husband with his express consent.

Adoption by widow. **29.** (1) A widow may adopt a son to her deceased husband with his express authority :

Provided that, in places not subject to the Bengal and Benares schools, she may also adopt without such authority in accordance with the following rules :—

(2) (a) In the Dravid country she may make an adoption after consulting thereon all her husband's sapindas, and with the assent of all or the majority

of them, thereto : provided that if only some of them assent to the adoption made, it will still be valid if it is proper and was made in the *bona fide* performance of a religious duty.

(b) Provided also, that where the family is joint, the consent of the father-in-law, and in his absence, of its managing member, would be sufficient for an adoption made in their own life-time.

(3) (a) In the Maharashtra, where the widow succeeds to her husband who died a separated member from his family, she may adopt without his consent which is presumed.

(b) But if her husband died a member of an undivided family then she may only adopt with the consent of his undivided co-parceners, in which case in lieu of such consent the consent of persons mentioned in clause (2) (b) will be sufficient, and the provisions of clause (2) (a) *mutatis mutandis* apply.

Explanation 1.—The consent hereinbefore mentioned must be free and not one induced by fraud or corruption.

Explanation 2.—Where the majority of co-parceners or sapindas as the case may be, have assented to an adoption, it will be presumed that their assent was *bona fide*.

Exception 1.—A widow in Mithila can make no adoption to her husband with or without his consent.

Exception 2.—In the Punjab, the validity of an adoption by a widow depends upon her compliance with the tribal and territorial custom.

30. The authority by the husband to adopt may be verbal or in writing. Form of authority. but if it is in writing of a non-testamentary nature, it must be stamped and registered.

Construction and limits of authority

31. (1) The authority of the husband to adopt must be liberally, though reasonably, construed so as to advance the purpose he had in view.

(2) Such authority may be general or limited, but it will be ineffectual if it is illegal, vague or void.

(3) The authority to adopt can only be conferred on, and used by, the wife.

(4) He who confers the authority may revoke it at any time before it is used.

Illustrations.

(a) A authorized his wife B to adopt a son. B adopted C who died after the adoption, whereupon B adopted D. The adoption of D is valid for the general authority to adopt empowered B to make any number of successive adoptions.

(b) A authorizes his wife B to adopt C. C dies. B has no power to adopt.

(c) A authorizes B to adopt a son should their son C die unmarried. C dies unmarried B adopts. The adoption is valid

(d) A authorizes his wife B to make an adoption should their son C die. C died leaving his widow D surviving him as his heir. B adopted C. The adoption is invalid as it would divest D.

(e) A authorized B to adopt C. B adopts D. The adoption is invalid for B's authority was limited to the adoption of C.

(f) A authorizes his wife B and executor C to adopt. The authority is invalid as A was legally competent only to authorize B.

32. (1) Where the authority to adopt devolves or is conferred on two or more widows, in the absence of any express direction to the contrary, it may be used by the senior widow then living at the time of adoption.

(2) But no co-widow can make an adoption without the consent of the other co-widow in whom by inheritance from her son the whole estate had become vested.

Illustrations.

(a) A directs that his two wives B and C may jointly adopt a son. Here B, though senior, cannot adopt without C and if one of them dies, the other cannot adopt.

(b) A directs that his two wives A and B should make an adoption. There is nothing to indicate that they are to act jointly. A if senior, may adopt and if she dies or refuses, B may do so.

A has two wives B and C of whom C has a son by him who survives A. A authorizes B to adopt in case his son by C should die. The son dies and his estate vests in his mother C. B cannot divest C by adopting to A without C's consent.

33. An adoption brought about by coercion, undue influence, fraud or misrepresentation, mistake or otherwise than by the free consent of the parties thereto, is voidable at the instance of the party wronged, but subject to the rights of other parties, it may be confirmed.

Illustrations.

(a) A a widow in the Dravid country falsely represented to her husband's Sapindas that she had authority from her husband to adopt. They thereupon accorded their consent. The adoption is invalid as their consent was obtained by a misrepresentation.

(b) A threatened B with a criminal prosecution falsely accusing her of forgery. B thereupon adopted A's son C. She treated C as her son for years. B could not afterwards avoid it, for she had ratified it.

34. The widow's power to adopt becomes incapable of execution on the legal limitation vesting of her husband's estate in another by inheritance on widow's power.

Provided that when the estate of the husband has vested in his co-widows by inheritance to him, an adoption made by one of them will not be invalid by reason of the fact that it has the effect of divesting them.

Illustrations.

(a) A the father of B then aged 2 years, empowers his wife C to adopt should B die. B lived to be of age, married D and on A's death inherited his estate. He then died and was succeeded by his widow D. C then adopted E. The adoption is invalid as E could not divest D in whom A's estate had vested as the heir of his son B.

(b) But if in the last case B had died unmarried and on his death the estate had vested in his mother C, C could have adopted to A as by so doing she would have merely divested her own estate.

(c) A and B are joint brothers. B predeceases A who succeeds to his share by survivorship. B's widow adopts to her husband. The adoption is valid as A has not inherited B's share.

(d) But if in the last case A had also died and his estate had vested in his widow then B's widow could not adopt.

(e) A dies leaving two co-widows B and C in whom his estate vests by inheritance to him. B adopts divesting C. The adoption is valid.

35. (1) A boy may be given in adoption by his natural father, or by the mother with his consent, except where such consent cannot be obtained owing to his death or disability, pro-

vided that he had not at any time expressly or impliedly prohibited her from so doing.

Explanation.—Where the gift and acceptance of the boy to be adopted is completed by the parents in a manner required by law, the fact that they had in their unavoidable absence, delegated the performance of any of its ceremonies to a near relation on their behalf, will not render the adoption invalid.

36. A boy must possess the following qualifications to be eligible for

Qualification for adoption, namely :—
adoption.

(1) He must belong to the same caste as the parties giving and taking him in adoption.

(2) He must not be an orphan.

(3) He must not have been adopted by any other person.

(4) Except in Bombay, he must not be married.

(5) Under the Bengal and Benares Schools, he must not have been invested with the sacred thread.

(6) In Dravid, he may be adopted after his investiture with the sacred thread provided he is not married.

(7) Except in Dravid, if the parties are *Dwijas* he should not be the sister's son, daughter's son, and mother's sister's son of the adopter :

Provided that in the Bombay Presidency, and the Punjab, and amongst Jains, he may be adopted at any age, even though older than his adopter, is married and has children.

Exception.—Nothing in clauses (5) to (7) applies to Shudras.

37. (1) No adoption is complete without the corporeal delivery of the adoptee to his adopter with a declaration by the person,
Ceremony of adoption. delivering him, that he delivers him in adoption ; and of the adopter, that he so accepts him.

(2) Provided, that they have also performed such other act or ceremonies as may be required by law, or are customary to that end.

(3) Provided further, that if the parties thereto belong to any of the regenerate castes, and do not belong to the same *Gotra*, they must also perform the ceremony of *Datt Homa*.

(4) But non-performance of the *Datt Homa* or of the further ceremonies mentioned in clause (2) will not invalidate an adoption made as provided in clause (1) unless their performance is regarded by the caste as of the essence of the ceremony of adoption.

Explanation.—No delivery and its acceptance is valid unless the parties thereto were capable of understanding the nature of the act and its effect upon their rights.

Illustrations.

(a) Amongst Nambudris an adoption is performed by burning a pan of sacred grass. *A* is a Nambudri. He adopts *B* without burning such grass. It is a question of fact whether without such burning, the adoption is complete.

(b) An adoption by a widow subject to the Oudh Estates Act (I of 1869) must be in writing attested as in the case of a will and registered. *A* is such widow. She performs the ceremony of giving and taking but omits to execute a registered deed of adoption. The adoption is invalid.

Factum valet. **38.** (1) No adoption may be set aside for a mere irregularity or for non-observance of a form not essential to its validity.

(2) In particular and without prejudice to the generality of the foregoing rule, it may not be set aside on any of the following grounds, namely :—

- (a) That the adopted son was the eldest, the youngest or the only son of his father ;
- (b) that he was given in adoption after his investiture with the sacred thread ;
- (c) that the adoptee was older than the adopter ;
- (d) that the adoption was made during pollution ; or
- (e) by an untunsured widow.

Conditional adop- **39.** An adoption is irrevocable but the rights there-
tion. by acquired may be limited or postponed to any reason-
able extent.

Illustrations.

(a) *A* adopts *B* on condition that it shall be void on the birth of a son to *A*. The condition is invalid as an adoption when once completed cannot be revoked.

(b) *A* Hindu widow in possession of her limited estate adopts *B* on condition that *A* shall have full power of its disposal during her life-time. The condition is invalid for it creates in *A* an unqualified power of disposal.

(c) *A* adopts *B* on condition that *A* shall continue to manage her estate during her life-time. The condition being reasonable is valid.

(d) *A* directed in his will that his wife *B* should adopt a son who should take one-third of his estate giving two-thirds to his wife and daughter. *A* adopted *C* *C* is bound by *A*'s direction.

(e) *A* adopts *B* on condition that *B* shall not call for partition during *A*'s life time. *B* is bound by the condition as it is reasonable.

40. A son may be given in adoption on condition that he shall be the
Dvamushyayan son of both the natural and the adoptive fathers. Such
adoption. a son is called the *Dvamushyayan*.

Rights of Dvamu- **41.** A *Dvamushyayan* is entitled to inherit in both
shyayan. the families of his natural and adoptive fathers.

42. (1) Customary adoptions.—A husband or wife may adopt a
Kritrim adoption. Kritrim son to himself or herself either jointly or separately in accordance with the following rules :—

- (a) The adopter must have no son, grandson or great grandson living at the time of adoption.
- (b) The adoptee may be an adult and married.
- (c) Both he and his parents must consent to his adoption.
- (d) A husband or wife may adopt jointly, or they may each adopt a separate son.
- (e) The son so adopted is the son of the adopter, even if she be a wife or widow.
- (f) A wife or widow may adopt a son in her own right, and without the assent of her husband or his kinsmen.
- (g) Any relation, or a stranger may be so adopted.

(2) Such an adoption can only be made in the Mithila Province and the districts adjoining it; in the Punjab, and elsewhere if permitted by custom.

Illustration.

A is the father of B. B. adopts A as his Kritrim son. The adoption is valid.

Incidents of a Kritrim adoption. **43.** A Kritrim adoption is subject to the following incidents:—

- (1) The adoption is concluded by contract, no ceremony being necessary.
- (2) There is no restriction as to the qualifications of the adoptee except that he should be of the same caste as the adopter.
- (3) For the purpose of marriage his Sapinda relationship in the family of his adopter extends only to three degrees.
- (4) He does not assume the surname of his adoptive father.

Rights of a Kritrim son. **44.** A Kritrim son becomes entitled to the following rights in consequence of his adoption:—

- (1) He succeeds both to his father and the adopter.
- (2) He acquires no relationship with his adopter's father.
- (3) He does not succeed to his adopter's collaterals.
- (4) If adopted by a wife or widow, he succeeds to her exclusive property having no right in her husband's estate.

Proof of adoption. **45.** (1) He who relies upon an adoption must prove it.

(2) Where an adoption has the effect of disinheriting the natural heirs, it must be proved by such cogent evidence as is sufficient to prove its *factum* and validity and not merely its probability, due regard being had to all the circumstances including

- (a) its antecedent and attendant probability.
- (b) the existence of a writing,
- (c) the conduct of the parties before and since the alleged adoption, and
- (d) its publicity; and where the adopter is an illiterate widow,
- (e) the assent, intention and inclination of her husband,
- (f) the receipt by her of independent advice, and
- (g) the effect of the adoption upon her rights.

(3) Provided that where an adoption has been acted upon for a considerable time without dispute, the court may, upon proof of its *factum* presume its validity.

Illustration.

A a young illiterate pardanashin widow has for her adviser her husband's cousin B. She adopts his son C. C. sues her for possession. The burden is on C to prove that A had not been unduly influenced by B to adopt him.

Effect of void adoption. **46.** (1) A person whose adoption is for any reason void, acquires no right as an adopted son.

(2) And where a gift is made to such person, described as an adopted son, the adoption failing, the gift also fails unless it was intended as a gift to a *persona designata* and was not a condition of the gift.

Illustrations.

(a) *A* bequeathes a legacy "to *B* whom I have adopted." *A* directs his wife *C* to perform the ceremonies and bring up *B*. *C* fails to perform the ceremonies and the adoption is invalid. *A*'s bequest takes effect for he had intended to benefit *B* as a *persona designata*.

(b) But if in the last case, *A* bequeathes a legacy to *B* by virtue of *B* being his adopted son, then on the failure of *B*'s adoption, *A*'s bequest would also fail as *A* intended to benefit *B* *qua* his adopted son.

47. (1) The adoption of a person has, from the date of his adoption, the **Effect on natural family.** effect of determining all his rights and liabilities in the natural family, but not so as to divest him of any property which may have already vested in him prior to that date.

(2) But no adoption severs the natural relationship of the adopted son with his natural family so as to exempt him from the prohibition which would otherwise bind him as regards marriage and adoption.

48. In the absence of a natural son, an adopted son possesses all the rights and is subject to all the liabilities of a natural son in the family of his adoptive father, including the right of lineal and collateral inheritance.

Adopted son's rights in the adopted family. **49.** (1) Save as otherwise provided in clause (3), the rights of an adopted son arise at adoption.

(2) An adopted son cannot dispute an alienation made by the adopted father before his adoption; and on his adoption he would be bound by an alienation made by his adoptive father or any other manager of the family to the same extent as a natural son.

(3) The rights of a son adopted by a widow do not relate back to the death of her husband except in the following cases and to the following extent, namely:—

(a) His adoption relates back to the death of her husband for the purpose of continuing a partnership of which he was a member.

(b) He divests the co-parcenary interest of the husband which has become vested in another by survivorship.

(c) He may set aside an antecedent gift of her husband's property made by his widow, and in the case of other alienations, he may dispute their propriety if unsupported by legal necessity.

Adoptee's rights limited by auras son. **50.** (1) Except in the case of a Shudra the rights of an adopted son are, on the birth of an auras son, limited as follows:—

(2) He loses all rights to the performance of religious ceremonies.

(3) He is not entitled to succeed to an impartible estate in preference to the auras son.

(4) His right of inheritance in other cases is reduced to one fifth share of the natural son.

51. No suit lies for the specific performance of an agreement to adopt, **No specific relief in adoption.** the breach of which may, however, be redressed by damages.

52. (1) An invalid adoption cannot be validated by a subsequent consent, **Effect of acquiescence in an invalid adoption.** though the person so consenting may be estopped from denying it; but there can be no estoppel unless there is such a course of acquiescence in treating the

adopted boy as a member of the adopted family that it will be impossible to restore him to his original position in the natural family.

(2) Mere acquiescence or even presence at the adoption does not necessarily amount to an estoppel.

CHAPTER VI.

MINORITY AND GUARDIANSHIP.

OF MINORITY.

53. (1) In matters relating to marriage, dower, and adoption, a person attains the age of majority on completion of the sixteenth year : otherwise, except in the cases hereinafter provided, he attains it on completion of the eighteenth year.

Age of majority.

(2) Every minor of whose person or property a guardian has been appointed or declared under the Guardians and Wards Act, and every minor whose property is under the superintendence of a Court of Wards, attains his majority on completion of his twenty-first year.

"Guardian" defined.

54. Guardian means a person having the care of the person of another or of his property or of both.

Three classes of guardians.

55. (1) A guardian may be natural, testamentary, or one appointed by the court.

(2) A natural guardian is one who is entitled under the personal law to which he is subject to act as the guardian by virtue of his relationship to the minor. Such guardian is also called a *de facto* guardian.

(3) A testamentary guardian is one so appointed by the father in his will for his children.

(4) The Court may appoint or declare a guardian in accordance with the provisions of the Guardians and Wards Act, or the High Court might do so in the exercise of its inherent power. The guardian so appointed may be called the certificated guardian. He is also called a *de jure* guardian.

OF NATURAL GUARDIANS.

56. The following relations are the natural guardians of the person and property of a minor in the order mentioned below, namely :—

Natural guardians

(a) The father.

(c) The paternal relations.

(b) The mother.

(d) The maternal relations.

Marriage and loss of caste no disqualification.

57. (1) Neither re-marriage, conversion nor loss of caste is any disqualification to act as a guardian.

(2) Where a Hindu child becomes converted to an alien faith it is for the Court to consider whether it would be for the welfare of the child that it should be restored to its parents.

58. Where the minor is a member of a joint family governed by the Karta or guardian Mitakshara law, the father, or in his absence, the elder of co-parcenary. brother or other senior male member of the family is entitled to the management of the whole co-parcenary property including the minor's interest.

59. (1) A Hindu father may by his will, made orally or in writing, appoint one or more persons to act as a guardian or guardians of his children after his death; and in doing so he may exclude even the mother from her natural guardianship. The mother, however, has not a similar power to appoint a guardian by will though the Court may pay regard to her wishes so expressed.

(2) Where more than one person are appointed guardians, unless the contrary is expressed or necessarily implied, it is competent to any one to accept the office though the others may disclaim or die.

(3) Any guardian accepting office cannot resign at will.

60. (1) The husband is the lawful guardian of his minor wife and is entitled to require her to live with him irrespective of her infancy.

(2) After the husband's death, the guardianship of her person devolves on the husband's relations in preference to her paternal relations.

61. (1) Any relations or friend of a minor, or the Collector of the District in which the minor resides or has any property, may apply to the court for the appointment or declaration of a guardian and the court may, on being satisfied that it would be for the welfare of the minor, subject to the rules herein stated, appoint or declare a guardian.

(2) Where a guardian has been validly appointed by the father by his will, the court may not appoint or declare any other person as a guardian until he has been removed for any of the reasons stated in section 39 of the Guardians and Wards Act.

(3) Where any parent and in the case of a married female, her husband, is available, the court may not appoint any other guardian unless it finds that the parent or the husband is unfit to discharge the obligations of that office.

(4) Provided that in the case of other relations the Court will pay due regard to their natural claims to guardianship and may appoint any of them or some other person found best fitted to promote the minor's welfare.

(5) Provided further that where the minor has attained sufficient maturity of intelligence and discretion, it will consult him and pay due regard to his choice of a guardian but will not be bound to appoint his nominee if it finds any other person better fitted to promote his welfare.

(6) Any order passed by the Court acting under the Guardians and Wards Act may be set aside in a suit for the custody of the minor.

62. (1) One person may be appointed guardian of the person and another of the property; and two or more persons may be so appointed joint guardians of the person or of the property or of both.

Court's jurisdiction when limited.

63. It is not competent to the court to appoint a guardian in respect of the property of a minor of which he has no present separate possession.

64. (1) The natural guardian of a minor's property possesses the power to transfer any portion of the minor's property in case of necessity or for the benefit of the estate.

Natural guardian

(2) Provided that where the property comprises a family trade, the guardian has the power to transfer or pledge the property and credit of the firm for the ordinary purposes of that trade.

65. The natural guardian of a minor may enter into a contract or compromise on behalf of his ward and do all other acts which are reasonable and proper for the protection of his property and for his benefit.

Natural guardian may contract or compromise.

What acts bind minor.

66. The guardian may bind the minor in the following cases :—

- (1) By entering into a contract charging the minor's estate.
- (2) By acknowledging his debt before it is barred by time.

Personal contract by guardian.

67. A guardian cannot contract in the name of a ward, so as to impose on him a personal liability.

68. (1) A transfer made by the guardian may be avoided by the minor, if it is wholly or partially unsupported by necessity or not for the benefit of the estate.

Transfer by guardian when voidable

(2) Provided that in the latter case, the alienee is entitled to restitution of the money paid for such necessity or benefit.

(3) Provided further, that where the bulk of the consideration is supported by legal necessity, the court may, instead of setting aside the transfer, order payment to the transferor such consideration as is not supported by necessity or benefit.

Guardian must act as such.

69. A guardian cannot bind his ward by an act not purported to be done on his behalf.

Minor's privilege is personal.

70. A transaction entered into with a minor is only voidable at the option of the minor.

Minor's liability under decree.

71 (1) A minor is bound by the result of a suit to which he was a party, if he was properly represented therein.

(2) Provided that if any decree be passed on a compromise, such compromise must be sanctioned by the court.

(3) Provided further that no decree obtained by consent has any effect against the minor unless it was consented to by his natural or certificated guardians.

(4) But no decree so obtained has any effect against him if it was secured by the fraud or misconduct of such guardian.

Right to custody.
dianship.

72. A guardian of the minor's person has the right to the custody of his ward during the period of his guar-

CHAPTER VII.

LAW OF MAINTENANCE.

Personal obligation to maintain certain relations.

73. A person is personally bound to maintain the following persons :—

- (a) his minor sons, whether legitimate or illegitimate ;
- (b) his unmarried daughters ;
- (c) his wife so long as she is chaste and remains under his roof and protection ;
- (d) his aged father and mother.

Husband's conversion immaterial.

74. A wife who is entitled to maintenance does not forfeit her right by her husband's conversion to another faith.

75. No mistress of a Hindu has any right of maintenance unless she had been kept by him until his death, in which case she becomes entitled to maintenance out of the estate in the hands of his heirs, so long as she remains chaste.

76. (1) The manager of a joint Mitakshara family is bound to maintain all male members of the family, their wives and their children, and on the death of any of the male members, he is bound to maintain his widow and his children.

(2) The obligation is commensurate only with the possession of family property.

(3) The same principles apply to cases governed by the Dayabhag law

(4) The holder of an impartible estate is bound to maintain all those who are customarily entitled to maintenance.

77. Where a son or other heir is excluded from inheritance by reason of disability he is entitled to maintain himself and his family out of the property which he would have inherited but for his disability.

78. (1) The widow who does not succeed to the estate of her husband as his heir is entitled to maintenance out of her husband's separate property, or out of the property in which he was a co-parcener at the time of his death.

(2) Save and except as above, she has no absolute right of maintenance.

(3) Her right of maintenance is not forfeited by reason of her having lived apart from her husband in his life-time without any justifying cause.

(4) The widow does not forfeit her right of maintenance by reason of her living apart from her husband's relations unless she does so for immoral or improper purposes.

(5) Continued chastity is a condition precedent to the widow's right to maintenance. But she is allowed a *locus penitentie* so that if she reforms and leads a continent life, she becomes entitled at least to a starving maintenance.

(6) Maintenance is not a charge upon the estate, but may be so made by contract or a Court's decree.

79. The widow is as of right entitled to reside in the family dwelling house. This right cannot be defeated by a sale of the house to a purchaser with notice. Even in the case of a purchaser without notice she cannot be evicted unless she is provided with

another residence. But she has no such right where the sale is contracted by the husband or is for a debt binding upon her.

No forfeiture on loss of caste. **80.** Mere loss of caste does not deprive a person of his right to maintenance.

Amount of maintenance. **81.** (1) In fixing the amount of maintenance payable to a widow, regard must be had to the following facts :—

- (a) the income of the entire estate,
- (b) the position and status of the deceased husband,
- (c) the value of his estate,
- (d) the stridhan in her possession, and,
- (e) her reasonable wants.

(2) Provided that the amount of maintenance shall in no case exceed the annual profits of the share to which the husband would have been entitled to on partition, if living.

When widow disentitled to maintenance. **82.** The widow has no right of maintenance in the following cases :—

(1) If she has sufficient stridhan or other means of support from the income of which she can maintain herself.

(2) If she had once received sufficient allotment for her maintenance which she has since dissipated.

(3) If she is re-married.

(4) If she is leading an unchaste life.

(5) If she is living apart from her husband's family for immoral or improper reasons.

83. The amount of maintenance is liable to variation with the change of circumstances of the family and the value of the estate.

Priority of debts **84.** Debts due from the family take precedence over the widow's claim for maintenance.

Maintenance a personal right. **85.** (1) The right to maintenance is a personal right and cannot be transferred.

(2) A right to maintenance cannot be attached in execution of a decree though arrears of maintenance may be so attached or transferred.

Illustration.

A, a Hindu transfers Sultanpur to his sister-in-law B, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property and agrees with her that, if she is dispossessed of Sultanpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith, without notice of the agreement. B is dispossessed of Sultanpur. She has no claim on the village transferred to C.

86. A person cannot defeat the right of his wife or widow to maintenance by disposing of his entire property by gift or devise and if he does so, she has the right to enforce her claim against the donee or devisee as the case may be.

Maintenance cannot be defeated by gift or devise

87. The right to maintenance or residence may be enforced, against all transferees and devisees of the property liable to the claim, except a *bona fide* transferee for valuable consideration paid for a purpose binding upon the claimant, or one without notice of the right.

88. Maintenance is payable out of and may be charged on any property of the person personally liable for it; otherwise it may be charged on and is payable out of the joint family or inherited property according to the nature of the right.

89. A person entitled to maintenance may sue for a declaration of his right and combine therewith a claim for a past and future maintenance with or without a charge to be created on any property liable to the claim.

90. (1) A suit by the widow for maintenance must be brought against all or any of the heirs in possession of the estate liable to the claim.

(2) But if the suit be to declare or enforce a charge, then all persons interested in the estate must be joined.

91. (1) A decree for maintenance must fix dates for the periodical payments of the amounts decreed, giving directions for its execution and where it is charged on any estate, it must contain directions for a sale of the property charged, so far as may be in accordance with O. 34 Rr. 4 and 5 of the Code of Civil Procedure.

(2) A decree charging any property for maintenance may be executed in accordance with the law regulating the enforcement of a charge.

92. A suit for a declaration of a right of maintenance must be brought within 12 years from the time when the right is denied, and a suit for arrears within the same period from the time when the arrears are payable.

CHAPTER VIII.

THE JOINT FAMILY.

93. "Issue" of a person means and includes his son, son's son and son's son's son by legitimate descent, or valid adoption.

94. (1) Ancestral property means property which a person inherits from his father or father's father or father's father's father; and

(2) all property acquired out of the income of such property.

95. (1) The joint property of a joint family, comprises the following property namely:—

(a) Ancestral property inherited by a member of the family from a direct male ancestor not exceeding three degrees higher than himself.

(b) Acquisitions to the property made with the help of joint ancestral property.

(c) Property acquired by members of the joint family.

(d) Property acquired with the help of nucleus of ancestral property.

(e) Property separately acquired but thrown into the common stock.

(2) Such property may be called co-parcenary property.

(3) And members of the family possessing a share therein may be called co-parceners.

Self-acquired property defined.

96. (1) The following property constitutes the self-acquisition of a member of a joint family :—

(a) property acquired by inheritance from a lineal ancestor more than three degrees remote or from a collateral or from or through a female relation.

(b) property acquired by gift or devise.

(c) property acquired without detriment to the joint estate.

(d) property which is the gains of learning or science acquired without substantial help from the joint funds.

(e) property which by its nature or extent or the mode of its acquisition is incapable of joint ownership.

(2) Where ancestral property is blended with self-acquired property in such a manner that it is impossible to separate the two, the whole may be presumed to be self-acquired.

Illustrations.

(a) A a member of a co-parcenary receives the gift of a village from his father-in-law as his marriage dowry. The village is his self-acquisition.

(b) The father of a co-parcenary gives half of his self-acquired estate to his son A, and the other half to his daughter B, using appropriate words to convey an absolute estate. The estate is the self acquisition of A and the *stridhan* of B.

(c) A, a member of a co-parcenary, insured his life and purchased the insurance premium out of his salary. The insurance money is his self-acquisition.

(d) A who had received a general education out of the joint funds, acquires property out of his savings made in the practice of his business as vakil, contractor, or astrologer. The property is his self-acquisition.

(e) A purchased land at a court auction in execution of a decree for money of a co-parcenership. It is his self-acquisition, for under S. 66 (1) of the Civil Procedure Code, no evidence is admissible to show that the purchase was on account of the joint family.

(f) A member of a co-parcenary receives a grant of an impartible estate. The estate is his self-acquisition as by its nature it is incapable of joint ownership.

97. (1) The term “legal necessity” implies such pressing requirement of “Legal necessity” the family or of the estate which the law regards as sufficient justification for contracting a debt, or for the transfer of the joint estate.

(2) In particular and without prejudice to the generality of the foregoing principle, the following objects constitute such necessity :—

(1) Debt of the father.

(2) Payment of Government Revenue.

(3) Maintenance of co-parceners and of their wives and issue.

(4) Marriage expenses of co-parceners and of their daughters.

- (5) Performance of the customary family and funeral ceremonies.
- (6) Costs of litigation in recovering or preserving the estate.
- (7) Cost of defending a member of the joint family prosecuted for an offence.

98. The term "benefit" includes such protection or preservation or improvement of the family estate, or the maintenance, education, or advancement of its members, as may, due regard being had to all the circumstances, be considered reasonable and proper.

Benefit defined. **99.** A Hindu family is constituted of the following members, namely:—

- (1) Persons descended from a common ancestor and related to one another as sapindas.
- (2) Collateral relations descended from a common ancestor in the male lines.
- (3) Persons who are adopted into the family.
- (4) The mother, the wives and widows, of the male members, and unmarried daughters.

100. (1) A co-parcenary is a joint family comprising a common male ancestor with his lineal descendants in the male line not more than three degrees remote from him, or of the last holder of a share of his property.

Co-parcenary and coparcener defined. (2) A co-parcener is a male related not more than three degrees remote from a direct ancestor who owned an estate or was entitled to a share therein.

No co-parcenary by contract. **101.** The relation of co-parcenership arises by law. It cannot be created by contract.

Normal state of Hindu family **102.** (1) The normal state of a Hindu family is one of jointness in mess and estate.

(2) As such, it may be presumed that

- (a) Such family continues to remain joint until the contrary is shown.
- (b) Where property is shown to have been once joint family property it is presumed to remain joint until the contrary is shown.
- (c) All property acquired by or in the possession of a joint member is joint property.
- (d) Where there is a nucleus from which property may be acquired, any property acquired with its aid by a member is joint property.

(3) Provided that no presumption in the last case will arise where it is admitted or proved that there has been separation from the joint family.

Co-parceners' acquisition presumed joint. **103.** (1) All acquisitions made by the manager of a joint family in the name of any of its co-parceners will be presumed to be made out of its fund and for its benefit.

(2) But no such presumption arises where the property stands in the name of a non-co-parcener.

Co parcenary manager. **104.** Except in the case of a trading family, the father and in his absence, the next senior male relation, is the rightful manager of a co-parcenary.

Manager's powers.**105.** The manager possesses the following powers :—

(1) He is entitled to be in physical possession of the joint property and perform in respect of it, all acts of management.

(2) As such, he may realize and expend its income at his discretion.

(3) He is not accountable to his co-parceners for his management, nor liable to them for his negligence or mis-management.

(4) He is, however, liable if he has fraudulently mis-appropriated any of its income, or spent it on purposes not binding on the family.

(5) He is entitled to contract debts and alienate or charge the joint estate for family necessity, or for its benefit.

(6) He is entitled to represent the co-parcenary in all suits and proceedings affecting its interests, to make contracts, give discharge, pass receipts, acknowledge debts, refer to arbitration, compromise any claim or dispute affecting it, and generally to do all such acts as he may consider necessary or to its benefit.

(7) He is the *de facto* guardian of the co-parcenary interest of minor members of the family.

Powers of other managers**106.** The provisions relating to the power of the manager of a joint family generally apply to—

(1) The manager whether subject to the Mitakshara or the Dayabhog law.

(2) The widow managing property inherited by her minor son.

(3) Guardian of a minor's estate.

(4) Manager of a religious endowment.

(5) Manager of the estate of a lunatic.

107. (1) The manager is entitled to make such gifts or presents either **Gift by the manager.** to the members of the family or strangers as are usual or customary.

(2) And the father and in his absence, the mother, has in this respect even a larger discretion, being entitled to make it at any time to a reasonable extent.

108. (1) The father is entitled to alienate the co-parcenary property **Father's additional powers.** to satisfy his antecedent debt contracted by him for a purpose which is neither illegal nor immoral.

(2) In other respects, he possesses the same power as any other manager.

Explanation.—A debt may be imprudent or improper without being illegal or immoral.

109. Subject to any law for the time being in force and the nature of the estate, every co-parcener other than the father and the **Co-parcener's rights inter se.** manager possesses the following rights in respect of the co-parcenary property :—

(1) He is, subject to the provisions hereinafter contained, entitled to call for the partition of his share.

(2) Until partition he is entitled to joint possession.

(3) He may restrain any illegal or improper acts of the other co-parceners in respect of the co-parcenary.

(4) He and his wife and children are entitled to be maintained out of the co-parcenary funds.

(5) He may alien his share with the consent of his co-parceners or for family necessity but in Bengal he may do so as of right, and he may do the same in Bombay and Madras for a valuable consideration.

(6) His interest is liable to variation with the members of the co-parcenary, but in Bengal it is fixed.

(7) Except in a suit for partition a co-parcener cannot recover the profits of his share or separate possession of any portion of the joint property.

(8) His power over his separate and self-acquired property is in no way affected by his interest in the co-parcenary.

Manager's fraud **110.** No manager can exercise his power in fraud of the co-parceners.

Trading family **111.** (1) An ancestral family trade devolves upon members of a joint undivided family and the partnership is not dissolved by the death of any of the members, nor can any one of the partners when severing his connection with the business, ask for an account of past profits and losses.

(2) Where a joint Hindu family carries on an ancestral trade, it becomes a trading family and is then governed—not by the rules of co-parcenership—but by the co-parcenary rules as modified by the incidents and exigencies of trade.

(3) In particular and without prejudice to the generality of the foregoing principle, the rules applicable to them are as follows :—

(1) Any member may be appointed the accredited manager and agent of the firm.

(2) Such manager or agent may carry on the trading business of the firm.

(3) And for that purpose, he may pledge the credit of the joint family.

(4) He is not accountable to them for past profits and losses.

(5) Whether major or minor, all members are equally liable to the extent of their shares for payment of such debts irrespective of whether they were incurred for necessity of the firm or whether the creditor had not inquired into the purpose and necessity of the loan.

(6) And even if the manager had incurred loans with intent to defraud the family.

(7) The manager may sue or be sued on behalf of the firm without being under the necessity of impleading its other members.

Explanation.—The rules hereinbefore stated are equally applicable whether the trading business be an ancient family business or one started by the joint family; or whether it be carried on by the family alone or in partnership with an outsider, provided that where the business is not ancestral the share of the minor co-parcener is not liable without reference to legal necessity or benefit of the family.

Exception.—But nothing hereinbefore contained applies to a trading partnership composed only of certain members of a joint family with or without outsiders.

CHAPTER IX.

DAYABHAG JOINT FAMILY.

Dayabhag family with father as head. **112.** In a family comprising the father and his sons and grandsons, the father is absolutely entitled to all property whether ancestral, or his self-acquired property.

113. Except where the father is alive, the Dayabhag joint family is Other Dayabhag families as regards its management and the rights of members, subject to the same rules as the Mitakshara family, except that :—

- (a) A co-parcener may alien his share by sale, mortgage, gift or devise ;
- (b) Women are not disqualified from becoming co-parceners.

CHAPTER X.

DEBTS.

114. A debt is a pecuniary obligation arising out of a contract express or implied, or from a breach of civil duty.
Debt defined.

115. The husband and wife are not liable for the debts contracted by each other except in the following cases :—
Debts of husband and wife.

- (a) Where they were contracted by one as the agent of the other.
- (b) Where they were contracted for household necessities.

116. (1) A co-parcener is liable to pay his own debts personally and out of his separate property or co-parcenary interest so long as he is alive but on his death it cannot be recovered out of his co-parcenary interest unless it was attached during his life-time.
Liability for personal debts.

(2) Provided that where the debt was due from the father and is not illegal or immoral, both his son and grandson are, on his death, liable to pay it to the extent of the assets inherited by them from the father or the grandfather.

Son's liability limited to inherited assets. **117.** (1) The son's liability to pay his father's debt is limited to the assets inherited by him from his father.

- (2) His separate property is exempt from payment of such debt.
- (3) The son in this section includes a grandson.

Not liable after separation. **118.** The son is not liable to pay his father's debts incurred after his separation.

When the son is personally liable. **119.** (1) The father's debt is not a charge upon the inheritance.

(2) But as heir, the son becomes personally liable to pay the father's debt if he has alienated the inherited property, otherwise than in due course of administration, with the intention of avoiding his liability.

Heir's liability to pay predecessor's debts. **120.** (1) The debts of a person must be paid by the heir who inherits his estate to the extent of his inheritance.

(2) The heir to an impartible estate is liable to pay all the lawful debts of his predecessor out of the estate.

(3) The widow is liable to pay her husband's debts which she may pay even though barred by time.

(4) The rule stated in clause (1) applies equally to donees to the extent provided in Ss. 127 and 128 of the Transfer of Property Act

121. Where the manager or the heir contracts a debt or transfers property for consideration, alleging the existence of justifying necessity or benefit, it will as between the creditor or the transferee on the one part, and the manager or the heir and other persons (if any) affected by the debt or the transfer, on the other part, be deemed to have existed, if the creditor or transferee as the case may be, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

The same rule extends to the father contracting a debt or transferring property in consideration of an antecedent debt.

Illustrations.

(a) *A*, the manager, represents to *B* that the joint family property was proclaimed for sale for non-payment of revenue. *B* enquires and learns that it is so. He advances money to *A*. *B* sues *A* and the other members for his debt when it appeared that *A* had deceived *B*. *B*, however, shows that he had made independent enquiries which corroborated *A*'s statement. *B* may recover on the basis of *A*'s statement which binds the family.

(b) *A*, Hindu widow, whose husband has left collateral heirs alleging that the property held by her as such is insufficient for her maintenance, agrees for purposes neither religious nor charitable, to sell a field, part of such property, to *B*. *B* satisfies himself by reasonable enquiry that the income of the property is insufficient for *A*'s maintenance and that the sale of the field is necessary, and, acting in good faith, buys the field from *A*. As between *B* on the one part, and *A* and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

122. Where a transfer by the manager is found to be void its effect upon the interest of the transferor is subject to the following rules.—

(1) Where the transfer was voluntarily made by the manager subject to the Mitakshara law as applied in Behar, United Provinces, Oudh and the Punjab, it is wholly void, subject, however to such restitution and compensation to the transferee as the requirements of equity may demand.

(2) Where, however, in the provinces last mentioned, the transfer is involuntary, and in all other provinces whether it is voluntary or otherwise, on the transfer being found void against the joint family, the transferee is entitled to obtain his transferor's interest therein.

(3) Without prejudice to the generality of the rule stated in clause 1, due regard will be had to the following facts:—

(1) The representation made by the transferor as to the necessity of the sale.

(2) The enquiries, if any, made by the purchaser into the same.

(3) Improvements made by him.

(4) The fact that unconditional rescission of the sale will benefit the transferor.

(5) Collusion between the transferor and his co-parceners.

(6) Acquiescence and delay in challenging the sale.

Creditor's suit against the son.

123. (1) The unsecured creditor suing the son for the recovery of his father's debt must prove the debt.

(2) It is then upon the son to prove that the debt was non-existent, or that it was illegal or immoral, of which fact the creditor had notice.

(3) The creditor may then show that he had made the loan after reasonable inquiry being satisfied that it was required for a purpose neither illegal nor immoral.

124. In a suit on a mortgage executed by the father or manager against the other co-parceners it lies on the mortgagee to prove that the debt was contracted for a purpose binding upon them.

125. In a suit instituted to enforce a mortgage executed by the manager, the other members are proper parties, but their non-joinder of parties. joinder does not exempt them from liability, if it appears that they were sufficiently represented by the manager.

126. (1) It lies on the co-parcener suing for recovery of joint property sold by the manager to prove that the sale was one which by its nature and purpose, did not bind his interest, and that the purchaser had notice of it.

(2) In a sale made in execution of a decree obtained against the manager the court will presume that the purchaser, if a stranger to the suit, had no notice of anything that does not appear in the decree

127. (1) A decree passed against the manager in respect of a liability incurred within the scope of his authority is enforceable against the manager. against the other members of the joint family though they may not have been parties to the suit.

(2) But in such case the other members are not precluded from contesting the authority of the manager or the binding nature of the debt.

(3) Where a decree directs sale of the right, title and interest of the defendant in any property, the question whether the sale so made suffices to pass the entire estate of which the defendant was the manager or only his own interest, is one of construction and intention to be gathered from the proceedings and other circumstances of the case.

(4) In particular and without prejudice to the generality of the foregoing principle, in determining this question the following facts are material :—

(a) The nature of the contract, if any.

(b) The character of the debt.

(c) The capacity in which the defendant is sued.

(d) The intention of the court.

(e) The price paid by the purchaser.

(f) And any fact which shows what interest he intended to purchase.

Illustrations.

A decree is passed against the father *A*, for sale of his interest in mouza *B*, which is his family property. *C* objects to the sale of anything beyond *A*'s interest therein on the ground that the decree was obtained for *A*'s immoral debt. He fails to prove it. The sale conveys the entirety of *B*.

Rule of Damdupat. **128.** (1) No debtor is liable to pay at the same time interest which exceeds the principal.

(2) This rule extends only to the areas within the original jurisdiction of the Calcutta High Court, the Presidency of Bombay, Sindh and Berar.

(3) It does not apply to the following cases:—

(a) Where the debtor is not a Hindu.

(b) Where the creditor is liable to account.

(c) Where the debtor agrees to the capitalization of interest.

(d) Where the debt merges in a decree.

CHAPTER XI.

PARTITION.

Partition defined. **129.** (1) Partition is the intentional severance of co-parcenary interests by members of a joint family.

(2) An unequivocal expression of an intention to separate such interest may amount to partition.

(3) Partition may be effected by the definition of rights or by the division of property by metes and bounds.

Family arrangement. **130.** (1) A family arrangement is a settlement by members of the joint family as to the mode of enjoyment of their property.

(2) It differs from partition in that it is an agreement for separate enjoyment by members without determination of their rights.

When a family arrangement may be set aside. **131.** (1) A family arrangement cannot be set aside except for coercion, fraud, misrepresentation or undue influence.

(2) In particular and without prejudice to the generality of the foregoing rule it may not be set aside upon any of the following grounds:—

(a) That there was no consideration to support it.

(b) That it has transferred property to a person without any right.

(c) That it was unfair and such as no court would support upon its merits.

(d) That it was made by mistake of either party.

(3) It may, however, be set aside on the ground that it was not *bona fide* or that there was no dispute.

(4) But before giving weight to these considerations due regard must be had to the time during which the arrangement has been acted upon or has remained unchallenged.

Illustrations.

(a) *A* disputes *B*'s legitimacy. He afterwards compromises his claim with *B* on the basis of legitimacy. *A* cannot afterwards repudiate the compromise on proof of *B*'s illegitimacy.

(b) *A*, *B*, and *C* are three brothers. On a distribution of the family estate *C* receives an allotment of land in lieu of maintenance. He did not claim nor was allowed any share. *C* is bound by the arrangement.

(c) *A* transfers to *B* property by mistake. *B* accepts innocently. The transfer is valid.

(d) *A* and *B* partitioned their property in mutual ignorance of their respective legal rights. The partition is binding.

132. A family arrangement binds both the parties
Whom it binds. and their legal representatives.

133. No writing is required to effect partition, but if it is reduced to writing, which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immoveable property, it must be stamped and registered.

Form.

Illustrations.

(a) *A* and *B* divide their property in 1918. Next year *A* desiring to mortgage his share to *C*, *C* demands evidence of his separation. *A* and *B* reduce it to writing. The writing though it relates to immoveable property over Rs. 100 in value, is not compulsorily registrable because it is a written memorandum of a past partition.

(b) *A* and *B* having a valuable estate agree to divide it by exchanging lists of the property which falls to the share of each party. The lists require registration if they were intended to evidence partition.

(c) *A* and *B* appoint an arbitrator who delivers an award detailing the division of property. *A* and *B* both sign it in token of their acceptance. The award is converted into a partition deed and must be registered if it affects land over Rs. 100 in value.

134. The following persons are entitled to claim
Persons entitled to partition. partition of joint property :—

(1) Adult co-parceners not disqualified for inheritance.

(2) Minor co-parcener, if the partition of his share would advance or protect his interest.

(3) A co-parcener's transferee acquiring a partible interest in the joint property.

135. (1) A co-widow is entitled to the partition of
Co-widow's right to partition. her life-interest in her husband's estate.

(2) But such partition is not absolute and does not in the absence of an express agreement to the contrary, determine her co-parcenary right of survivorship.

Female shares on partition. **136.** Subject to any local law or usage to the contrary, the following female relations are each entitled to a share on partition :—

(1) On a partition between the father and his sons, or between the sons, their mother and their grandmother are entitled to a share which with the stridhan received from their husband or the father-in-law must equal a son's share.

(2) And unmarried daughters are entitled to a quarter of a son's share.

(3) On a partition between her sons or grandsons a widow is entitled to a share equal to that of a son's son.

Exception.—The wife or the widow in Southern India is allotted no share.

When partition refused. **137.** A person otherwise entitled to partition may be disqualified from enforcing it for any of the following reasons :—

- (a) If he has entered into a valid agreement against it.
- (b) If the property is subject to a family arrangement.
- (c) If the parties have already become otherwise separate.
- (d) If he has relinquished his share in the joint property.

Partial Partition. **138.** (1) Partition may be general or partial.

(2) Partition is general where all members join in partitioning their joint property.

(3) It is partial when some of them separate, leaving the rest joint ; or where all divide only some of their joint property.

(4) Partial partition cannot be made otherwise than by the agreement of parties, except where it is otherwise indispensable or would be equitable or convenient to the parties without prejudice to the rights of the co-parcenary.

(5) Without prejudice to the generality of the foregoing general rule such partition may be permitted in the following cases :—

- (i) Where partial partition is permitted by any other law.
- (ii) Where different portions of the family property are situate in different districts.
- (iii) Where the portion excluded is impartible.
- (iv) Where the portion excluded has already been partitioned or is the subject of a family arrangement.
- (v) Where the portion excluded is not in the possession of co-parceners
- (vi) Where the portion excluded is held jointly with a stranger who has no interest in the family partition.
- (vii) Where the defendant has no interest in the portion excluded.
- (viii) Where the property was omitted or excluded from a previous partition.

Illustrations.

(a) A, B, and C, are three joint brothers. A decides to separate. He cannot compel both B and C to separate from each other.

(b) A, B, and C, jointly own properties D and E. A claims partition of D. He cannot do so unless B and C agree.

Distribution of
shares.

139 In the absence of any contract to the contrary, co-parceners are entitled to shares at partition according to the following rules:—

(1) Each member is presumed to represent himself and his sons whose share is included in the share allotted to him.

(2) Brothers take equal shares; and the share of a brother who has died is represented by his sons, grandsons and great grandsons.

(3) As between different branches of a family shares are given *per stirpes* and as between the sons of the same father *per capita*.

But this rule does not apply to a partial partition.

140. (1) Separation may be proved by any declaration, act or conduct of a party entitled to partition showing an intention inconsistent with jointness.

(2) In particular and without prejudice to the generality of the foregoing rule separation may be presumed from the following facts:—

(a) Cesser of commensality and joint worship.

(b) Separate enjoyment of portions of the property, or of their income.

(c) Division of income.

(d) Agreement to divide the income in definite shares.

(e) Separate definement of shares.

(f) Separate transactions of the co-parceners between themselves with others.

(3) An act of a stranger such as attachment and sale of a co-parcenary interest does not suffice to effect separation.

(4) Conversion of any co-parcener to an alien faith such as Christianity or Mahomedanism has the effect of separating *ipso facto* the convert from the co-parcenary.

141. (1) Any person entitled to claim partition may sue for it.

(2) All persons entitled to a share therein are necessary parties.

(3) But a person in possession of any property under the joint family is not a necessary party.

Illustrations.

(a) *A, B and C are co-parceners. D is their mother who is also entitled to a share. A wishes to separate from B and C. He must sue both B and C impleading his mother D.*

(b) *A, B and C are co-parceners. D the wife of a predeceased brother is in possession of a village given to her out of the family estate in lieu of her maintenance. A sues for a general partition. D is not a necessary party as she has no right to a share.*

142. (1) Except as otherwise provided in this behalf, a suit for partition must relate to all property partible at the time and subject to the jurisdiction of the court in which the suit is instituted.

(2) Where however, such property is situate within the jurisdiction of more than one court suits may be brought in the several courts possessing the requisite jurisdiction.

143. (1) Every person entitled to a share may demand the partition of his share *in specie* and such partition may be made except in the circumstances next following :—

- Mode of partition.**
- (2) Where the thing is by its nature indivisible.
 - (3) Or where its partition *in specie* will destroy its intrinsic value or be otherwise inconvenient.
 - (4) Where its sale is demanded and justified by the Partition Act.

Mutual non liability to account **143a.** (1) Partition must be made only of such property as is available at the date of demand.

(2) In the absence of fraud or misappropriation the manager is not liable to account to the co-parceners for past transactions or to pay them mesne profits in respect of property in his possession.

(3) Provided that if partition is demanded and refused or a co-parcener is excluded from joint or separate possession to which he was entitled under an arrangement, he may be allowed mesne profits from the date of such refusal or exclusion.

(4) Nor are the other members entitled to the cost of improvement or are accountable for the profits made from property in their separate possession.

Provision for debts, maintenance and ceremonies.

144. In every partition provision should first be made for the payments of—

- (a) All family debts.
- (b) Maintenance of members entitled to it.
- (c) Upnayan and the marriage expenses of members payable by the joint family.
- (d) Such religious and other ceremonies for which the joint property is liable.

145. In a partition by metes and bounds the allotment of shares should be made as far as possible in conformity with the following rules :—

- Equities on distribution of shares.**
- (1) The separate possession of co-parceners of any property or which they have improved at their own expense should not be disturbed.
 - (2) The predilection of co-parceners to any property should be respected.
 - (3) Shares should be made as compact and convenient as the nature of the property would allow.
 - (4) The *bona fide* transferee of a defined portion of co-parcenary property should be protected in his right as far as possible.
 - (5) Inequalities of shares may be removed by payment of owelty.

Whom a partition binds.

146. A partition once made cannot be re-opened by the parties thereto except on the ground of error or fraud.

All property placed into hotchpot.

147. In a suit for a general partition every member of the co-parcenary is liable to bring into hotchpot all partible joint property.

Presumption of complete partition

148. Every partition is presumed to be complete both as to the person and the property.

Right of absent and disqualified co-parceners to re-partition.

149. The following persons are entitled to claim their share of the property even after its partition :—

(1) A co-parcener who being conceived at the date of partition is subsequently born.

(2) Any other son born after the partition if the father had reserved no share for himself.

(3) Absent co-parcener.

(4) Disqualified co-parcener on the removal of his disqualification for which he was excluded from partition.

(5) A son of such qualified co-parcener, born after the partition.

150. (1) A decree for partition may be preliminary or final.

(2) A preliminary decree must determine and declare the shares of the several parties and order the same to be partitioned by a Commissioner, or in the case of a revenue paying estate, by the Collector or his gazetted subordinate.

(3) The final decree must be confirmatory of the distribution made by the Commissioner or the Collector with such variations as the Court may be competent and think fit to make.

151. (1) A person may re-unite after partition with his father, brother or uncle.

(2) Provided that under the Mithila school any late co-parceners may re-unite.

152. (1) Subject to the following modifications, a re-united family is, for the purpose of succession, treated as a joint family.

(2) In a re-union between brothers of the whole blood and those of half-blood the former succeed to each other in preference to the latter.

(3) Where brothers of the whole blood remained separate and only those of the half-blood re-unite, brothers of the whole blood and those of the half-blood and their descendants inherit together.

(4) Where only some brothers of the half-blood re-unite, those not re-united do not inherit.

Burden of proving re-union.

153. He who relies upon re-union must prove it.

CHAPTER XII.

IMPARTIBLE ESTATES.

Incidents of impartible estate.

154. An impartible estate is subject to the following incidents :—

(1) The estate is held by one person at a time

(2) The holder for the time being is the sole owner of the estate which he may relinquish, transfer or devise in favour of any one at his discretion.

(3) Succession to the estate is ordinarily by primogeniture determined by the personal law adapted to the tenure.

(4) The successor takes the estate subject to the burdens created and the debts payable by his predecessor.

(5) The heir-apparent has merely a *spes successionis* which he cannot partition, transfer or devise, nor is it liable to be sold in execution of a decree against him.

(6) The sons and brothers of the holder are entitled to maintenance, the right of other relations to maintenance being determined by custom.

(7) The estate does not lose its incidents of impartibility by the mere discontinuance of service attaching thereto, or by the fact that it is regranted after confiscation.

Illustrations

(a) *A, B and C are three members of a joint family. An impartible estate is granted to A. It is A's separate property, though he remains joint with B and C as regards the other estate.*

(b) *In the last case A has sons D and E. On A's death his eldest son D will succeed to A's impartible estate and will be a co-parcener with B, C and E in the joint estate.*

(c) *A, B and C are members of a co-parcenary. A is the holder of an impartible estate. On his death the estate will devolve on his widow to the exclusion of B and C.*

(d) *A is the holder of an impartible estate. He becomes a rebel whereupon his estate is confiscated by Government who regrants it to his brother C. It remains an impartible estate in the hands of C.*

(e) *But if in the last case, the regrant is to "C and his heirs" then the estate loses its impartibility, for the "heir" of C cannot come in if the estate remain impartible.*

(f) *A obtains a service grant which is impartible. A discontinues the service. It does not affect the impartibility of his estate.*

155. (1) An impartible estate is not necessarily inalienable, though it may be so created by the terms of the grant, law, or custom.

(2) He who alleges its inalienability must prove it.

(3) Where an estate is alienable, the extent of its alienability must be determined by the law or custom which creates it.

156. (1) Property acquired by the holder of an impartible estate out of its income does not partake of its character but is his self-acquisition unless it is intentionally incorporated with it.

Acquisitions and accretions.

(2) An accretion so made to an impartible estate also becomes impartible.

Illustration.

A the holder of an impartible Raj acquires mouzas B, C, and D out of its income. B, C and D, are managed by the same staff and their collection papers kept with those of the Raj. This is insufficient to show A's intention to treat B, C and D as a part of his Raj.

Property is presumably partible.

157. (1) All property is presumably partible and alienable.

(2) Impartibility and inalienability are the incidents of an estate which must be pleaded and proved in each case,

CHAPTER XIII. SUCCESSION TO IMPARTIBLE ESTATE.

158. In the absence of any law or custom to the contrary, succession to an impartible estate is subject to the personal law of the holder adapted to the nature of the tenure to the following extent :—

- Succession to im-partible estate.**
- (1) Succession is subject to the rule of primogeniture.
 - (2) Where the holder is subject to the Mitakshara law, the heir is the eldest male issue of the deceased or failing him the eldest co-parcener.
 - (3) Where it passes by survivorship from one line of descent to another, it devolves not on the co-parcener nearest in blood but on the nearest co-parcener of the senior line.
 - (4) Females are presumably excluded from succession in favour of co-parceners if the estate is ancestral, but if it is a separate acquisition of the holder they are entitled to succeed.
 - (5) In a case subject to the Dayabhag school the heir is the eldest member of the class of persons who are the next heirs of the deceased.

Explanation.—In the absence of custom determining seniority according to the seniority of the mother, seniority in age amongst brothers alone determines the seniority, irrespective of the seniority of the mother.

Illustrations.

(NOTE.—In the following illustrations *A* must be understood to be the owner of an impartible estate).

- (a) *A* dies leaving his son *B* aged 10 and a brother *C* aged 30. *B* succeeds in preference to *C*.
- (b) *A* dies leaving his widow and a brother. The widow would succeed if the zamindari is in Bengal, otherwise it will go to the brother.
- (c) *A* dies leaving him surviving *B* an elder brother of the half blood, and *C* a younger brother of the whole blood. *B* succeeds in preference to *C* in the Mitakshara country, while *C* will succeed in Bengal.
- (d) *A* dies leaving two sons *B* aged 19 by his junior wife and *C* aged 10 by his senior wife. *B* succeeds.
- (e) *A* died leaving a grandson *B* aged 10 and a brother's son *C* aged 20. *B* succeeds.

CHAPTER XIV. TRANSFER OF PROPERTY.

Definition of property.

159. (1) Property is anything which may be the subject of ownership.

- (2) It may be moveable or immoveable.

Inalienable property.

160. Property of any kind may be transferred except as otherwise provided by any law for the time being in force and by the following clauses.—

- (a) The chance of obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature,

- (b) *Res extra commercium*.
- (c) Coparcenary interest except to the extent hereinbefore allowed.
- (d) Maintenance grant.
- (e) Personal grant.

Repugnant condition. **161.** Where an absolute estate is given by a transfer or devise with a condition superadded which restricts the grantee's legal power of transfer or mode of enjoyment, the condition is void.

(2) Such are the conditions against alienation and partition of the property or that the alienee should accumulate its income or submit to the control of certain trustees.

(3) But there is nothing illegal in the grantor stipulating that the grantee shall live in his house.

Illustrations.

(a) A devises his estate to B on condition that he does not alienate it. The devise is good but the condition against alienation is invalid and void.

(b) A devises his estate to B and C on condition that it shall not be partitioned between them. The devise will take effect without the condition which is void.

(c) A devises his estate to an idol on condition that after defraying the cost of its worship the surplus should maintain the family but that it shall not be liable for any debts. The devise operates as an onerous bequest in favour of the family but the condition as to its non-liability for debts is void.

(d) A bequeaths his estate to B but at the same time provides that C will manage it for B. B takes the estate without being obliged to have it managed by C.

Rule against perpetuity. **162.** A perpetuity cannot be created by transfer or devise, except for religious and charitable purposes.

163. A direction to accumulate income is valid if limited to the period during which the testator is entitled to direct and control the course of devolution of property.

164. The principle of election enacted in Chapter XXVII of the Succession Act, and S. 35 of the Transfer of Property Act applies to the transfers and bequests of Hindus.

Transfer or devise of self-acquired property. **165.** A person may transfer or devise his self-acquired property.

Power of the manager, trustee, guardian, shebait, female heir to transfer. **166.** (1) The manager, trustee, guardian, and the shebait are all entitled to transfer the property entrusted to their management for the sake of necessity or benefit of the estate or of the family members or the ward or the trust as the case may be.

(2) The father of a joint family may transfer its property for the same purpose or for the satisfaction of his own antecedent debts.

(3) The widow, and other female heirs possess similar powers of alienation for legal necessity or benefit of the estate.

CHAPTER XV.

TRUSTS AND BENAMI TRANSACTIONS.

Form of Trust. **167.** (1) No form is necessary to create a trust for religious or charitable purposes.

(2) But a secular trust cannot be created otherwise than as provided in Ss. 5 and 6 of the Trusts Act.

Trusts valid and void. **168.** A trust may be created for any lawful purpose, whether secular or religious.

Benami Transfer. **169.** (1) A person does not acquire any interest in property by merely lending his name to another.

(2) Where one person holds property for another, he will be deemed to hold it in trust for another.

Proof of benami. **170.** (1) There is no presumption in favour of *benami* and he who alleges that the apparent title is not the real title must allege and prove it.

(2) There is no presumption that a purchase made in the name of the child, wife or mistress is benami or by way of advancement, the question being one of intention which must be proved by the party asserting it.

CHAPTER XVI.

GIFTS AND GRANTS.

Who may make a gift. **171.** Any adult may make a gift of his property or any interest therein over which he possesses the power of disposal.

Illustration

A agreed by deed to pay to his sister and on her death to her daughter Rs. 10 per annum from his self-acquired estate. The deed creates a corrody or charge on the profits of his estate which binds it in the hands of A's widow.

Gift how made. **172.** A gift may be made in the form prescribed by S. 123 of the Transfer of Property Act.

Transfer in favour of unborn person. **173.** Subject to the provisions of Ss. 13, 14 and 20 of the Transfer of Property Act, 1882, a settlement, gift, or devise may be made in favour of a person not in existence at the date of the gift.

Gift or devise to unborn person. **174.** (1) A settlement, gift or devise to an unborn person may be made as provided by the Hindu Disposition of Property Act; or in the Madras Presidency, as provided in the Madras Hindu Transfers and Bequests Act.

2) Provided that no restriction contained in these Acts shall limit or affect a disposition of property for a religious or charitable endowment or for the benefit of the public, for the advancement of knowledge, commerce, health, safety or any other object beneficial to mankind.

Illustrations.

(a) *A* gifts his property to *B*, a living person, for his life, with remainder to *C* on his attaining his 18th year. The gift is valid.

(b) In the last case a son *D* is born to *C* before *C*'s estate is reduced to possession. *D* takes a vested interest in *C*'s estate on his birth.

(c) *A* creates a trust for the benefit of his daughters *B*, *C* and *D* with a direction that if any of them marry under age, her share shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. *B*, *C*, and *D* must be in existence at *A*'s decease and any portion of the estate which may eventually be settled as directed must vest not later than 18 years from the death of the daughter whose share it was. All these provisions are valid.

(d) *A* gifts his property to *B*, a living person for his life, with remainder to *C* on his attaining his 19th year. The validity of the gift depends upon whether the gift will or will not vest in *C* within *A*'s own life-time. If it does not, it is void being opposed to S. 14 of the Transfer of Property Act and S. 101 of the Succession Act.

Conditional gift or devise. **175.** (1) A gift or devise may be absolute or conditional.

(2) A conditional gift or devise takes effect upon the fulfilment of the condition, except in the following cases:—

- (a) Where the condition is a condition subsequent,
- (b) where it is illegal or immoral,
- (c) or is repugnant to the nature of the grant.

(3) A substantial fulfilment of the condition may be sufficient if its literal fulfilment is impossible or impracticable.

(4) A gift once completed cannot be revoked except on the ground which would suffice to cancel a contract.

CHAPTER XVII.

WILLS.

176. (1) Will is the expression of a person's wish with reference to his property which he desires to be carried into effect after his death.

"Will" and "Codicil" defined.

(2) Where the will is in writing, it may be modified by an instrument, made in relation thereto and explaining, altering or adding to its dispositions. This instrument is called a codicil. It is considered as forming an additional part of the will.

Who may make a will. **177.** (1) Any adult person may bequeath his estate by will.

(2) His power to bequeath an estate by will is co-extensive with his power over the estate in his life-time.

178. Except as otherwise provided by the Hindu Wills Act or any other law for the time being in force, a will may be oral or in writing and if in writing, it need not be registered.

Form of will.

179. (1) "Power" is a right which a person acquires over another, or over things not his own.

Power defined.

(2) The person who confers the power may be called the donor of the power, and the person upon whom it is conferred, the donee of the power.

(3) The exercise of power is discretionary with the donee.

180. (1) A will made in accordance with the Hindu Wills Act must be proved as therein required.

Proof of will.

(2) A will otherwise executed must be proved so as to show that it is a complete instrument and expresses the deliberate intentions of the testator.

(3) The words of an oral will must be proved with the utmost precision, with every circumstance of time and place.

181. (1) The maker of a will may revoke it at any time.

Revocation of will

(2) Subject to any law for the time being in force, such revocation may be oral though the will itself be in writing.

(3) The subsequent marriage of the testator, or the birth or adoption of a son, has not the effect of revocation; nor has the subsequent execution of another will necessarily that effect except so far as it is inconsistent with its terms.

Explanation.—A written will may be revoked by parol though the will itself is not destroyed.

Illustrations.

(a) A has made an unprivileged will. Afterwards A makes another unprivileged will which purports to revoke the first.

This is a revocation.

(b) A has made an unprivileged will. Afterwards A being minded to make a privileged will makes a privileged will which purports to revoke his unprivileged will.

This is a revocation.

182. (1) A will or any part thereof is void if it is brought about by coercion, fraud, undue influence, misrepresentation or by such importunity as deprives the maker of his free will.

Will when void.

(2) And if the maker of a will is induced by the same means to alter or revoke his will, or is prevented from altering it, it will have the same effect which the maker had intended.

Explanation.—The importunity, undue influence and misrepresentation under this section must be such as amounts to fraud or force destroying the free agency of the testator.

Illustrations.

(a) A threatens to shoot B, or to burn his house, or to cause him to be arrested on a false charge unless he makes a bequest in favour of C. B in consequence makes a bequest in favour of C. The bequest is void as induced by coercion.

(b) A falsely informs B that his son is dead and thereby induces B to bequeath his estate to A. The bequest is void.

(c) A being in so feeble a state of mind as to be unable to resist importunity is pressed by B to make a will of a certain property merely to purchase peace and in submission to B. The will is void.

(d) *A* wishes to revoke his will made in favour of *B*. *B* threatens to kill *A* if he revoked it. The will is void.

(e) *A* makes a will in favour of *B* on his death-bed. He is induced by importunities of *C* to alter it in favour of *C*. The alteration is void.

(f) *A* is induced by the adulation and flattery of *B* to make a bequest in his favour. The bequest is not rendered invalid by reason *B*'s adulation and flattery.

Burden of proof. 183. (1) The burden of proving a will lies upon the person who propounds it and not upon the person who impeaches it.

(2) Such proof must comprise not only proof of due execution, but also that the executant was of a sound disposing mind, though if nothing appears to the contrary, this may be presumed.

Explanation.—A person is said to possess a disposing mind if he possesses sufficient understanding and reason to be able to form an intelligent judgment as to the disposal of his property.

CHAPTER XVIII.

CONSTRUCTION OF GIFTS AND WILLS.

Construction of Indian deeds. 184. Deeds must be literally construed giving effect to the grantor's intention ascertainable, as far as possible, without the aid of any artificial rules of construction.

Grant or bequest conveys grantor's entire interest. 185. A grant or bequest *prima facie* conveys the entire interest of the grantor unless it is limited expressly or by necessary implication.

Illustration.

A the proprietor of the estate *B* bequeaths it to *C* with the words "I give *B* to *C*." The *quantum* of interest bequeathed to *C* is that possessed by *A* at the moment of the grant.

Gift to female relation 186. In the absence of an express direction to the contrary a gift or devise to a female relation is presumed to convey only a life-estate.

187. A gift or devise creating an estate of inheritance inconsistent with the general law of inheritance is void to that extent.

Illustrations.

(a) *A* devises his estate to *B* and his eldest nephew and the eldest nephew of such eldest nephew and so forth for ever. *B* takes the life-estate but the rest of the devise is invalid for it creates a line of succession inconsistent with the general law.

(b) *A* bequeathes his partible estate to *B* on his death to his eldest son and thenceforward to the eldest son of each holder. The bequest is invalid for it alters the course of ordinary succession to one by primogeniture a new form of estate which cannot be created by will.

188. Where an interest is gifted or devised to a class some of which are incapable of taking by reason of any rule of law or otherwise, the gift or devise will take effect as to the rest.

Gift to a class.

Construction of will. **189.** (1) A will must be construed according to its true intent and purpose giving effect to the actual intention of the testator unaided by any rules of technical construction.

(2) Without prejudice to the generality of the foregoing principle its construction is subject to the rules set out in Ss. 61-77, 82, 83, 85, **88**—98 of the Succession Act, and principally those set out in the next following Ss. 190-200.

190. Extrinsic evidence is inadmissible to alter, detract from, or add to the terms of a will, though it may remove a latent ambiguity arising from words equally descriptive of two or more subjects or objects of gift.

Extrinsic evidence when admissible.

191. The surrounding circumstances under which the deviser made his will, as the state of his property, of his family and the like is admissible.

Construction of will. **192.** A will must be liberally and not too literally construed.

193. Where a specific charitable bequest fails for uncertainty in the object and there is no direction, upon its failure that the bequest should go to the residue, the court will apply the gift *cypres*, that is to say, to other objects as nearly as may be of a similar character.

Cypres doctrine.

Construction of words **194.** All words must be construed in their ordinary popular sense, unless there is a clear indication that they are used in another sense.

Construction of technical terms. **195.** Technical terms must be presumed to bear their legal sense, unless the context clearly indicates the contrary.

Construction must be uniform. **196.** The construction must be uniform, the same words being construed in the same sense, unless a contrary intention appear by the context, or unless the words be applied to a different subject.

All words must be considered. **197.** Of two modes, preference must be given to the construction which gives effect to every expression.

Construction must be benignant. **198.** That construction must be preferred which will prevent a total intestacy.

Subsequent events ignored. **199.** The construction is not to be varied by events subsequent to the execution.

Effect of operative part. **200.** Where a testator's intention cannot operate to its full extent, it shall take effect as far as possible.

Devise to female. **201.** A devise to a female presumably conveys a limited estate though an absolute estate may be conveyed by apt words conferring the power of alienation.

Probate. **202.** (1) Persons subject to the Hindu Wills Act shall, and others may, obtain probate of a will, whether oral or in writing.

(2) The grant of probate is subject to the provisions of the Probate and Administration Act.

CHAPTER XIX.

RELIGIOUS AND CHARITABLE ENDOWMENTS.

Endowment defined. **203.** (1) Endowment is the dedication of property by gift or devise to religious or charitable uses.

(2) An endowment must be certain both as to the subject and the object.

(3) A dedication of property to an endowment may be partial or complete.

(4) It is partial when there is merely a charge or trust created.

(5) It is complete when the property is dedicated absolutely and no person has any beneficial interest therein.

*Explanation :—*An endowment is distinguishable from a bequest in that its operation is perpetual and the object general.

Religious and charitable endowments defined. **204.** (1) A religious endowment is one which has for its object the establishment, maintenance or worship, of an idol or deity, or any object or purpose subservient to religion.

(2) A charitable endowment is one which has for its object the benefit of the public or of mankind.

(3) No endowment is valid except when made in accordance with the following rules stated in this chapter.

Public and private religious endowment **205.** (1) A religious endowment may be public or private.

(2) A public religious endowment is dedication of property for the use or benefit of the public.

(3) A private religious endowment is dedication of property for the worship of a family God in which the public are not interested.

Form of endowment. **206.** (1) An endowment may be created by an oral dedication by a person divesting himself of specific property for religious or charitable uses.

(2) But where an endowment is created by a will subject to the Hindu Wills Act such will must be in writing and attested as therein provided.

*Explanation (1)—*No express words are necessary to create an endowment.

*Explanation (2)—*A trust is not necessary to create an endowment; all that is necessary is a complete dedication.

Subject of endowment. **207.** Any property which a person can dispose of by gift or will may form the subject of an endowment.

Operation of endowment **208.** An endowment takes effect from the moment of dedication.

209. In the absence of anything appearing to the contrary the beneficial interest in dedicated property vests in the religious or charitable object, while the trustee or manager is entitled to its possession and management.

(2) Debutter property is property dedicated to a god or gods. The trustee or manager of such property is called a *Sarbarakar*, *Shebait*, *Dharm Karta* or *Mahant*.

Endowment in favour of non-existing object.

210. An endowment may be created in favour of an idol, muth or other object, not in existence at the death of the testator.

211. An endowment is illusory and void where it is a device to preserve the estate to the family of endower or defraud, defeat or delay his other claimants or creditors.

Illusory and void endowment.

Illustrations.

(a) A being indebted dedicates his property to his family god, retaining all control. The endowment is void.

(b) A endows a god to spite his son. The endowment is void.

212. No endowment can be made the purpose or object of which is illegal.

Invalid endowment.

Illustrations.

A Hindu endows a mosque. The endowment is invalid.

Endowment when irrevocable.

213. (1) An endowment once completed is both irrevocable and unalterable.

(2) Provided that an endowment in favour of a family idol may be revoked, altered or transferred by the consensus of the family.

Who may be appointed manager.

214. (1) No person is disqualified by reason of his caste or sex to be appointed a manager.

(2) A female is not disqualified by reason of her sex from holding a priestly office, though she might not be competent to perform its spiritual duties.

Appointment and succession of manager.

215. (1) The founder is entitled to provide for the management of any endowment created by him.

(2) He may nominate a shebait and provide for his successor and effect will be given to his wishes if not inconsistent with the general law.

(3) Where the founder makes an endowment without providing for its management, the right of management vests in the founder and his heirs.

(4) The right of the founder to provide for the management devolves upon his heirs on his death.

(5) The court may appoint a manager in the last resort.

216. (1) In the absence of any custom or usage to the contrary, the rights and liabilities of the manager of an endowment are those of the guardian of a minor's estate, that is to say, he may incur debts, charge or alienate the corpus of an endowment if justified by legal necessity or its benefit.

(2) Property belonging to an endowment may be attached and sold in execution of a decree obtained against the manager as such.

(3) Any person interested in the endowment may sue to set aside an improper alienation of its property by the manager.

(4) Any person suing to enforce an alienation made by the manager must prove both its *factum* and necessity.

Explanation 1.—The term “manager” in clause (1) includes any person actually filling that character whatever may be the defect in his appointment.

Explanation 2.—The term “manager” in clause (1) means and includes a shebait or the trustee or mahant of a muth, and any other person by whatever name called provided he discharges the duties of manager.

Manager's office **217.** The office of manager is inalienable except to
how far transferable the following extent :—

(1) The manager of a private endowment may transfer it with the consent of the founder or his whole family.

(2) In other cases, it may be relinquished if allowed by the terms of the foundation or usage, in favour of a member of the family or failing such member, a stranger eligible to discharge the duties of the office.

(3) Provided that notwithstanding any usage, no transfer can be made for the pecuniary benefit of the transferor or which is incompatible with the interest of the trust.

Illustration.

A bequeathes his shebaitship to A. The bequest is invalid for since A's office only enures for his life, there remains nothing on A's death which he could bequeath.

Manager's duties. **218** The manager of an endowment is charged
with the following duties :—

(1) He must carry out the founder's directions, if any, as to the management of the property.

(2) He must maintain the customary usages of the institution.

(3) He is entitled to the possession of all endowed property; and as shebait, he is entitled to the custody of the idol and all its paraphernalia.

(4) He must maintain accounts of the trust and is entitled to an indemnity for anything of his own spent thereon.

(5) He may retain or apply the surplus as may be usual or customary.

(6) He may improve the property out of its surplus.

(7) He is accountable to the founder and in his absence, his legal representatives.

(8) He is entitled to sue and is liable to be sued on behalf of the trust.

Removal of manager. **219.** A manager may be removed from his office for
such misconduct as is incompatible with the interest of
the endowment.

220. (1) Beneficiaries are persons for whose spiritual or temporal advancement an endowment is created. It includes an idol to whom property is dedicated.

Rights and duties of beneficiaries. (2) The beneficiaries are interested in seeing that the endowment is maintained and its legitimate functions preserved.

(3) Worshippers and devotees of an idol and other sacred object or institution are entitled to resort to it at all reasonable hours for the purpose of worship and devotion.

(4) The manager is bound to afford them reasonable facilities for that purpose.

(5) Beneficiaries are jointly and severally, as the case may be, entitled to participate in the benefit of the endowment created and maintained for their benefit.

Exception.—Nothing contained in this section applies to private endowments.

Statutory control. **221.** Public, religious and charitable endowments are subject to the following statutory control.

(1) Any two or more persons interested therein may maintain a suit in accordance with the procedure prescribed in S. 92 of the Code of Civil Procedure, 1908.

(2) And any person so interested may sue alone in a case arising under the Religious Endowments Act, 1863.

(3) Such suit does not affect a suit otherwise maintainable.

CHAPTER XX.

SUCCESSION BY SURVIVORSHIP.

222. (1) When a person dies possessed of co-parcenary property his interest therein passes to the other co-parceners then living by right of survivorship, who take it in their own right and not in trust for the heirs of the deceased.

Provided that where he has left sons or grandsons in the male line, his interest survives to them to the exclusion of his other co-parceners.

(3) Where such property passes to the surviving co-parceners, they take *per stirpes* and not *per capita*.

(4) Nothing herein applies to members of a Dayabhag family who take by inheritance and not by survivorship.

When co-parcenary property devolves on heirs. **223.** Where the deceased was at his death the sole co-parcener, his estate devolves upon his heirs in the same manner as if it were his separate property.

CHAPTER. XXI.

MITAKSHARA INHERITANCE.

224. (1) "Propositus" means the person from whom a descent is traced.

(2) "Last full owner" means one who held the property absolutely at the time of his death.

225. "Sapindas" means blood-relations of the propositus to the seventh degree on the father's side and fifth on the side of the mother reckoned from and inclusive of the deceased. Sapindas may be Gotraj or Bhinna gotras.

226. "Gotraj Sapindas" are all agnates, that is, persons connected "Gotraj Sapinda" with the propositus by an unbroken line of male descent, defined. up to the sixth degree. They are also called "Saman Gotra Sapindas."

227. "Bhinna Gotraj Sapindas" are those related to the propositus Bandhus defined. through a female. They are also known as bandhus.

(2) Bandhus may be

(a) "Atma Bandhus," that is, relations of one's own.

(b) "Pitri Bandhus" that is, the father's Bandhus.

(c) "Matri Bandhus" that is, the mother's Bandhus.

228. "Samanodakas" are relations from the seventh degree to the "Samanodak" defined. fourteenth degree and even beyond, if agnatic relationship be clearly established.

229. (1) "Stridhan," unless otherwise stated, means the woman's "Stridhan" defined. property acquired by her otherwise than by inheritance or partition over which she possesses full power of disposal.

(2) But in Bombay property inherited by a woman otherwise than from her husband becomes her stridhan.

(3) For the purpose of succession, the Mayukh sub-divides stridhan into (a) technical or proper and (b) non-technical or improper.

(4) Technical or proper stridhan. means and includes (a) a woman's marriage presents and (b) gifts and bequests made to her by the blood relations.

(5) Non-technical or improper stridham means and includes (a) properties inherited by her from a male, (b) or received from a stranger, (c) her own earnings and (d) her maintenance grant.

The Mayukh lays down special rules of succession to stridhan technical and non-technical.

230. No person can alter the course of inheritance prescribed by law except to the extent permitted by it.
Course of inheritance cannot be altered.

Illustrations

(a) The course of inheritance may be altered by will, since laws allows it.

(b) Heirs may waive or vary their shares, since law allows it.

231. The heir succeeds in his own right and not in Hier's right personal. a right derived from another.

(2) On a property descending to a male heir, he becomes a fresh stock of descent and the property passes to his own heir and not to the heir of any previous owner.

(3) But where property descends to a female heir, her heirs are those of the full owner except in Bombay where the female heir becomes a fresh stock of descent.

Illustrations.

(a) *A* and *B* are father and son, *B* predeceased *A* leaving him surviving his daughter *C*, On *A*'s death *C* does not inherit though her father *B*, would have if he were then alive

(b) *A* has two sons *B* and *C*, *B* predeceased leaving his widow *D*. On *A*'s death *C* inherits the whole estate. *D* takes nothing though her husband would have taken a moiety if he were alive at *A*'s death.

232. On the death of the owner the estate vests immediately in the heir then living.

(1) The inheritance cannot be held in abeyance except when the heir is in the womb.

233. On the vesting of the inheritance, the heir becomes entitled to all property which was vested in the deceased in title or in possession, though its enjoyment by the deceased may have been postponed.

234. An estate once vested cannot be divested except in the following cases.

Divesting of inheritance.

- (a) Where the estate has vested in the widow, upon whose adoption of a son her own estate is divested.
- (b) by the posthumous son of a father who, if born when the inheritance, opened, would have had a preferential claim to the estate.

235. The right of a person to succeed to another is a mere contingency which cannot be transferred or divided or be the subject of a valid contract.

Spes successionis.

Rights of women.

236. Women are excluded from inheritance unless their claim is supported by special texts or local usage.

Disqualified heirs.

237. (1) The following defects disqualify an heir from inheritance.

- (a) Congenital blindness, deafness and dumbness.
- (b) Congenital want of any limb or organ.
- (c) Lunacy and idiocy though not congenital or incurable.
- (d) Sanious or ulcerous leprosy.
- (e) Impotency or other incurable disease.
- (f) Unchastity in a female heir.

(2) No one is entitled to succeed to the property of a person to whose murder he has been an accessory.

(3) A widow re-marrying under the Hindu Widow's Remarriage Act 1856 forfeits her right to the estate of her husband and his lineal descendants.

Succession on exclusion of disqualified heir.

238. When an heir is disqualified, the next heir of the deceased succeeds but the disqualified heir is entitled to maintenance for himself and his family.

CHAPTER XXII.

ORDER OF THE MITAKSHARA INHERITANCE TO MALES.

239. (1) Sapindas are of two classes : (a) Gotraj and (b) Bandhus.

Classification of Sapindas.

(2) Gotraj comprise Gotraj Sapinda and Samanodaks who are the preferential heirs, failing whom the succession devolves on the Bandhus.

(3) Among the Gotraj Sapindas the nearest Sapinda succeeds provided the deceased and his heir were related to each other as Sapindas and provided further that the Sapinda who was joint with the deceased is preferred to other Sapindas of the same class, except in the case of brothers and sons of brothers among whom no distinction is made between persons of the whole blood and those of the half blood.

Explanation.—Legitimate sons by different mothers succeed equally to the property of their father.

Exception.—The rule as to propinquity stated in clause 3 does not apply to the issue of the owner as defined in S. 50 who inherit by representation.

240. The heirs of a deceased person are the following, who, subject to the other provisions hereinafter contained in this behalf, succeed in the order given below:—

Order of succession
of heirs.

- (1) Gotraj Sapindas.
- (2) Samanodaks.
- (3) Bandhus.
- (4) Spiritual Preceptor.
- (5) Pupil.
- (6) Fellow Student.
- (7) The Crown.

241. The issue of the deceased inherit in accordance with the following rules:—

Right of issue

(1) When there are more than one son, whether by the same or different mothers, they take equal shares.

(2) Sons who were joint with their father at the time of his decease inherit to the exclusion of those who were separate.

(3) Grandsons of a predeceased son inherit in the right of their father taking per stirpes and not per capita.

(4) An adopted son of the deceased inherits the whole estate. But where the deceased has left an *auras* son him surviving, the adopted son takes one-fifth of the share of an *auras* son as provided in S. 50 (4).

(5) The illegitimate son of a twice born does not inherit to his putative father. But the son of a Shudra inherits to the same extent as a legitimate son provided that he was born of a continuous concubine intercourse with whom was neither incestuous nor adulterous. Provided further, that where a Shudra father has sons both legitimate and illegitimate, the latter takes half the share of a legitimate son in default of whom he inherits the whole; but he has otherwise no right to collateral succession. He shares equally with the widow and the daughter's son.

Succession of illegitimate son.

242. The order of succession amongst Samanodaks is subject to the following rules:

Order of Succession
amongst Samanodaks.

- (1) The nearer line excludes the line more remote; and
- (2) a nearer kinsman excludes a remoter kinsman in the same line.

Order of succession amongst Bandhus. **243.** The order of succession among Bandhus is subject to the following rules :—

(1) The deceased owner and the bandhu claiming the heritable right must be Sapindas of each other either through themselves or through their mother and father.

(2) Of Bandhus of the same class where both are expressly mentioned in the Mitakshara the order of preference is according to the order in which they are mentioned therein.

(3) Of Bandhus of different classes Atma Bandhus succeed first, secondly Pitri Bandhus and lastly Matri Bandhus.

(4) Bandhus in a nearer line exclude the line more remote and a nearer Bandhu excludes a remoter Bandhu in the same line.

Explanation to clauses (2) and (3).

Bandhus are said to belong to the same class when they are all Atma Bandhus, Pitri Bandhus or Matri Bandhus.

244. In Bombay, Berar and Sindh subject to the Mayukh, the wives of Gotraj Sapindus are themselves treated as such and take their husband's places in the line of heirs subject to the two following rules.—

(1) They come in only after all the Gotraj Sapindas in the line to which their husbands belonged are exhausted.

(2) A widow of a gotraj sapinda cannot inherit until after the sister.

(3) As such, the following other females are recognized as heirs.—

(4) Sister, whether of the whole or half blood.

(5) Widows of predeceased Sapindas and Samanodaks.

(6) Son's widow.

(7) Step-mother.

(8) Father's widow.

(9) Brother's widow.

(10) Brother's son's widow.

(11) Paternal uncle's widow and the widows of the paternal first cousins.

(12) Daughter's descendants and collaterals within 5 degrees such as

(a) The son's daughter,

(b) The daughter's daughter,

(c) Brother's daughter,

(d) Sister's daughter,

who all inherit after the nine *bandhus* expressly enumerated in the Mitakshara.

(13) Father's sister who comes in after all the Gotraj Sapindas but before the Bandhus.

Madras Female heirs.

245. In the Madras Presidency the following females are recognized as heritable bandhus,

(1) Sister

(2) Half sister.

- (3) Son's daughter.
- (4) Daughter's daughter.
- (5) Brother's daughter.
- (6) Such female Bandhus rank after all male bandhus.

246. The heir of a hermit (Vanprasth) is a spiritual brother or associate
 Hermit's heir. in holiness, of an ascetic (*Sanyasi* or *Yati*) a virtuous
 pupil, and that of a professed student (*Brahmachari*)
 his religious preceptor. In default of these heirs any one associated in holi-
 ness may inherit.

CHAPTER XXIII.

THE DAYABHAG SUCCESSION.

247. In this chapter unless there is anything repugnant in the subject or
 Sapinda. context *Sapinda* means a Sapinda as defined in S. 224
 but not more than 3 degrees removed and includes cognate
 Sapindas within the limit.

248. "Sakulya" is a male agnate relation of the propositus in the
 "Sakulya" defined. Dayabhag law, four to six degrees remote from him.

249. All property owned by person whether joint or separate passes on
 Heritable property his death by succession.

250. The heirs of a deceased owner are in their
 Principle governing succession. order the following :—

- (1) Sapindas.
- (2) Sakulyas.
- (3) Samanodaks.
- (4) Bandhus other than those taking as Sapindas.
- (5) The preceptor.
- (6) A Pupil.
- (7) A Fellow student.
- (8) The king.

Order of Succession among Sapindas, etc. **251.** The order of succession among Sapindas, Sakul-
 yas and Samanodaks is governed by the following rules:—

(1) Except in the cases stated below, those who offer pindas to the
 deceased are preferred to those who offer them to any of his ancestors.

(2) And those who offer them to the deceased are preferred to those
 who accept them from the deceased.

(3) A person who offers pindas to a near ancestor is preferred to one
 offering pindas to an ancestor more remote irrespective of the number of pindas
 offered by each of them.

(4) Those who offer oblations to both the paternal and maternal ancestors
 are preferred to those who only offer to the paternal ancestors.

(5) Those who are competent to offer pindas to the paternal ancestors of
 the propositus are preferred to those who are competent to offer them only to
 their maternal ancestors irrespective of the number of pindas offered.

(6) Agnatic Sapindas in any line are always preferred to the cognate Sapindas of the same line.

(7) Between an agnate Sapinda and a cognate Sapinda of equal degree of propinquity, the former is preferred to the latter even though he offers more pindas in which the deceased would participate.

(8) Subject to the above, those who offer a larger number of pindas of a particular description are preferred to those who offer a less number of pindas.

(9) And where the number of such pindas is equal, those that offer to nearer ancestors are preferred to those offering to more distant ones.

Exception to Clause (1):—Nothing contained in clause (1) affects the priority of the sons, grandsons and daughter's sons of the propositus.

CHAPTER XXIV.

WOMAN'S ESTATE.

Restriction on woman's estate **252.** Except as otherwise provided, the rights of a woman in her property acquired by partition or inheritance, are limited as follows:—

(1) The estate is liable to be divested upon the subsequent birth or adoption of a son or upon her re-marriage but not for unchastity.

(2) She is not entitled to alienate the corpus except for legal necessity or benefit, as hereinafter provided but she is entitled to appropriate all its income and accumulations which she may dispose of at her discretion.

(3) On her death her estate devolves on the next heir of the last male owner,

Exception 1.—Under the Mayukh law females who belong to the family of the propositus by birth take an absolute interest while those who come into it by marriage take only a limited estate.

Exception 2:—A Jain widow has absolute power of disposal over the self-acquired property of her husband inherited by her.

Exception 3:—Nothing in this section applies to an estate acquired by a woman by deed or devise which may confer on her an absolute estate.

Illustrations.

(a) A inherits an impartible estate from her husband. She takes a limited estate.

(b) A, the mother, succeeds as heir to her son. A takes only a limited estate.

(c) A, the daughter, inherits her father's estate. A's estate is limited.

(d) A, a sister, inherits her brother's estate in Bombay. A takes an absolute estate though elsewhere her estate would be limited.

Estate of Joint heirs. **253.** (1) Under the Mitakshara two or more joint female heirs take as joint tenants with the right of survivorship *inter se*.

(2) But those subject to the Mayukh and Dayabagh laws take as tenants-in-common.

(3) Any alienation by the former must be made either jointly by all or with their express or implied consent.

(4) But an alienation by the latter may be made by any of the co-heiresses to the extent of her share.

Accretions.

254. (1) Any accretion made by an heiress partakes of the nature of the estate to which it is added.

(2) The question whether any property is an accretion to the parent estate is one of intention to augment it by treating it as a part thereof.

(3) But in the absence of anything appearing to the contrary, any purchase made out of income of an estate may be presumed to be an accretion thereto.

Illustrations.

(a) A female heiress receives the income of her husband's estate from the executor of his will who holds the estate in trust for her and his other heirs. A purchases property out of the income so received and devises it to her own relation. A is entitled to do so since having no estate in possession there is no question of accretion.

(b) A receives an estate by way of maintenance out of the profits of which she purchases a village B. B is A's stridhan at her absolute disposal.

(c) A devises an estate to his widow B for life. Out of the profits of this estate, B purchases a property C. C is her stridhan at her absolute disposal.

Testamentary incapacity

255. A woman has no power (even with the consent of reversioners) to dispose of by will either of her limited estate or its accumulations.

Incidents of a woman's estate

256. Except as otherwise provided by any law for the time being in force, the incidents of a woman's inherited estate are as follows:—

(1) She is entitled to absolute possession of the estate which vests in her by right of inheritance.

(2) She is entitled to its beneficial enjoyment.

(3) She may grant leases and do other acts in the ordinary course of management.

(4) She may transfer all or any portion of the estate for her life or until her estate is determined earlier, as by her re-marriage.

(5) Her interest therein may be seized and sold in execution of a decree against her.

When heiress ward of Court.

257. Where the Court of Wards or any other guardian is in possession of a woman's estate its power of alienation is equally subject to the provisions of S. 258.

Valid alienation of the estate.

258. (1) A woman may alienate her estate so as to bind the reversioners for legal necessity or for its benefit.

(2) In particular, and without prejudice to the generality of the foregoing principle such alienation may be made for any of the purposes or objects stated in the next following clauses:

(3) For performance of Shradh of the last full owner and of his ancestors which he was bound to perform when living.

(4) For the performance of such other religious ceremonies as constitute a spiritual necessity of the last full owner, provided that the immoveable property alienated is in every case reasonable and of moderate extent.

(5) For the payment of the debts of the last full owner even though barred by time.

(6) The payment of Government Revenue and all other public charges accruing due in respect thereof and any arrears of rent in default of payment of which the property may be summarily sold.

(7) Cost of obtaining letters of administration or a succession certificate of the property of the last full owner.

(8) Costs of litigation necessary for preserving and defending the estate.

(9) Costs of its preservation and repairs.

(10) Maintenance of herself and those whom the last full owner was bound to maintain.

(11) Marriage of female relations of the last full owner whom he was bound to marry such as his sister, daughter, son's and grandson's daughter, and the like

(12) Customary ceremonial gifts to a reasonable extent on the occasion of marriage of such relations.

(13) Customary small gifts on other ceremonial occasions.

Legal necessity S. 96.

Benefit S. 97.

Surrender of woman's estate.

259. (1) The heiress may surrender her entire interest to the next reversioner, or to any one or more of such reversioners with the consent of the rest, provided that where the next reversioner is a female it may be surrendered to the male reversioner next in order with her consent.

(2) Such surrender does not affect the validity of her prior alienations.

260. (1) An alienation for value or otherwise supported by legal necessity of any property made by the heiress with the consent of the next male reversioner will be presumed to be valid and supported by legal necessity.

(2) But where the alienation relates to her entire interest in the estate and is consented to by all her next reversioners it will be conclusive against the actual reversioners when the succession opens.

Explanation :—(1) Such consent may be express or implied and may be given contemporaneously with or subsequently to the transaction.

(2) No consent is valid

(a) if it is given without full knowledge of the nature and effect of the transaction

(b) if it is given or obtained collusively or fraudulently with intent to defeat the claims of a future reversioner ;

(c) or if it is not given in good faith with intent to confirm the transaction.

CHAPTER XXV.

REVERSIONERS AND THEIR RIGHTS.

— — —

261. (1) So long as the estate is vested in the heiress the interest of her Reversioner's interest. reversioners to succeed to it is a mere *spes successionis* and is incapable of being the subject of any contract, surrender or disposal.

(2) One reversioner does not derive his title from another but all derive their title equally from the last full owner.

No declaration by reversioner of his rights. **262.** A reversioner cannot bring a suit merely to obtain a declaration of his reversionary rights.

Prevention of waste, improper act and alienation. **263.** (1) Subject to the provisions of the next section, the reversioner is entitled to restrain the heiress or her alienee from committing waste or otherwise endangering the reversion.

(2) And he may restrain her by an injunction from making an improper alienation and obtain a declaration that any alienation made by her would be voidable by him on her death.

(3) He may obtain a declaration that an alleged adoption prejudicing his reversion is invalid or never in fact took place.

(4) He may oppose the grant of probate to the limited owner if prejudicial to the reversion.

264. (1) Such suit must be brought in the first instance by the presumptive reversioner, but if owing to his minority, collusion or consent, ratification, waiver of his right as reversioner, estoppel or limitation, he is unable or unwilling without sufficient cause to sue, then it may be brought by the reversioner next to him in succession but in that case the court may join the presumptive reversioner as a party to the suit.

(2) A suit instituted by the presumptive reversioner may on his death, or otherwise on proof of laches or collusion with the heiress whose acts are impugned, be continued by the next presumable reversioner.

(3) Where the immediate reversioner is a female the nearest male reversioner may maintain such suit without having to show any of the causes mentioned in clause (1).

(4) Any adjudication made in such suit is *res judicata* as against the heir when the reversion opens.

265. Where an alienation made by the heiress is found to be only partially supported by legal necessity or benefit binding on the reversion, it may, except as otherwise provided, be set aside or upheld in accordance with the following rules:—

(1) Where it is mainly supported by legal necessity but only an inconsiderable part is not so supported, the alienation will not be set aside but the alienee will be bound to make good the amount not supported by legal necessity.

(2) Where the alienation is not mainly supported by legal necessity, the alienation will be set aside on the reversioner refunding to the alienee the consideration he had paid for legal necessity.

(3) Provided that no person not a *bona fide* alienee for valuable consideration and without notice can claim such equity to compensation.

266. (1) In a suit between the reversioner and the heiress's alienee for possession of property comprised in her estate, it lies on the latter to prove that the former is bound by the transfer to him as supported by legal necessity.

Burden of proof.

(2) In a suit between a pardanashin heiress and her transferees, it lies on the transferee to prove not only that the deed was executed by, but was explained to and really understood by the former who had executed it by the free and independent exercise of her will.

267. A suit to avoid an alienation may be brought by the presumptive reversioner within 12 years and by a presumable reversioner within six years from the date thereof.

Improper alienation voidable.

268. An alienation by the heiress in excess of her powers is not void but is voidable at the election of the reversioner.

Succession of reversioners.

269. (1) On the death of the heiress her limited estate devolves on her next reversioner then alive.

(2) Reversioners take *per capita*.

(3) Where the next reversioner disclaims the estate it devolves on the reversioner next to him in succession.

Explanation.—The term “death” in clause (1) includes civil death as by re-marriage or abandonment of worldly affairs which determines the estate.

Reversioner's rights on succession.

270. On the estate vesting in the reversioner he acquires the following rights:—

(1) He is entitled to possession of the estate together with all its accumulations, accretions and incidents as on the death of the heiress.

(2) He is entitled to dispute all unauthorised acts of the female heir.

(3) He is entitled to represent the estate and as such may continue the suit instituted by or against the heiress.

(4) He may execute all decrees obtained by her as representing the estate as he is liable to satisfy all such decrees obtained against her.

His liabilities.

271. (1) On succession, the reversioner becomes subject to the following liabilities:—

(1) He is bound by all alienations made by the heiress supported by legal necessity or benefit of the estate.

(2) He is liable to pay for the reasonable expenses of her Shradh in proportion to the estate which he has inherited.

(3) He must pay all her debts incurred for necessity or for the benefit of the estate although not charged on the inheritance.

272. Reversioners are not bound to pay the debts of the heiress other than her trade debts incurred in respect of a family business or those not supported by legal necessity or benefit.

273 The reversioner is bound to pay for the tortious acts of the heiress committed for the benefit of the estate.

274. The reversioners are bound by a decree passed against the heiress personally as representing the estate, unless it is shown that it was a decree obtained by collusion or fraud, or that there had not been a fair trial of the rights in the suit.

Decree against the heiress

Explanation.—1. The decree in this section includes all proceedings consequent upon such decree including a sale in execution thereof.

Explanation.—2. A decree passed against the heiress on a matter personal to her is not a decree passed against her as representing the estate.

Explanation.—3. A decree otherwise valid is not rendered invalid merely by reason of the fact that it had been obtained by consent or compromise.

Illustrations.

(a) A, a widow sues B for a declaration of the invalidity of his adoption. Her suit is dismissed on the ground that B's adoption was valid. On A's death her daughter sues B for possession of the estate on the ground that B's adoption is invalid. The question is *res judicata*.

(b) A widow sues B for a declaration of the invalidity of B's adoption. Afterwards A compromises her claim with B and suffers a decree declaring B's adoption valid. On A's death her daughter C sues B for possession of the estate alleging the invalidity of B's adoption. The question whether the matter as to B's adoption is *res judicata* depends upon whether the decree in the previous suit had been obtained after a fair contest.

(c) A the mother of the last owner obtains a decree for maintenance against his widow B. In execution she attaches and brings to sale the right, title and interest of B. The seller takes only the widow's estate as the decree was a personal decree against B.

(d) A the creditor of the last owner sues and obtains a decree against the latter's widow B in execution of which he sells the right, title and interest of B. The sale passes the entire estate and not merely B's life estate.

275 The reversioner is entitled to sue for possession of immoveable property to which he becomes entitled on the death of a female owner at any time within 12 years from her death as provided in Art. 141 of the Limitation Act; or in case of its forfeiture, within the same period calculated from when the forfeiture is incurred as provided in Art 143 of the Limitation Act.

(2) Where however the property to be recovered is moveable he must sue within six years from the same event under Art. 120 of the Limitation Act.

(3) Provided that where the heiress had at any time set up an adverse title against the reversioner his claim will be barred by her adverse possession for 12 years.

CHAPTER XXVI.

STRIDHAN.

276. (1) Stridhan means woman's property over which she possesses the power of full disposal and which on her death devolves upon her own heirs.

Stridhan defined.

(2) It includes property into which it is converted by sale exchange or otherwise.

Illustrations.

(a) A possesses two properties B and C as her stridhan. She makes a gift of B to D and devises C to E. Both the gift and the devise are valid as the properties being A's stridhan, she possessed the absolute power of disposal over them.

(b) A inherits the property B from her husband. She accumulates its income which she bequeathes to C by will. The bequest is void as though A possessed the absolute power of disposal over B's income it was not her stridhan. She could not therefore bequeath it.

What property is **277.** The following property constitutes a woman's stridhan. stridhan :—

(1) Property inherited by female heirs born in the family and subject to Mayukh.

(2) Property acquired by grant, gift, or devise from a relation or a stranger which confers an absolute power of disposal.

(3) Property given for the purpose, or in lieu of maintenance, not being property allotted on partition to a wife or widow.

(4) Accretions to and purchases made out of such property.

(5) Property acquired by adverse possession.

(6) Property acquired by self exertion.

(7) Wedding gift and more particularly the following :—

(i) *Yautak* including

(a) *Adhyagnik Stridhan*—gifts made before the nuptial fire, i.e., at the actual marriage ceremony, and

(b) *Adhyavahnik Stridhan*—gifts received at the time of the marriage procession.

(ii) *Sulk*—or gratuity.

(8) *Adhivednik*—or the compensation given by the husband to his wife on his marrying another wife.

(9) *Anwadeyik*—or gifts made after marriage by her relations or by her husband's relations.

278. A woman cannot alien or devise her stridhan other than *Saudayak* during coverture without her husband's consent.

279. On the death of a maiden, her Stridhan is inherited by her heirs in the following order :—

Succession to maiden's Stridhan.

(1) Uterine brothers.

(2) Mother.

(3) Father.

(4) The father's sapindas.

(5) The mother's sapindas.

(6) Her own sapindas.

Succession to Stridhan of woman with children.

280. Except as otherwise hereinafter provided, the Stridhan of a woman with children devolves on her following relations :—

- (1) Unmarried daughters.
- (2) Married daughter who is poor or childless.
- (3) Married daughter who is well to do whether she has children or not.
- (4) Daughter's daughter.
- (5) Daughter's son.
- (6) Son.
- (7) Son's son.
- (8) Husband.
- (9) Her nearest sapindas.

281. (1) The stridhan of an issueless woman devolves on her husband if she was married to him in the Brahm form which will be presumed, and failing him to his nearest sapindas in the order of their succession to him.

(2) But if she was married to him in the Asur form (or some other unapproved form) it devolves on her mother, then on her father, and then on the father's or mother's nearest sapinda in the order of their succession to them.

Devolution of Sulk. **282.** (1) Both under the Mitakshara and the Dayabhag Sulk goes first to the uterine brothers, then to the mother and in default of both, it goes to the heirs of the other Stridhan.

(2) Provided that in the Mithila Country it is first taken by the uterine brothers, then by the mother, and then by the father.

(3) And in Southern India the uterine brothers take in preference to the mother.

Devolution of certain other Stridhans. **283.** In the Mayukh and the Dravid country the following classes of Stridhan follow a special line of devolution:—

(1) *Yautak Stridhan* goes to the maiden daughters in the first instance.

(2) Anwadheyak, Adhivednik and Pritti Dutt stridhans are shared equally by (i) the sons and unmarried daughters (ii) by the sons and married daughters and failing them, it is inherited by the daughter's children and son's son.

Provided that in the case of Stridhan mentioned in the last clause, widowed daughters are excluded and the widows of Gotraj sapindas do not inherit any stridhan.

SPECIAL RULES OF DAYABHAG SUCCESSION.

Succession to Sulk and Anwadheya.

284. The heirs to the Sulk, Anwadheyak and gifts received during maidenhood of a woman subject to the Dayabhag law are in the first instance her—

- (1) brothers of the whole blood,
- (2) mother,
- (3) father,

(4) husband,

and it then follows the line of succession applicable to other stridhan.

Devolution of Stridhan under the Dayabhag law.

ing heirs :—

- (1) The son and unbetrothed daughter.
- (2) Married daughter having or who is likely to have a son.
- (3) Son's son.
- (4) Daughter's son.
- (5) Son's son's son.
- (6) The son of a rival wife.
- (7) Her son's son.
- (8) A barren daughter or sonless widowed daughter.
- (9) The parents.
- (10) Brother.
- (11) The husband.

Succession to child.

less woman.

285. Under the Dayabhag law stridhan other than Sulk, Ayautak and Pritti Dutt and other special classes of stridhan hereinafter provided for, devolves on the following heirs :—

286. Except the Sulk and Anwadheya Stridhans, the heirs to the stridhan of a childless woman are :—

(a) *If married in Brahm form.*—

- (1) Husband.
- (2) Brother.
- (3) Mother.
- (4) Father.

(b) *If married in Asur form.*—

- (1) Mother.
- (2) Father.
- (3) Brother.
- (4) Husband.

(c) *After whom in whatever form married, her heirs are*—

- (1) Husband's younger brother.
- (2) Son of husband's elder or younger brother.
- (3) Sister's son, including step sister's son.
- (4) Husband's sister's son.
- (5) Brother's son.
- (6) Daughter's husband.
- (7) Father-in-law.
- (8) Husband's elder brother.
- (9) Her father-in-law's great grandson in the male line.
- (10) The paternal grandfather of her husband or his issue.

(11). The paternal great grandfather of her husband or his issue of the husband in order of propinquity.

(12) The Sakulyas.

(13) The Samanodaks.

(14) Samanpravars.

(15) The Crown.

Heirs to property given by the father. **287.** The heirs to Stridhan given by the father are in the first instance.

(1) The full brother.

(2) The mother.

(3) The father.

(4) The husband.

Heirs to yautak. **288.** The Yautak is in the first instance taken by—

(1) Unbetrothed daughters

(2) Betrothed daughters

(3) Married daughters who have or are likely to have a son

(4) Barren and sonless widowed daughters

(5) The son

(6) Daughter's son.

(7) The son's son.

(8) The son's son's son.

(9) The son of a rival wife.

(10) Grandson of a rival wife

(11) Great grandson of a rival wife.

289. Persons disqualified from ordinary inheritance by reason of physical defects mentioned in S. 236 are equally incompetent to inherit to stridhan.
Disqualified heirs.

Illegitimacy no bar. **290.** (1) In the absence of legitimate issue, illegitimate issue inherit, daughters taking before sons

(2) Nothing in this section applies to a married woman.

THE HINDU CODE.

CHAPTER I.

OPERATION AND EXTENT OF THE HINDU CODE.

Short title. 1. (1) This code may be cited as the Hindu Code.

Local extent. (2) It extends to the whole of British India :

And except as provided by this code or by any other law or custom for the time being in force, the rules herein contained are applicable to all Hindus and such other persons as may have adopted them.

(3) The term "Hindu" in this connection includes not only those who are Hindu by religion but also those who are commonly known as such.

Meaning of 'Hindu'

Synopsis.

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| (1) <i>History of the early codes</i> (222). | (15) <i>Essence of Hinduism</i> (266-271). |
| (2) <i>History of Hinduism</i> (224-229). | (16) <i>Present day Hindus</i> (272-278). |
| (3) <i>History of the Hindu Code</i> (230). | (17) <i>Outcaste Hindus</i> (279). |
| (4) <i>Its Extent and operation</i> (231-236). | (18) <i>Caste Disabilities Removal Act</i> (280). |
| (5) <i>Sources of Hindu Law</i> (237-246). | (19) <i>Its scope</i> (281). |
| (6) <i>Custom</i> (247). | (20) <i>Illegitimate children of Hindus</i> (282). |
| (7) <i>Judicial decisions</i> (248-250). | (21) <i>Children of mixed alliances</i> (283-285). |
| (8) <i>Statutes</i> (251). | (22) <i>General rules deduced</i> (286). |
| (9) <i>Hindu conception of Immoveable Property</i> (252). | (23) <i>The four castes</i> (287, 288). |
| (10) <i>Procedure under Hindu Law</i> (253). | (24) <i>Caste Tests</i> (289). |
| (11) <i>Caste Autonomy</i> (254). | (25) <i>Kayasths</i> (290, 291). |
| (12) <i>Schools of Hindu Law</i> (255). | (26) <i>Lingayats</i> (292). |
| (13) <i>Rules of Interpretation</i> (259). | (27) <i>Sikhs</i> (293-295). |
| (14) <i>Who are the Hindus</i> (260-265). | (28) <i>Jains</i> (296, 297-331). |
| | (29) <i>Brahmos</i> (295, 298-299). |

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|---|---|
| (30) <i>Arya Samaj</i> (300). | (38) <i>Non-Hindu followers of Hindu Law</i> (316). |
| (31) <i>Kabir Panthis</i> (302). | (39) <i>Khojas</i> (317, 318). |
| (32) <i>Shivites-Vaishnavites</i> (303-307). | (40) <i>Kutchi Memons</i> (319). |
| (33) <i>Minor sects</i> (308, 309). | (41) <i>Sunni Borahs</i> (319). |
| (34) <i>Ascetics</i> (310). | (42) <i>Molasalam Girasias</i> (319). |
| (35) <i>Gossavis</i> (311-313). | (43) <i>Christian converts</i> (320-322). |
| (36) <i>Brahmacharis, Sadhus. Sanyasis</i> (314). | (44) <i>Conversion to Hinduism</i> (323-328). |
| (37) <i>Aboriginal Hindus</i> (315). | (45) <i>Buddhists</i> (329, 330). |

222. Analogous Law.—The Hindu Law as stated by the Smritikars has always been formulated in the form of codes. In later times similar attempts have been made under European direction of which a history will be found given in the General Introduction (§ 170). All these codes were, however, no more than select extracts from the sacred writings and shared their incompleteness. Jagannath's Digest of Hindu Law is an example. It merely set out selected *Sutras* from Manu, Yajnavalkya, Gautam and other ancient and medieval law givers to which were appended short explanatory notes. The growth of case law with its accumulated wealth of precedents has produced a vast body of detail which has not tended to the simplification of a subject which enters into the daily lives of the people. This work is the first attempt to reduce it to a system in the shape of a code which the legislature has left alone on account of its professed neutrality, only interfering on matters of detail whenever impelled to do so by public policy or public opinion, with the result that the Hindu Law of the present day has to be found, some of it enshrined in the sacred works written in a dead language, some of it in the statutes, much of it in cases, and not a little of it in the commentaries and customs of which a critical study involves time which every lawyer cannot afford, and even where time is of no consequence, the result attained does not give one an assurance of that measure of certainty which is the acknowledged justification of a code (§ 230).

223. This Code is an attempt in the direction of declaring the leading principles of Hindu Law. It is intended to be exhaustive of all principles which the legislature would have embodied in a code, if it were to make an authoritative declaration of the personal law of the Hindus, as the Courts are enjoined to administer on the subjects, upon which the statute has declared its neutrality.

224. Hinduism old and new.—The one question that often exercises the courts in this connection is whether a party belongs to a particular community, before it is entitled to be judged by its own personal law or customs. The question in the first place, depends upon whether he is a "Hindu." In the early days of British rule, the term was used in its largest sense, but it was soon discovered that the term "Hindu" was not an exact concept as defining any determinate body of people to whom that term was accurately applicable. For even within the class of people who were by religion Hindus, there were those who differed from each other in their tenets and conduct as far widely as polytheists and atheists,—those who revered cows and those who ate them, those who worshipped a god and those who reviled it, those who revered Brahmins and those who denounced them as unscrupulous charlatans. Various attempts have been made to define the term—some of these definitions were merely *obscurum ab obscurius*. Such, for instance, is the definition that Hin-

duism was "what the Hindus, or a major portion of them in a Hindu community do" (1) or that Hinduism is "the large residuum, that is not Sikh or Jain, or Buddhist, or professedly Animistic or included in one of the foreign religions, such as Islam, Judaism, Christianity or Hebraism." (2) As will be presently seen the highest court of appeal has held that both Sikhs and Jains are Hindus (§§ 295, 296).

226. Sir Alfred Lyall defined Hinduism as "the religion of all the people who accept the Brahmanic scriptures." (3) But this again is not a correct definition, for the Brahmos have been held to be Hindu though they do not answer the test. Sir. H. Risley commends this definition and quotes with approval Lyall, who, described Hinduism as "a tangled jungle of disorderly superstitions" and as "the collection of rites, worships, beliefs, traditions, and mythologies, that are sanctioned by the sacred books and ordinances of the Brahmins and are propagated by Brahmanic teaching" to which he adds, "The general accuracy of this newest definition, is beyond dispute." (4) But the definition, if it can be called a definition, is neither accurate nor even precise. Taken as a religion, Hinduism may be defined as the religion which postulates the existence of one God who manifests himself to the world in His incarnations and of a people who believe in His various incarnations. Hinduism is both esoteric and exoteric in its doctrine. The former though pantheistic in form is purely monotheistic in principle. The latter which is the popular Hinduism, while still retaining the same attribute, appeals to the popular imagination by the adoption of images which are the visible symbols of the Divine Spirit whose power and attributes they are intended to typify. This was admitted by Sir Alfred Lyall himself in his Rede Lecture delivered to the Cambridge University in 1892 (5) from which Sir Herbert Risley has made only a partial quotation in his book. What he then said was this: "The dominant idea of intellectual Hinduism, the belief of which overhangs all this jungle of superstitions, is the unity of Spirit under a plurality of forms." (6)

226. But this is not religion. It is philosophy, and Hinduism is now more a system than a religion. But its members while holding diverse views and practising contradictory rites still all agree in the following essential articles of faith which bind together Hindu society and distinguish their religion from all others:—(a)—That God is Spirit and permeates the universe. "He is one without a second" (b)—That He from time to time reveals Himself to the world by becoming incarnate in man. As such he has manifested himself in innumerable incarnations or *Avatars*. But his principal avatars are in the form of Vishnu, Krishn and Ramchand. (c)—The world is a *maya* or an illusion. It is an emanation from, God; but as the snail comes out of the shell and can withdraw itself at will from sight so the universe has come out from God and He can withdraw all into Himself. As such, all things are merely imaginary and he who practices meditation becomes conscious of its futility. (d)—Life is an evil because it is hide-bound. Its severance from body effects its release from pain. It should not, therefore, be nourished but starved and suffered till it obtains the welcome release from body. The religious development of India is

(1) G. P. Sen Introduction to the study of Hinduism, 1898 p. 9.

(2) Sir A. Barnes Census Report for India 1891, p. 158.

(3) Asiatic Studies, 1899, vol. 2, p. 283.

(4) People of India, 2nd Ed, p. 288.

(5) Published as Ch. V of his Asiatic Studies (2nd series), pp 287-323.

(6) *Ib.*, p. 318.

attached through the course of three thousand years to the word *Brahma*. This conception might be taken as the standard for estimating the progress of thought directed to divine things, as at every step taken by the latter it has gained a new form ; while at the same time it has always embraced in itself the highest spiritual acquisition of the nation. The original signification of the word *Brahma*, as we easily discover it in the Vedic hymns, is that of prayer ; not praise or thanksgiving, but that invocation which, with the force of the will directed to God, seeks to draw Him to itself, and to receive satisfaction from Him. From this oldest sense and form of *Brahma* was formed the masculine noun *Brahmin*, which was the designation of those who pronounced the prayers, or performed the sacred ceremonies and in, nearly all the passages of the *Rig Veda*, in which it was thought that this word must refer to the Brahminical caste, the more extended sense must be substituted for the other more limited one. From this sense of the word *brahma* nothing was more natural than to convert this offer of prayer into a particular description of the sacrificial priest : so soon as the ritual began to be fixed, the functions which before were united in a single person, who both prayed to the gods and sacrificed to them became separated, and a priesthood interposed itself between man and God " (1).

227. "All over India" writes Sir Herbert Risley "at the present moment tribes are gradually and insensibly being transformed into castes. The stages of this operation are in themselves difficult to trace. The main agency at work is fiction, which in this instance takes the form of the pretence that whatever usage prevails to-day did not come into existence yesterday, but has been so from the beginning of time." (2)

228. He then enumerates the several distinct processes, which he adds, proceed in different places and at different times. These may be summarized as follows:—The leading men of an aboriginal tribe having succeeded in life and secured land, first bethink themselves of improving their social position. The first thing they do is to enlist the services of a Brahmin priest who invents for them a pedigree, and discovers for them an ancient connection with an imaginary clan of the Rajput community. They purchase wives from needy Rajputs and in course of time establish a tangible connection with that race. He instances the case of the Nagbansi Rajputs of Chota Nagpur who are now acknowledged as Rajputs. (3) Sometimes a whole tribe of aborigines, or a large section of a tribe form themselves into a new caste of Hinduism. Such are the Rajbansis or Bhanga Kshatriy to which caste belong the great majority of the Kochh inhabitants of Jalpaiguri, Rangpur and a part of Dinajpur, all of whom claim descent from Raja Dasrath. (4) Some of them establish a distinct Hindu sect, such as the Vaishnavas, Lingayats, Ramayats or the like. (5) Whole tribes become gradually converted to Hinduism without, like the Rajbansis, abandoning their tribal designation. Such are the Bunij of western Bengal, who were originally of a pure Dravidian race but are now fully Hinduised, and speak Bengali instead of their original language which they have lost—other castes belonging to this group are the Ahir, Dom and Dosadh of the United Provinces and Behar ; the Gujar, Jat, Meo and Rajput of Rajputana and the Punjab ; the Koli, Mahar, and Maratha of Bombay ; the Bagde, Barri, Chandal (Namsudra), Kaibarta Pod, and Rajbansi Kochh of Bengal ; and in Madras, the Mala, Nair, Vellala and Paraiyan or Pariah, of whom the last retain tradi-

(1) Old Sanskrit Texts, Vol. 1. p. 289.

(2) People of India, (2nd Ed.) p. 72.

(3) *Ib* p. 72, 73 citing Dalton's Descript-

ive Ethnology of Bengal. 1872, p. 165 et seq.

(4) *Ib.*, p. 74.

(5) *Ib.*, p. 75.

tions of a time when they possessed an independent organization of their own and had not been relegated to a low place in the Hindu social system. (1)

229. The following remarks occur in the Census Report for Bengal: "At the present time two great influences are at work. The first is the contempt shown by the general body of Hindus for their aboriginal neighbours, and their refusal to have any dealings with them. They are spurned as unclean, and gradually come to share the feeling themselves and to take the superior Hindu at his own valuation. The other influence, paradoxical as it may seem, is the cajolery of certain classes of Brahmins. Degraded members of the priestly caste wander amongst them in search of a livelihood. They commence by reading some religious book, and so gradually acquire an influence which often ends in their obtaining the position of spiritual adviser to the rude inhabitants of the village they have settled upon. In the Orissa States and the Chittagong Hill Tracts, Vaishnava Bairagis, more often than Brahmins, act as missionaries of a debased form of Hinduism." (2)

230. History of the Hindu Code. The Hindu Dharma Shastras which embody the rules of law here codified are all in the form of codes. The laws of Rome which are the parent of all European jurisprudence are essentially codes so intended and constructed. The modern Continental and American law is mostly codified. So is the law of Japan. Various attempts have been made to codify the laws of England, but the attempts have so far failed. There is a tendency in the direction of the codification of Indian Law. The advantages of codification are its certainty, simplicity and uniformity—its sole disadvantage is stated to be its artificial rigidity. (3) The state of Hindu Law before and since the advent of British rule has been already considered. (§§42-194) The declared policy of Government to administer the Hindu Law as it finds it, does not preclude the possibility of its codification. This is an attempt in that direction.

231. Its extent.—The code is stated to extend only to British India because many of its rules are based upon decided cases which have no more than persuasive value in the native states. But in practice, it is apprehended, that its rules will be found generally applicable throughout India.

232. Its operation.—In 1772 the East India Company assumed the "Diwani" of Bengal, and Warren Hastings its Governor-General prepared and submitted a scheme for the better administration of justice to the inhabitants of Calcutta, which provided that "their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of gentus by the laws and usages of gentus; and where only one of the parties shall be a Mahomedan or gentu, by the laws and usages of the defendant." (4) This provision was afterwards adapted or incorporated into various legislative enactments the first of which was passed in 1780 (5) and declared that the Supreme Court of Bengal (6) in the exercise of its original juris-

(1) *Ib.* p. 76 To the same effect, Census of India, 1901, Vol. 1, 668, p. 880

(2) Cited in the Census of India, 1901, Vol. 1, 668

(3) See on this point the author's view set out at length in his General Introduc-

tion to the Law of Transfer §§ 42—45.

(4) Ilbert's Government of India (2nd Ed) 325.

(5) 21 Geo. iii C 70 S. 17.

(6) Established in 1772 Geo. iii C 68; See *Kahandas, In re* 5 B. 154 (165).

dition was to apply to Mahomedans and Hindus their personal law in matters relating to "Inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party", and this provision was a few years later (in 1796) extended to the original side of the Supreme Court of Bombay ⁽¹⁾ and Madras ⁽²⁾ and re-enacted in 1799. ⁽³⁾ The same provision was extended to the Mofussil Courts by local Regulations which were extended and modified according to local exigencies. ⁽⁴⁾

233. The same course was adopted as regards the mofussil courts subject to the Supreme Court in Bombay ⁽⁵⁾ and in its own charter dated 8th August 1823 the same provision was inserted. ⁽⁶⁾

234. These statutes were intended to provide against specific mischiefs which had arisen in the exercise of the Supreme Court's jurisdiction. Like the Bill of Rights and similar, statutes they are to be interpreted not as exhausting by enumeration the classes of rights which it specifically guards, but rather as thus recognizing the larger general principles on which these rights stand, by forbidding any such encroachments on them for the future, as actual experience, had in the past, shown to be possible. ⁽⁷⁾ So it was held that though the Bengal regulations provide in terms for the preservation of the Hindu and Mahomedan laws only as to some particular subjects, yet the courts have given to those laws a distinctly wider operation. The judges said, in fact, that the intention was to allow the population to retain their own laws and customs throughout the sphere of which particular portions only had been expressly indicated, so far, at least, as this retention was compatible with the public law involved in the sovereignty of the British Crown, and with the principles of natural justice brought as far as possible into harmonious working with the settled rules of personal law from which divergence was legally impossible. So, in the charter of the Supreme Court the specification of matters of succession and matters of contract as matters to be governed by native laws and usages, might be construed as an indication of a wider operation of those laws and usages intended to be secured by the statute. ⁽⁸⁾

235. The Presidency High Courts were constituted by the Letters Patent issued in 1865, S. 19 of which conserves the pre-existing law and equity, as if the letters patent had not been issued. The same provision was inserted in the Letters Patent issued in the following year, establishing the N. W. P. High Court.

236. Several Acts and Regulations have extended the same provision to the mofussil courts ⁽⁹⁾ which are to the following effect :—

97. (1) Where in any suit or other proceeding it is necessary for a civil court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Mahomedan law, in cases where the parties are Mahomedans, and the Hindu Law in case where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished.

(1) Established in 1823 by 4 Geo. IV C. Reg. X of 1800, Beng. Reg. XI of 1805 S. 86. 71 Ss 7, 17. (5) Bom. Reg. IV of 1827 S. 26.

(2) 37 Geo. iii C. 142 S. 13; now consolidated and re-enacted in 5 and 6 Geo. V. C. 5 S. 112 (The Government of India Act 1915)

(3) 39 and 40 Geo. iii C. 79 S. 5; See *Kahandas In re* 5 B. 154 (165, 166).

(4) Beng. Reg. XI of 1793 extended to Benares Beng. Reg. XLIV of 1795; Hindu law modified in certain districts by Beng.

(6) Cl. 29; See *Mithura v. Esu* 4 B. 545 (556)

(7) *Kahandas In re* 5 B. 154 (166).

(8) *Ib* pp. 166, 167.

(9) Civil Courts Act Bengal (VI of 1871) S. 24 repealed by the Bengal N.W. P. and Assam Civil Courts Act XII of 1887.

(2) In cases not provided for by sub-section (1) or by any other law for the time being in force, the court shall act according to justice, equity, and good conscience. (1)

A similar provision made by the Madras Regulation of 1802, (2) is reproduced in the Madras Civil Courts Act, (3) and in the Civil Courts Acts of the Punjab, (4) Oudh, (5) the Central Provinces, (6) and Burmah, (7) and in the Regulations applicable to Bombay, (8) Ajmere and Merwara, (9) and British Baluchistan. (10)

In Bombay the rules of Hindu Law have been modified by the Bombay Act VII of 1866 which relieves the second husband of a Hindu widow from the debts of her former husband (11) and limits the liability of the personal representatives of a deceased debtor only to the extent of his assets, (12) and otherwise limits the liability of a member of an undivided Hindu family for debts contracted before he was 21 years of age. (13)

237. Sources of Hindu Law.—The ultimate sources of Hindu Law go far beyond the sacred writings which are ordinarily held to embody it (§ 1-9). Its immediate sources are however the following :—

- (1) The Sruti (§ 44—51).
- (2) The Smritis (§§ 76—77).
- (3) Digest and commentaries (§ 77).
- (4) Custom (§ 192).
- (5) Legislative Enactments § 177—188).
- (6) Judicial decisions (§ 189).

238. A general view of the sources of Hindu Law has already been presented in the General Introduction (II, III). It will suffice here to state that the Shruti or Revelation is a term applied and confined to the Vedas which possess no legal value (§ 53). The Smritis or tradition, however, nominally constitute the chief source of Hindu Law. But as they constitute a record of about 2000 years, it is obvious that they must of necessity contain many contradictions due to the change of social conditions which cannot all be reconciled on the complaisant doctrine that all contradictions are equally good law (§ 146). The only rational rule to apply in such cases is that the later Smriti supersedes the earlier one.

239. The art of writing had not been discovered when the Aryan immigration to India first commenced. Consequently, the only possible record of the customs and usages of their forefathers was in their memory which again had limits. They therefore only memorized the *ipsissima verba* of their older traditions which, being sanctified by time, were necessarily regarded as more sacred. They constituted the Srutis or matter directly heard from the deity; while later traditions not so important and which even grew in bulk and number, were only memorized in substance and these became known as the Smritis. A list and description of these has already been given (§§ 76-77). Of them it may be generally stated that though they are in number numerous and are divided by long

(1) Bengal N. W. P. & Assam Civil Courts Act S. 87 (XII of 1887).

(2) Mad. Reg. II of 1802, S. 17.

(3) III of 1878 S. 16.

(4) Act IV of 1872 S. 5 as amended by Act XII of 1878.

(5) Act XVIII of 1876 S. 9 except the Shan States (XIII of 1868, S. 18).

(6) Act XX of 1875, S. 5.

(7) Act XIII of 1898 S. 13.

(8) Reg. IV of 1927 S. 26; Bombay Presidency Small Cause Courts Act 16(XV of 1882).

(9) Reg. III of 1877 S. 4.

(10) Reg. III of 1890 S. 89.

(11) Bom. Act VII of 1866, S. 4.

(12) *Ib.* Ss 1, 2.

(13) *Ib.* Ss. 5, 6.

stretches of time they are all based on the same model, contain many common verses, acknowledge the same authority and only differ on certain points of detail which reflect a change established in the social usages of the people.

240. Assuming the earliest Smṛiti to be that of Manu compiled somewhere about 600 to 800 B. C. and the latest, the Institutes of Yajñavalkya and that of Nārada, (400 to 300 A. D.) the intervening period of over a thousand years was marked by no great legal activity. The several Smṛitis during this period all clearly evince the growing strength of the sacerdotal influence, and the strengthening of the social barriers between different castes, with its attendant intercaste jealousies and hatred. Throughout all this period the position of women remains unaltered.⁽¹⁾ And as regards man, the ideal portrayed is one of severe asceticism,—endurance of life while it lasts, riddance of it as soon as the purpose of manhood is achieved (§ 195). Such are the Smṛitis. Of themselves they have little legal value. Most of the forms they acknowledge and employ have long since become obsolete (§ 197). Even their conceptions of social relations have become out of date. The Sanskrit legal works of greater value are therefore the Digests and Commentaries, which mark the last and comparatively modern period of Brahminical activity. As was to be expected, a few have outlived the time and place for which they were written and are now acknowledged to possess predominating authority in certain Provinces. Such is the work of the ascetic Vijnaneshwar called “The Mitakshara” or “The Compendium,” which though originally composed to guide a petty local chief, is now regarded as possessing paramount authority in the whole of India outside Bengal, where the Dayabhag of Jimutavahan holds the sway. But the paramount authority of the Mitakshara is now only so in name, since many of its doctrines have been refuted or modified by other works of local authority, and since the establishment of British Courts and the Legislature, the paramount authority has naturally become transferred to them, so that the authorities set out before now possess finality and importance only in their inverse order.

241. But nevertheless there still remain points unsettled by the Courts, on which the authority of the Commentaries remains unshaken. Wherever it is so, reference must still be made to the Sanskrit works for authority and guidance. These works may be divided into two main groups: Those which follow the old track and those which follow a line of their own. As such, Hindu Law has become divided into two schools, known as the Benares and the Bengal Schools. The former is the orthodox or conservative school, while the latter is the reformed school. The text-book of the one is the Mitakshara, that of the other, the Dayabhaga; but both the schools and their acknowledged text-books are held to apply only to the inhabitants of certain territories, and in each case they are subject to local modifications, sanctioned by text-books possessing only special local authority. So Sir James Colvile, delivering the judgment of the Privy Council, observed: “The remoter sources of the Hindu Law are common to all the different schools. The processes by which those schools have been developed seems to have been of this kind. Works universally or very generally received became subject of subsequent commentaries. The Commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose. Thus the Mitakshara which is universally accepted by all the schools, except that of Bengal, as of the highest

(1) See §§40, 61, 62, 68, 81, 88, 93, 99, 104, 111, 115, 116, 120, 124, 184, 187.

authority, and which in Bengal is received also as of high authority, yielding only to the Dayabag in those points where they differ, was a commentary on the Institutes of Yajnavalkya; and the Dayabag, which, wherever it differs from the Mitakshara prevails in Bengal and is the foundation of the principal divergences between that and the other schools, specially admits and relies on the authority of Yajnavalkya. In like manner there are glosses and commentaries upon the Mitakshara which are received by some of the schools that acknowledge the supreme authority of that treatise, but are not received by all. . . . The duty, therefore, of an European Judge, who is under the obligation to administer Hindu Law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage. For under the Hindu system of law, clear proof of usage will outweigh the written text of the law". (1)

242. Thus it will be seen that though modern Hindu Law nominally recognizes the authority of the Mitakshara as its sole accredited text-book, local departures from its rules have become sanctioned by usage giving rise to schools and sub-schools according to the line of divergence between its written text and the accepted usage. As such, the divergence between the Mitakshara and the Dayabag on many vital points has given rise to a distinct school known as the Bengal School of Hindu Law which prevails throughout Bengal and Assam. (2) The leading points of difference between the two schools have already been set out (141-153) and will have to be more fully considered in the sequel. The Dayabag view of law is generally spoken of as the reformed or the advanced view and it is even explained as influenced by the Mahomedan rule that had then become established in Bengal. But the fact that it makes succession depend upon religious efficacy whereas the Mitakshara bases it on affinity does not justify that assumption, though the fact that it does not recognize co-parcenership and thus vests the father with unfettered power of alienation marks a distinct advance upon the older doctrine of corporate property and enjoyment.

243. These works, though they profess to be merely Digests and Commentaries on the older Smritis, are not to be treated as such in any sense of the term since, if they were in fact merely what they profess to be, their views could be corrected or contradicted by reference to the Smritis. But this is not allowable for they possess an independent authority and are to be treated as works which, without reference to their form, portray the custom and usage of their contemporaries. They mark a distinct epoch in advance of the Smritis upon which they nominally rest their doctrines. But this is merely a fiction intended to reconcile the old with the new. While recognizing the dogmatic immobility of the Smritis, the commentaries attempt to circumvent their rigid doctrines by explanations, interpretations and deductions which are, on the points upon which they differ, so vitally at variance with the Smriti texts that if a reference were permissible to the latter, the futility of the former would at once become manifest. In another respect the commentaries differ from the Smritis. Unlike the Smritis they do not profess to represent the divine will. They profess to be mere expositions of the older texts. (3) As such, Sir George

(1). *The Collector of Madura v. Muttu Ramalinga* 12 M.I.A. 397 (435, 436).

(2) *Per Mookerjee, J., in Deepo v Gobindo*, 16 W. R. 42.

(3) See *Sec. 1-2 Mitakshara Ch -1* which says

that the writer had striven merely to simplify the difficult text of Yajnavalkya for the benefit of the young pupils. So also Nilkantha in *Mayukh*, § 1.

Knox, J., grouped all Hindu writers into three grades. He was of opinion that the authority of the oldest of them such as Manu, Vashishth and Yajnavalkya could not be questioned, being so regarded by the Hindus. But he distinguished from these old gossellers, the medieval writers such as Narad who were entitled to very great weight; but referring to Vijyaneshwar, he said he was only a commentator, and as regards the latest of the writers such as Nanda Pandit he held that he was "as much open to review as the text of any commentator of the present school." (1) When this case went up on appeal to the Privy Council their Lordships animadverted on this view of the classical texts, adding: "Their Lordships cannot concur with Mr. Justice Knox in saying that their authority is open to examination, explanation, criticism, adoption or rejection like any scientific treatise on European jurisprudence. Such treatment would not allow for the effect, which long acceptance of written opinions has upon social customs and it would probably disturb recognized law and settled arrangements. But so far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned Judge". (2)

244. In another case, referring to Sir W. Jones' translation of a verse of Manu in which certain words were said to have been interpolated by a later and inferior commentator named Prakash and not by the ancient and eminent commentator named Kulluka Bhatt, as Sir William Jones believed, their Lordships said: "Their Lordships assume for the purposes of their judgment that Sir William Jones was mistaken in attributing the words interpolated in verse 122 to Kalluka Bhatt. But they observe that Sir William Jones' version was probably founded on the tradition of the time at which he wrote and has been accepted in the Indian Courts without question. *Communis error facit jus* is a sound maxim". (3) To the same effect their Lordships had delivered themselves as far back as 1868, when they observed: "The duty, therefore, of an European Judge who is under the obligation to administer Hindu Law is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has been sanctioned by usage". (4) Again, twelve years later they said: "The Hindu Law contains in itself the principles of its own exposition. The digest subordinates in more than one place the language of texts to custom and approved usage. Nothing from any foreign source should be introduced into it, nor should the courts interpret the text by the application to the language, of strained analogies". (5) But while the digests and commentaries have now with

(1) *Beni Prasad v. Hardas Bibi*, 14 A. 67 on appeal (118, 114) F. B., O. A. *Sri Balusu v. Sri Balusu* 22 M. 898 P. C.; *Muthu Karuppa v. Shellahemmal* 16 M. L. T. 587; 26 I. C. 785 (786, 787) in which it is observed "The fact is that commentators felt that any attempt to prescribe rules of inheritance on their own initiative will not find acceptance amongst the people. They had to justify their position by a reference to the sayings of the Rishis. This led them not—in frequently to depart from the literal meaning of the texts commented upon. They found a body of usage which was not in strict accordance with the Smritis,

They had to recognize the force of such usage; but they preferred to say that the usage was within the meaning of the text. The commentaries indicate an attempt to reconcile the text law with the actual usage of the people"

(2) *Sri Balusu v. Sri Balusu* 22 M. 898 (411, 412) P. C.

(3) *Jagdish v. Shoo Partab*. 28 A. 869 (881) P. C.

(4) *Collector of Madura v. Muttu Ramlinga*, 12 M. I. A. 397 (486).

(5) *Bhyah Ram Singh v. Bhyah Ugur Singh*, 18 M. I. A. 878 (890).

the passing of time attained a status of their own, they do not necessarily exclude a reference to the *Smritis* which they profess to annotate. This was conceded by the Privy Council in a case in which they said, "many of the precepts of Manu have been undoubtedly altered and modified by the modern law and usage, but his authority may properly be referred to when it is necessary to resort to first principles in order to ascertain and declare the law".⁽¹⁾

246. These cases then settle the following points:—(i)—That the statements in the digests and commentaries, though professing to be merely comments on the original shastric texts, cannot be examined with reference to the latter, but must be received as embodying the current accepted law; (ii)—that even if the statement be an interpolation, it is no blot upon its validity if it has remained unquestioned for a considerable period, for the interpolation may itself represent the accepted popular view; and (iii)—that whenever it is necessary to refer to the first principles in order to ascertain the law, reference to the *Smritis* is still justifiable.

246. As previously stated, the work now known as the "Dayabhog" is only a fragment of a larger and more complete digest on Hindu Law known as the "Nyayratn" (§151). The only portion of it that is now extant is that which deals with Partition and Inheritance. In Bengal this work takes precedence of the *Mitakshara*, though the latter work is to be referred to on points upon which the *Dayabhog* is silent.⁽²⁾ For the same purpose, other works may be equally referred to and their authority would appear to be something in the following order (1) *Dayabhog*, (2) *Mitakshara*, (3) *Dayatattv*, (4) *Viramitroday*, (5) *Dayakramasangrah*.

As of Jimut Vahan's Digest only the *Dayabhog* or the chapter dealing with Partition and Inheritance is extant, the differences between the Bengal and the Benares schools only arise on these subjects which will be set out in their appropriate places in the sequel.

247. Custom.—As a source of law custom takes a conspicuous place in the legal systems of all the nations. As a matter of fact custom is the mother of all laws, and whether it be the *Srutis* or the *Smritis* they are both alike founded on custom. Indeed, "Custom is powerful and overrides the sacred law".⁽³⁾ The general influence of custom upon the Aryan law has been already considered (§192) and its particular significance in moulding the current law will be considered in the sequel. Though custom is the parent of Hindu Law which is still subject to and modified by it, it does follow that in order to bring a case under any rule of law laid down by recognized authority for Hindus generally, it is not necessary that evidence should be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it. Special customs may be pleaded by way of exception, which it is proper to prove. To put one who asserts a rule of law under the necessity of proving that in point of fact, the community living under the system of which it forms part, is acting upon it, or defeat him by assertions that it has not been universally accepted or acted on, would go far to deny the

(1) *Ramalakshmi v. Sivanatha*, 14 M. I. A. 570 (591).

(2) *Moniram v. Kori*, 5 C. 776 P. C.

(3) *Narad* 1.40; *Collector of Madura v. Muttu Ramlinga*, 12 M. I. A. 897.

existence of any general Hindu Law, and to disregard the broad foundations which are common to all schools, though divergencies have grown out of them. (1)

248. Judicial decisions.--The sacred books enshrine the written law. The courts interpret and administer it. In doing so they place before themselves certain principles which have come to be regarded as rules for the interpretation of Hindu Law (§§ 202-204). Where the court finds a text suitable to the matter it has to adjudicate upon, it has naturally to interpret it. Now the difficulty of understanding them is by no means small. In the first place they are often cryptic and contradictory, and in the second place they are all written in a dead language a knowledge of which is by no means the sole qualification for understanding their meaning. As Golap Sircar Shastri truly remarks: "The Sanskrit works on law cannot be fully understood even by a Sanskrit scholar except with the aid of learned pundits familiar with the traditional interpretation of them". (2) The courts have ceased to requisition the aid of such pundits and for the best of reasons (§ 189). They now interpret the texts for themselves with the aid of such published translations as they can find; and in doing so they naturally accommodate them to their own view of what is just and proper. In other words, the judges while professing to administer law sometimes make it. This they have necessarily to do in cases not covered by any direct authority. But in either case they test their decision by reference to reason and convenience. (3) So when the Privy Council had to decide on the question of succession to an impartible Zemindari and the contest lay between the first born son of a junior wife and a second son of the senior wife, their Lordships in upholding the claim of the first born cited several sacred texts and observed: "It appears to their Lordships that the rules just cited approach very nearly to a distinct declaration of the general Hindu Law upon the question when regarded apart from any special custom prevailing in any particular district or family . . . It is right to observe that if the decision had to rest only upon reasons of policy and convenience, these reasons would seem greatly to preponderate in favour of the right of the first born son. The inheritances of Hindus which descend on a single heir, are almost entirely confined to Zemindaris in the nature of a Raj and to offices, and it is obviously in accordance with reason and convenience, that such succession should devolve upon the son who would, in the natural course, first reach manhood, and be capable of discharging the duties attaching to inheritances of this kind". (4)

249. Then again, even where the Sanskrit text covers a point it does not necessarily follow that the courts are to give it the force of a statute. As was observed by Mahmud, J.: "In all systems where juristic notions have at all been carefully classified, a distinction exists between rules which regulate matters of form and as such are directory in their nature, and those rules which go to the very essence of the matter, and violations of which, if allowed, would be destructive of the rule itself". (5) In other words, before giving effect to a text the court has to consider whether it is precatory or mandatory, merely directory or absolutely compulsory. This

(1) *Bhagwan Singh v. Bhagwan Singh*, 21 A. 412 P. C.; *Gita Bai v. Shivabakas* 5 Bom. L. R. 318; *Vayidinada v. Appu* 9 M. 44 F. B.

(2) H. L. (8rd Ed.) 35.

(3) *Ramalakshmi v. Sivanath*, 14 M. I. A.

570 (594).

(4) *Ramalakshmi v. Sivanath* 14 M. I. A. 570 (598, 594)

(5) *Ganga Sahai v. Lekhranj*, 9 A. 258 (296).

view of the law had to be considered by the Privy Council which had to decide as to the validity of the adoption of an only son. The Smritis condemn it ⁽¹⁾ and the question which their Lordships had to consider was whether the scriptural prohibition was mandatory or merely monitory and in adopting the latter view their Lordships quoting from an earlier case decided by their own Board ⁽²⁾ remarked: "All these old text books and commentaries, are apt to mingle religious and moral considerations not being positive laws, with rules intended for positive laws. In the preface to his valuable work on Hindu Law, Sir William Macnaghten ⁽³⁾ says: It by no means follows that because an act has been prohibited, it should therefore be considered as illegal. The distinction between the *Vinculum juris* and the *Vinculum pudoris* is not always discernible. They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers accustomed to treat as law what they find in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu Society, and impart to it an inflexible rigidity, never contemplated by the original law-givers ⁽⁴⁾. . . No system of law makes the province of legal obligation co-extensive with that of religious or moral obligation. A man may in his conduct or in the disposition of his property disregard the plainest dictates of duty. He may prefer an unworthy stranger to those who have the strongest natural claims upon him. He may be ungrateful, selfish, cruel, treacherous to those who have confided in him and whose affections for him have ruined them. And yet he may be within his legal rights. The Hindu sages doubtless saw this distinction as clearly as we do, and the precepts they have given for the guidance of life must be construed with reference to it. If a transaction is declared to be null and void in law, whether on a religious ground or another, it is so; and if its nullity is a necessary implication from a condemnation of it the law must be so declared. And the mere fact that a transaction is condemned in books like the Smritis does not necessarily prove it to be void. It raises the question what kind of condemnation is meant. ⁽⁵⁾"

250. Then referring to the conflicting decisions on the subject, their

Stare Decisis

Lordships observed: "In estimating the weight of reasoning in the various litigated cases their Lordships have not forgotten the weight of actual decisions; that they represent the opinions of eminent and responsible men, arrived at after public and anxious discussion, carrying with them an authority not legally disputable in the provinces under their jurisdiction, and it may be, affecting many lands and many titles to property or to personal status. Such decisions are not to be lightly set aside. A court of justice which only declares the law and does not make it, cannot, as the Legislature can, declare it with a reservation of titles acquired under a different view of it. But their Lordships are placed in the position of being forced to differ with one set of courts or the other. And so far as the fear of disturbance can affect the question, if it can rightly affect it at

(1) Mitakshara Ch-1, S XIV. 11 "Do an only son must not be given nor accepted. For Vasishtha ordains 'Let no man give accept an only son.'"

(2) *Rao Balwant Singh v. Rani Kishori*, 20 A. 267 (285, 286) P. C.

(3) Principles and Precedents of Hindu Law, Vol. I p. V]

(4) *Sri Balusu. v. Sri Balusu* 22 M 898 (415, 416) P. C.

(5) *Ib.*, p. 419.

all, it inclines in favour of the law which gives freedom of choice. People may be disturbed at finding themselves deprived of a power which they believed themselves to possess and may want to use. But they can hardly be disturbed at being told that they possess a power which they did not suspect and need not exercise unless they choose. And so with titles". (1)

251. Legislative Enactments.—The effect of legislation on Hindu Law is unlike the influence of custom and judicial decisions, immediate and direct. Law is paramount and it can make or unmake laws. It assured to the Hindus their personal law (§ 169); but finding it intolerable on many points it had to modify it. In other respects for the sake of uniformity or public convenience, it had to legislate irrespective of racial law. A list of such enactments has already been given (§§ 177-188). Their particular effect will be found set out in the sequel. The age of majority is 18 (2) under the Indian Majority Act which overrules the Hindu Law where sixteen years was the age of majority.

Neither writing nor registration was obligatory under Hindu Law to complete a contract or transfer. (3) In this respect the Transfer of Property and the Registration Acts have superseded the Hindu Law by prescribing forms which it did not contain.

252. Immoveable Property.—Although the various Indian Acts (4) describe immoveable property and the General Clauses Act defines it (5) more generally (6) that term may still connote property for the purpose of Hindu Law which is outside the terms of any enactment. Such would be the case where the nature and quality of property can only be determined by Hindu law. (7) Such is a hereditary office such as that of a Joshi, (8) Yajmanvritti, or the office of a hereditary priest, (9) or an annuity granted to a Hindu temple even though not charged upon land. (10) Such fixed and permanent payments are called "Nibhandhs" (11) in Hindu law and they are all treated as immoveable property.

253. Procedure not excepted.—The personal law assured to the Hindus only safeguards their substantive rights upon certain subjects. It does not affect processual matters, which are now entirely regulated by the statute. Originally, however before the Indian Legislature had addressed itself to the codification of Indian Law, the Hindus were judged by their own procedure

(1) *Sri Balusu v. Sri Balusu*, 22 M. 398 (430) P. O.

(2) *Moothoormohun Roy v. Soorendro*, 1 C. 108 (F. B.)

(3) *Alwar Chetty v. Vaidilinga*, 1 M. H. C. R. 9.

(4) Transfer of Property Act S. 8, Registration Act S. 2 (6).

(5) S. 8 (25) Act X of 1897.

(6) *Id.*, S. 8.

(7) *Fatesangji v. Desai*, 10 B. H. C. R. 136 P. O.

(8) *Balvantrav v. Purshotam*, 9 B.H.C.R. (A C) 99.

(9) *Krishna Bhat v. Kapa Bhat*, 6 B. H. C. R. (A C) 187; *Balvantrav v. Purshotam*,

9 B.H.C.R. 99 F. B. *contra Raiji v. Desai*, 6 B.H.C.R. (A) 56 dissented from in *Ghela Bhai v. Hargovan*, 12 Bom L R., 1171.

(10). *Collector v. Krishna Nath*, 5 B. 322.

(11). Nibandh-Skt-Lit "Fix'd," "made fast" "bound," from *bandh* to bind—Thence A.Sax *bindan* to bind. D.—*bindan*. Ice.—*binda* Dan *binda* G.—*bindan* Goth. *bindan* So described in Wilson's Glossary, "Nibandh" in law, fixed or immoveable property; also a corrody, or fixed allowance granted by a Raja or person in authority, to be received from the proceeds of a manufactory mine or estate. Hence corrody.

which bulks largely in Jagannath's Digest ⁽¹⁾ and in Macnaghten's work on Hindu law. ⁽²⁾

254. Caste Autonomy.—Caste is an essential institution of Hinduism and the reservation of their personal laws to the Hindus implies the reservation of the jurisdiction of caste. This is ensured by the enactment which limits the jurisdiction of the Civil Courts only to matters of a "civil nature". This term which occurs in all the Civil Procedure Codes ⁽³⁾ enacted since 1859, has as regards caste, acquired a somewhat settled sense which limits and defines the respective authority of the caste and of the court in matters affecting personal status, the leading principles of which may be thus stated :—

(1) In all matters affecting any property, office or dignity carrying with it the right to any perquisite or emoluments the courts possess jurisdiction to adjudicate but in doing so the court is limited to giving effect to what are considered as customary rights subject only to the just limitations within which they are operative. For instance, where a marriage takes place between persons, one or both parties to which are illegitimate children, or persons of any caste, its legality depends not upon what the court considers right but rather upon how the caste people regard it. If the latter treat it as a good marriage then the court must assume it as such ⁽⁴⁾ On the other hand, where the caste sanctions as marriage an alliance between a man and a married woman, who has neither been divorced or deserted by her husband, the court cannot give effect to the custom, as that would be tolerating adultery which is both immoral and opposed to the established law. ⁽⁵⁾

(2) It is within the jurisdiction of the caste to appoint a man to an office of dignity, *e.g.*, that of a priest, and so long as it is connected with no right to property, the court cannot control his appointment, retention or removal. But where there are annexed to it certain incidents in the nature of civil rights as against members of a community, then, in adjudicating upon the one question the court has necessarily to assume jurisdiction over the whole question. ⁽⁶⁾

(3) Thirdly, for the protection and better management of public, religious and charitable endowments, the Legislature has armed the court with certain powers of supervision and control in which it inherits the powers, which the Hindu Shastras acknowledge, belong to the Sovereign as the protector of *Dharm*.

(4) For the rest the powers of the court are confined to the interpretation and administration of the caste rules to persons acknowledging its supremacy.

(1) See Colebrooke's Digest, Vol. 1, Bk. I. Ch. VI.; Bk. II, Ch. II.

(2) Pp. 107-275; out of 278 pp only 99 deal with substantial rights, and the rest deal with the following heads :—

Administration of Justice; Constitution of a Judicial Assembly, Subject of a Judicial Proceeding; Process of Citation; Declaration, Answer, Onus Probandi and judgment; Recapitulation; Retort or re-crimination; Mesne Process; Judgment in Actions for Debt; Special rule regarding the Answer; Indications of Falsehood; Conflicting Claims; Action attended by Wager; Special Rules of Proceeding; Nature of Evidence; Relative Priority; Effect of Possession; Digression concerning Fines and other Penalties; Possession without

Title; Title without Possession; Appeals and other Matters; Digression concerning Trove and Plundered Property; Witnesses; Written proof; Evidence by Divine Test; Ordeal by Balance; Ordeal by Fire; Ordeal by Water; Ordeal by Poison; Ordeal by sacred Libation; Ordeal by Grains of Rice; Ordeal by hot Metal; Ordeal by Dharma and Adharma; Other Tests

(3) *Bisheshur v. Matagolam*, 2 A. W. N. 300.

(4) *Muthusami v. Masilamani* 33 M. 342; *Ram Kumari*, 1n re. 18 C. 264.

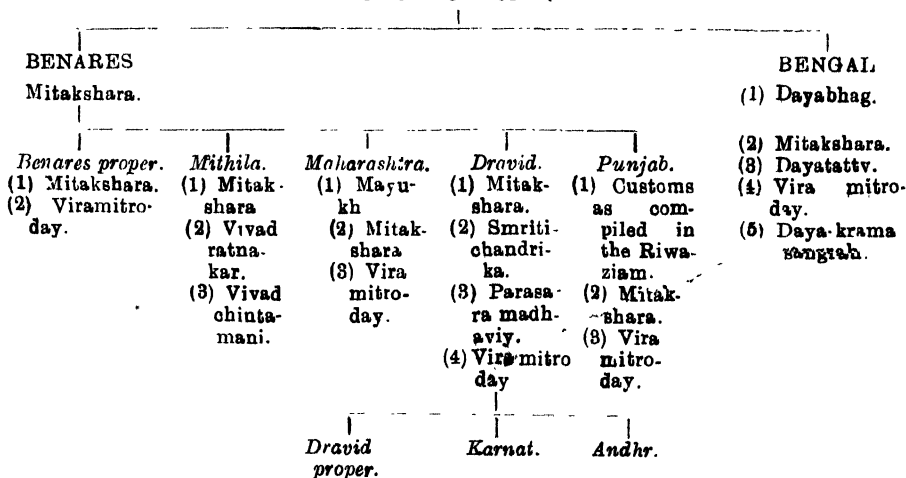
(5) *Uji Narain Das v. Tirlok Tewari*, v. *Hathi*, 7 Bom. H. C. R. (A. C.) 133, *Narain Das v. Tirlok* 29 A. 4; *Emperor v. Lazar*, 30 M. 550

(6) *Ghelabhai v. Hargovan*, 13 Bom. I. R. 1171

Apostacy or loss of caste by the husband is of itself no ground for restitution of conjugal rights (1) though the Court would be slow to decree it since by reason of the conversion to an alien faith co-habitation has become impossible. (2)

255. No reference to commentaries will be complete without reference to what has become known as the schools of Hindu Law, which owe their origin to the difference in interpretation or practice. (3) It has already been stated that the Hindu scriptures commingle theology, morality, metaphysics and law with one another, and the tendencies of the method of reasoning which are held to be applicable to the one are allowed to influence the interpretation of the other branches of knowledge. The first disruption of the orthodox school was doubtless due to religious differences on the interpretation of the Vedas. The orthodox school, of which Jaimini was the founder, differed from the school of Vyas in that the one supported the literal sense while the other drew from it the conclusion denying the existence of a material world; while both differed from the rationalist reasoning of the *Nyaya* of Gautam which threw all theories into the crucible of reason. This triangular contest naturally found many adherents. The philosophy of Gautam took hold of Bengal, while the orthodox creed still flourished elsewhere. Having once differed in religion the followers of the *Nyaya* applied the same test to law. And hence arose the two principal sects or schools, which, construing the same text, variously deduce upon some important point of law different inferences from the same maxims of law. But while the Bengal school stood out, in open revolt there still remained those who though still fighting under the orthodox banner, ventured to differ in details in conformity with the prevailing local opinion and practice. In this process of legal development, schools and sub-schools have been formed which may be stated in the following table.

HINDU LAW.



(1) Act XXI of 1850; *Emurlee v. Nirinul*, (1864) N. W. P. H. C. R. 858; *Sahadur v. Rajwanta*, 27 A. 96; *Contra* 2 Dig. P. 418 overruled by the Legislature
(2) See XXI of 1866, Ss. 16 18; *Muchoo v.*

Arzoon, 5 W. R. 235 Cf *Moola v. Nundy*, 4 N. W. P. H. C. R. 109.

(3) *Ganga Sahai v. Lekhraj*, 9 A. 259 (290).

256. The main diversions are however only two *viz.*, that represented by the Mitakshara and by the Bengal schools. The sub-divisions of the Mitakshara are not only not based upon any pronounced departure from the orthodox tenets but nominally and essentially follow them. They are in the nature of local variations due to local usage embodied in the works that have obtained local celebrity, which while afraid to break away from the parent stem, justify their departure therefrom on the license of interpretation.

257. It has been already pointed out (§ 199) how Hindu law remained unsecularized by the divorce of legal from moral obligations. The tendency of judicial decisions by European Judges has in a measure effected that severance. For when these precepts passed through the secular judicial mind the pure legal rules became necessarily separated from their religious fignment and as much as was legal became in course of time crystalized into separate rules and principles which so far as they go are now accepted as a final enunciation of the living personal law of the Hindus. With the ever increasing accumulation of legal precedents of the supreme tribunal, the utility of the digests and commentaries must necessarily correspondingly diminish till they must eventually recede into the same background into which they have jostled the ancient Sruti and the Smritis. Even at the present day, most of the Hindu Law is case-law, and many points of controversy which exercised the minds of Colebrooke, Macnaghten and Strange have been finally set at rest by judicial decisions. As such, these latter occupy a prominent place in an inquiry into the sources of Hindu Law. Even where any matter is not the subject of a direct decision the reasoning and the rules by which the judges now consider themselves bound, have established canons for the construction of the sacred and secular Sanskrit texts which should afford solution to the novel problems which must continue to arise in practice.

258. The reduction of a few elementary rules from the great bodies of detail is no easy task, but the few following rules underlie the numerous decisions by which they were guided and controlled.

259. Rules of Interpretation.—

- (1) *Stare decisis.* In dealing with property and status, the courts are essentially conservative, following their own precedents and never departing therefrom unless very cogent reasons impel the departure (1).
- (2) All legal texts must be separated from moral injunctions, the former alone followed, the latter ignored, if their union is casual and not essential (2).
- (3) In interpreting old texts regard must be had to usage; for no text is binding unless it is accepted as binding on the community to which it relates (3).
- (4) When the two texts are equally authoritative but contradictory, the court is entitled to select the one which is in conformity with reason and convenience (4).

(1) *Rampiyari v. Mulchand*, 7 A. 114 : *Bai Kesser Bai v. Hansraj* 30 B 431 (452) P.C.

(2) *Sri Balusu v. Sri Balusu* 22 M. 898 P. C.

(3) *Collector v. Mootoo Ramalinga*, 12 M

I. A. 397 (436); *Kumar Gungadheer v. Kumar Hira Lal*, 20 C. W. N 489 (499).

(4) *Vedanayaga v. Vedammal*, 27 M. 591; *Vedammal v. Vedanayaga*, 31 M 100.

- (5) Where a rule is ambiguous or uncertain the court construes it reasonably.
- (6) Where there is no rule, the court decides according to the rule of justice, equity and good conscience.
- (7) The Court always gives effect to the policy of the Legislature paying due regard to its behests.
- (8) No rule, however sacred, is enforced if it is opposed to public morality.
- (9) In construing the standard texts the court considers what is mandatory and therefore legally enforceable, and what is merely monitory and therefore not legally enforceable.
- (10) In administering law the court pays due regard to consistency assuming the body of law, so far as possible, to be consistent with itself.
- (11) A well established usage overrides the written law.
- (12) In giving effect to legal presumptions it pays due regard to the altered conditions of the present day.
- (13) In construing deeds and bequests, the court assumes what was tacitly and necessarily implied.
- (14) Transactions prejudicing natural heirs must be supported by cogent reason and evidence.
- (15) In all acts the court presumes in favour of legality and morality.
- (16) Where a legal precept is not wholly applicable, subject to the other rules, it applies it by analogy.

The concrete exemplification of these rules will be found in the ensuing commentary.

260. Who are the Hindus—In the first place Hindu Law applies to Hindus. But who are the Hindus? This is by no means an idle question, for beyond a certain number who observe the correct rituals of Hinduism—an ever diminishing class—there remain the vast body of those who, though owing no allegiance to any other revealed religion, do not conform to the tenets of Hinduism and would, if the question were submitted to the judgment of the orthodox, be voted as non-descript out-castes. But in the eye of the law these might be as good Hindus as any. The term 'Hindu' is of comparatively recent origin (§ 216) and the tenets of Hinduism are uncertain and ill-defined. Like Judaism, Hinduism is not a proselytizing creed. A Hindu, like a poet, is *nascitur non fit*. If he is sprung out of any of the twice-born people then he is unquestionably a Hindu, otherwise, he may be a Hindu nevertheless. The true test of Hinduism now implies the observance of caste, the worship of a Hindu deity and the paying of homage to Brahmins who are the hierophants of that religion. The ceremonial observance of the Hindu fasts and feasts is another index. With the decline of Brahminical influence these symbols have been shorn of their support and the Hindu has ceased to believe in them, not because his belief has undergone a change, but because the narcotic that produced the symptom has lost its potency.

261. It has already been stated that the term Hindu was originally a mere geographical expression (§ 216). Its present meaning is still vague since it comprises not only those who are Hindus by religion but also those who are Hindu dissenters, while Hindu Law may apply to yet another class who do not follow Hindu religion at all and may, indeed, be converts to an antagonistic creed, such as Christianity or Mahomedanism. Considered as a religion Hinduism is rather a system than a creed. It has no dogma or articles of faith. A man may be a Deist or Atheist, he may believe in Krishna or Comte: he will continue to be a Hindu if he was born one. "Hinduism includes a fluctuating mass of beliefs, opinions, usages and observances, social and religious ideas, the exact details of which it is impossible to reduce to anything like order, and in the most divers aspects of which it is impossible to recognize anything that is common. A belief in the superiority of Brahmins, veneration for the cow, and respect for the distribution of castes are the elements of Hinduism, which are generally recognized as fundamental. But each one of these has been rejected, or is rejected by tribes, castes or sects whose title to be included amongst Hindus is not denied." (1)

262. So long as the lamps of orthodoxy were kept well trimmed by its creatures, the Hindu kings, the wildest and most purile ceremonials found complaisant observers—for to cease to observe them was to cease to be accredited a Hindu, and meant the forfeiture of all civic rights and the fate of a social outlaw. But with the Hinduism left to justify its existence upon its own merits, its dissolving forces set to work and now Hinduism is in reality a mere name—*Vex propterea nihil*. People may be diametrically opposed to each other in their ceremonial observances and bitterly scornful of each other's caste and social status and still be good Hindus.

263. So it was said in a case the decision in which was confirmed by the Privy Council. "The Hindu religion is marvellously catholic and elastic. Its theology is marked by eclecticism and tolerance and almost unlimited freedom of private worship. Its social code is much more stringent, but amongst its different castes and sections, exhibits wide diversity of practice. No trait is more marked of Hindu society in general than its horror of using the meat of the cow. Yet the *chamars* who profess Hinduism, but who eat beef and the meat of dead animals, are, however low in the scale, included within its pale. it is easier to say who are not Hindus, and practically the separation of Hindus from non-Hindus is not a matter of much difficulty. The people know the difference well and can easily tell who are Hindus and who are not." (2)

264. Hinduism unlike the newer faiths, such as Buddhism, Christianity and the Islam is not a brotherhood but a purely individualistic creed. All Hindus were primarily divided into four castes the genesis of which has already been given (§ 207). Of these the Brahmins who were the priests, the Kshatriyas who were the warriors, the Vaishyas who were the traders and the Shudras who were relegated to the servile class were its main primary divisions, since multiplied into innumerable secondary castes, which the Shastras, however, do not recognize.

265. Out of the four primary castes, the first three were classed as Dwijas or the twice-born and the last, who though Hindus, were not entitled to that privilege. All were enjoined certain duties which in the original conception

(1) N. W. P. Census Report 1891 Pt. I
§ 178 p. 152.

(2) *Bhagwan Koer v. Bose*, 81 C. 11
(15) P. C.

of Hindu society were unchangeable. The elaborate rules which bound the twice-born have long since ceased to be operative with the liberalizing forces created by the advent of the Mahomedan rule and strengthened by its suppression by the British rule which has almost completely destroyed the artificial barrier which held together the Hindu society. Even those who nominally remain within the vinculum of Hinduism have long since ceased to practise its observances. The tests by which Manu judged of Hinduism have ceased to apply. The sovereign who was the defender of the Hindu faith has long since vanished from the land. His ordinances to preserve the ideal of Hinduism have become mute with the political subjugation of the country by professors of an alien creed. What remains of Hinduism is but a name. And that name has now found a fresh attribute.

As such, a Hindu may follow the conventional creed or he may not. Law still treats and regards him a Hindu if he is acknowledged to be a Hindu because he has sprung from a Hindu stock and has by his conduct or course of life not become allied to another essential non-Hindu faith.

266. Essence of Hinduism.—Though Hinduism possesses no formula which distinguishes its creed from the other revealed religions, and though its catholicity has ushered into its fold the most divergent and heterodox faith, still there are some elements more or less essential in which Hinduism with all its family members ordinarily agree. These are belief in (1) the unity of Godhead, (2) *Maya*, (3) Pantheism, (4) the doctrine of *Karm*, and (5) its consequent pessimism. All Hindu speculation centred round these subjects which afford a key to the many dogmas and beliefs which, to the mind of an outsider, present a maze of bewildering confusion of ideas, theories and rituals between whom there seems to be nothing in common. But a close examination of them all reveals their essential unity on these five points of which a succinct account only will be here attempted.

267. The first article of Hindu faith is that "God is one without a second." Hinduism at heart is purely monotheistic, though it is difficult to discover it through the thick incrustation of superstition and the corrupting influence of caste with its distinct divinities.

But though God is one, He brings himself nearer to man in His incarnations or *Avatars* which present to man the many and varied phases of the divine energy. This accounts for the seeming incongruity between the pure spirit and its incarnate actions.

268. Belief in *Maya* (1) which is the illusion by virtue of which one considers the unreal universe as really existent and as distinct from the Supreme spirit is the second feature of Hinduism. This doctrine was adopted into the *Sankhya* philosophy of *Kapil* and has become the corner-stone of all oriental thought. The Hindus believe that this universe is an emanation of the self-emanant God; that as the snail comes out of the shell and can withdraw itself at will from sight, so the universe has come out from God and He can withdraw it all into Himself. And as God is spirit, intangible and imperceptible, so is the Universe. The things we see are not what they seem. It is a mere illusion that we consider

- (1) Lit. Deceit, fraud, trickery; a device, an artifice—thence a phantom, illusion, or an illusory image.

them as material and something different from Him. It is all *Māya* or illusion. True wisdom consists in realizing the oneness of all things with God and when this is done one realizes the identity of one's own self with the Universe which is the play or sport of God. He was tired of being alone and so created the world for His own amusement. All the pains and miseries of life are mere illusions which deceive one into imagining oneself to be something different from God. The best way to overcome this illusion is to realize by meditation the identity of one's soul with God. When that state is reached the mind loses all other consciousness. The best preparation for this state of mental beatitude is to cultivate indifference to pleasure and pain, heat and cold, hunger and thirst, day and night, self and the world. A life of inaction is the noblest man can live; and a life without thought, is the only life free from the worldly illusions. Life has no meaning. It has no goal. Therefore, it is an evil and the sooner it is got rid of the better, since by its illusory attractions it keeps the soul away from God.

269. *Maya* leads to Pantheism, and it is another doctrine of Hinduism.

(3) **Pantheism.** In fact the two doctrines are really parts and parcel of the same dogma of Hindu Philosophy, of which another fine flower is the doctrine of *Karm*, (1) pre-destination or fate.

270. This doctrine of fate which is an integral part of Hindu Philosophy has equally found favour with all oriental speculation. It

(4) **"Karm"** is the *Kismet* of the Sufis. The essence of this dogma lies in the statement that man's future is pre-arranged by the Deity and that he cannot alter his recorded destiny. Exertion is therefore useless if not a profane interference with divine dispensation. This bowing to Fate paralyzes effort, and accounts for the many otherwise inexplicable turns in the political history of this country. Of late the people have commenced to put forth exertion in spite of their beliefs; but the inexorable doctrine still remains to neutralize effort and put a pause upon their exertion.

These four-fold beliefs may be said to underlie all forms and sects and offshoots of Hinduism and they are the binding dogmas of that creed or system.

271. Another distinguishing feature of Hinduism is its prevailing pessimism. All Hindu Philosophy is pessimistic (§ 270) and it

(5) **Pessimism.** tinctures their religious belief. Time is divided into four ages. The first age called "*Sattya Yug*" was the golden age of truth and virtue, the second (*Dvapara*) and the third ages (*Treta*) were those in which those qualities gradually diminished but nothing comparable to the extent they have in the present age (*Kul Yug*) which is the age of lying and deceit, vice and infidelity. As these four ages of the world were pre-ordained, there is no help for it but to endure the present life with all its unhappiness and coarse brutality. All this is typified by the fable that in the *Sattya Yug Dharm* stood upon four legs. In each successive age its one prop was removed till it has now to support itself upon only a single leg.

272. Present Day Hindus: The subject of practical Hinduism may be presented in the following order. (1) Those who follow the Orthodox creed (2) Those who without following it are still classed as Hindus (3) Those who have been admitted into another creed and (4) Those who follow the Hindu Law without following the Hindu religion.

(1) *Lit. Action, work, deed—thence the result of such action &c.*

273. The first class presents comparatively little difficulty. Persons born of the first three castes still remain Hindus whatever may be their caste, or status. The fact that an issue of an irregular alliance has forfeited his caste is no blot on his Hinduism, since the forfeiture of one's caste does no longer entail its pristine penalties. (§ 178) But the following ceremonies are still in vogue both amongst orthodox and reformed Hindus (1) On birth of a child a Brahmin is called in to note the time of the birth, prepare its horoscope and forecast its future. Manu says that the name-giving ceremony should be performed on the 10th or 12th day after birth "or on some fortunate day of the moon, at a lucky hour, and under the influence of a star with good qualities." (2) The name should be a compound name consisting of two parts each bearing a meaning according to the caste. That of a Brahmin—first part—holiness—the second part—prosperity. That of a Kshatriya—first part—power—the second part—preservation. That of a Vaishya—first part—wealth—the second part—nourishment. That of a Shudra—first part—contempt—the second part—humble attendance. (3) "The names of women should be agreeable, soft, clear, captivating the fancy, auspicious, ending in long vowels, resembling words of "benediction". (4) But these are the counsels of perfection. The names of Hindus now follow no fixed rule. They are usually coupled with the name of a god or goddess and it has no reference to caste, since a Shiv Prasad (5) or Ram Autar, (6) may as much be a Brahmin as a Shudra and so while the suffix "Sinha" (7) is usually found added to the name of a Kshatriya it is not his sole monopoly. The modern trend of Hindu society is in the direction of unification. The levelling influence of western education has destroyed the acute feeling about caste and the education of the masses is tending to uplift the lower classes in the social scale. The conferral of a Hindu name has consequently no meaning beyond the fact that its bearer is or was a Hindu, since, even Hindu converts to Christianity at times prefer to retain their old names.

274. Taking first the Dwijas or twiceborn for whom the sacred books were written, the orthodox Hindu is enjoined to perform the following sixteen ceremonies:—

Table of the Sixteenth Shastric Ceremonies.

No.	Ceremony	Nature	Remarks
1	Garbhādan गर्भाधान	Ceremony before conception, performed on the bride attaining puberty.	
2	Punsāwan पुंसवन	Ceremony for the birth of the male issue.	
3	Simant सीमन्त	.....

(1) The ceremonies mentioned in M. nu ii-27 are now obsolete, except the severance of the umbilical cord, which is of course necessary and the tonsure of its head (if male) with a lock of hair left on it, is still customary.

(2) Manu ii-30.

(3) *Ib.* ii-81-82.

(4) Manu ii-83.

(5) Lit. "Gift of the God Shiva".

(6) Lit. "Incarnation of the God Ram."

(7) Lit. "Lion".

No.	Ceremony.	Nature.	Remark.
4	Jat Karm जातकर्म	... "Birth-ceremony," to be performed immediately on delivery and before severance of the umbilical cord	
5	Namkarn नामकरण	... Naming-ceremony, performed on the 10th 11th or the 12th day	Ordinarily performed on the 12th day.
6	Nishkram निष्क्रमण	... The ceremony of presenting the boy to the Sun, to be performed in the 4th month.	
7	Annaprasnan अन्नप्राशन	... Ceremony of taking food, performed in the sixth month.	
8	Chuda चूडा	... Tonsure, by shaving off the head, except a tuft of hair in the centre of which is the <i>choti</i> or pigtail of the Hindu, performed according to family custom.	
9	Upnayan उपनयन	.. Lit. "carrying near the Guru"; the thread-ceremony performed by 1. Brahmins 8-16 years. 2. Kshatriya 11-22 " 3. Vaisya 12-24 "	Popularly called "Muni." May be performed as early as the 5th year.
10	Mahanamni Vrat महानाम्नी	....	Obsolete
11	Mahavrat महाव्रत	.....
12	Upanishad Vrat उपनिषद् व्रत	.. ...
13	Godanvrat also called Keshant. गोदानव्रत	.. ...
14	Samavartan समावर्तन	... Home-coming ceremony performed on return from the Guru	Now performed at the same time as the thread ceremony.
15	Vivah विवाह	... Marriage.	
16	Shradh श्राद्ध	... The obsequies.	

275. Of these the only ceremonies now important are those of (1) tonsure, (2) thread, (3) marriage. The outward marks of Hinduism are a sandal, saffron or any coloured mark on the forehead, the pigtail and the sacred thread. Hindus also used to wear a turban and a loose coat which distinguished them

from the non-Hindus. But none of these ceremonies or symbols apply to the Shudras whose Hinduism is to be judged from an altogether different test.

276. The difference between the different castes of the Hindus is great but for the purpose of law it is immaterial, inasmuch as all the three regenerate castes are equally subject to the same rules. But the case of Sudras is different both because the Sanskrit texts are not primarily addressed to them as also because, being free from the rigid supervision of the priest, their custom had a freer scope for development. Consequently, ceremonies which might suffice to validate a Shudra adoption or marriage do not necessarily have that effect in the case of a Dwija and so while the illegitimate son of a Shudra is an heir, that of a Dwija is no heir at all. Considerable latitude still exists as regards inter-caste marriages amongst Shudras amongst whom divorce and re-marriage of women is customary and common.

It is therefore, often a question of some importance as it is one of some nicety, whether a person is a Dwija or a Sudra.

277. The following are some of the recognized tests by which a Shudra may be known :—

- (1) The Shudras bury their dead. They do not ordinarily burn them.
- (2) They do not don the sacred thread.
- (3) Inter-caste marriages amongst them are customary.
- (4) Divorces are common amongst them and even a woman may divorce her husband and marry another. But this is not encouraged though it is tolerated, and the second husband is mulcted in costs of marriage of the bereaved husband who is thereupon compelled to give a "Marti Jiti" feast which means that the woman is dead to her previous husband and become alive to her new one.
- (5) Brahmins as a rule do not officiate at their marriages.
- (6) Their caste occupations are menial and manual.
- (7) Their gods belong to a lower order and stand outside the Hindu pantheon.
- (8) They eat the forbidden flesh—such as the flesh of fowls, and domestic pigs, while the lowest of them eat even beef.
- (9) Their men do not stamp marks of sandal or saffron upon their temples.
- (10) They are so regarded by the general Hindu community.

As already observed these criteria have now lost much of their value by reason of the general social upheaval now proceeding in Hindu society and the removal of all social barriers created by the old religion. All the same they cannot be altogether ignored in judging of the *status* of a Hindu. Some well-known castes have already been the subject of judicial decisions. For instance, the Kayasths of Bengal have been held to be Shudras, (1) though some of their leaders lay claim to be Kshatriya.

(1) *Raj Coomar v. Bissessar*, 10 C, 688.

278. Outside this class stand an ever growing class of Hindus who have broken themselves off from the orthodox practices of their
(3) Masked Hindus. forbears and adopted a new mode of living in conformity with the pressure of western education and ideas. They are the reformed Hindus of varying degrees—those who have been educated in Europe and who upon return affect a life in conformity with that which they have become accustomed to, those who have been brought up in Missionary schools and have, consequently, imbibed the spirit of free Christianity, and those who have cast off irksome and irrational conventions. They are the product of India in transition. They wear no sacred thread nor maintain a pigtail. They eat at all hands and despise the ordinances which have created the caste—believing as they do in equality and universal brotherhood. These people consequently respond to no usual test of Hinduism and the only test applicable to them is whether they call themselves Hindus, and by the retention of their Hindu names, manners, and customs and by the general or substantial conformity to its usages, they pass as such. It may be that all these elements are wanting but the true criterion in such cases is whether being born in a family which was or passed as a Hindu family there has been conversion to any antagonistic non-Hindu revealed religion.

279. Outcaste Hindus.—Caste is an integral part of the Hindu religion and the Shastras enjoin the forfeiture of all civil rights with the deprivation of caste. But the Caste Disabilities Removal Act passed in 1850 has repealed all such texts and usages as have that effect—the result being that the forfeiture of one's caste now no longer entails any of its prescribed civil disabilities and an out-caste Hindu is in the eye of the law as good a Hindu as one who has never lost his caste.

280. The text of this Act runs as follows:—

CASTE DISABILITIES REMOVAL ACT, 1850.

(ACT XXI OF 1850.)

[Passed on the 11th April 1850.]

An Act for extending the principle of section 9, Regulation VII, 1832, of the Bengal Code throughout the territories subject to the Government of the East India Company.

WHEREAS it is enacted by section 9, Regulation VII, 1832, of the Bengal Code, that “whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled; and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company; It is enacted as follows:—

Preamble.

“So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.

Law or usage which inflicts forfeiture of or affects rights on change of religion or loss of caste to cease to be enforced.

281. This Act means that a person deprived of his caste by conversion to another faith or otherwise does not forfeit on that account (a) his rights, (b) his property, or (c) inheritance, the last two being merely illustrative of the first as both the “forfeiture of property” or a “right of inheritance” are included in the word “rights.” The section might have been worded thus “No rights which a person possesses shall be forfeited, impaired or in any way affected by reason merely of his renouncing, etc.”

The effect of this enactment is to remove all disabilities imposed by the Hindu Law on an out-caste Hindu, it being immaterial whether the deprivation of caste is due to conversion to another religion in which case the convert ceases to be a Hindu, or whether it is due to non-compliance with its rules. Consequently, an out-caste does not forfeit his right of guardianship of his children if he is otherwise qualified. ⁽¹⁾

282. Illegitimate children of Hindus.—Hindu Law makes no distinction between the legitimate and illegitimate children of Hindu parents ⁽²⁾ or even where one of them is a Hindu and the other non-Hindu provided they are brought up and received as Hindus. ⁽³⁾

283. The same rule applies equally to children of mixed parentage. In a case finally decided by the Privy Council in 1861 the question arose to the status of the two sons named Ram Prasad and Thakur Ram, of an Englishman by name Hughes by his native mistress, a Brahmin married woman, who lived apart from her husband in adultery with Hughes, who had in keeping another Hindu woman by whom he had three sons named Maya Ram, Chandu Lal and Uttar Ram. To all these five sons Hughes bequeathed his estate in equal shares. The five brothers lived as an united family. One of them Thakur Ram having died intestate his step-brother Chandu Lal took possession of all his property including the one-fifth which he had inherited under his father's will, whereupon his full brother Ram Prasad sued him for that share which he could only get by survivorship, which raised the question whether the five brothers were Hindus and if so co-parceners in their father's estate which alone could give to Ram Prasad his full brother's share by survivorship. The courts in India considered them to be Hindus and this view was approved by the Privy Council ⁽⁴⁾ who observed: “They were not an united Hindu family in the ordinary sense in which that term is used in the text-writers on the Hindu

(1) *Khunnilal v. Gobind*, 33 A 856 (865, 866) P. C. *Kaulesra v. Jorai Kasandhan*, 28 A. 283; *Muchoo v. Arzoom*, 5 W R. 285; *Ram Nath v. Durga*, 4 C. 550 (552), 555; *Sundari v. Pitambari*, 32 C. 871 (873, 874). *Gul Muhammad v. Wasir Begam*, (1901); P. R. No.

60; *Taij Singh v. Koneilla* (1902) P. R. 104.

(2) *Ramkumari (In re)* 18 C 264.

(3) *Myna Baijee v. Ootaram*, 8 M. I. A. 400; *Lingappa v. Esudasan*, 27 M. 18.

(4) *Myna Baijee v. Ootaram*, 8 M. I. A. 400 (420).

Law ; a family of which the father was, in his life-time, the head, and the sons in a sense parceners by birth, by an inchoate though alterable title : but they were sons of a Christian father by different Hindu mothers, constituting themselves parceners in the enjoyment of their property after the manner of a Hindu joint family. On the death of each, his lineal heirs representing their parent, would, by the effect of the agreement, enter into that partnership ; collaterals, however, could not so enter by succession, unless the Hindu Law gave, in the case under consideration, a right of inheritance also to collaterals. The parties could not by their agreement give new rights of succession to themselves or their heirs unknown to the law. The law of survivorship, which is the consequence of such a partnership amongst Hindus, would come in only on failure of the heirs."

284. In this case there is nothing to show that the brothers had embraced Christianity which was the religion of their father, but even if they had, it would not have necessarily made any difference in the decision. As their Lordships observed in another case : "The profession of Christianity releases the convert from the trammels of Hindu Law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in and his powers over, property. The convert, though not bound as to such matters, either by the Hindu Law, or by any other positive law, may by his course of conduct, after his conversion, have shown by what law he intended to be governed as to these matters. He may have done so either by attaching himself to a class which, as to these matters, has adopted and acted upon some particular law, or by having himself observed some family usage or custom ; and nothing can surely be more just than that the rights and interests in his property, and his powers over it, should be governed by the law which he has adopted, or the rules which he has observed." (1) Then referring to the native Christians, they went on to add : "Some adhere to the Hindu customs and usages as to property ; others again retain those customs and usages in a modified form ; and others again have wholly abandoned those customs and usages, and adopted different rules and laws as to their property." (2) To the last class belong the class known as the East Indians (3) who in all things follow the usages and customs of the European residents here. Then upon the evidence their Lordships held that the Abrahams, though Christians, had continued to retain their Hindu Law even upon their conversion. This case is instructive for it shows that the mere assumption of a European name is not conclusive of the matter. An extreme case of this sort is presented by the Khojas who are Hindus by origin, converted to Mahomedanism some centuries ago, but who still retain their Hindu Law of inheritance. (4) These cases show that a family ceasing to be Hindu in religion may still enjoy its property under Hindu Law. (5)

285. But as has been pointed out, these cases are only authorities for the proposition that a Hindu convert to Christianity may continue to follow his old laws, customs and usages which are not inconsistent with his new religion. As Wilson, J. observed, "We do not suppose the law could permit native converts (if one can imagine their desiring such a thing) to choose for themselves some marriage law wholly repugnant to Christian ideas—converts from Hinduism, for

(1) *Abraham v. Abraham*, 9 M. I. A. 195 (289, 240)

(2) *Ib.*, p. 241.

(3) *Ib.*

(4) *Raṇimat Bai v. Hirbai*, 3 B. 81 ;

Abdul Cadur v. Turner, 9 B. 158 (162).

(5) *Sri Gajapathi v. Sri Gajapathi*, 14 W R 38 P C ; *Lopez v. Lopez* 12 C 706 (722) ; *Ghosal v. Ghosal*, 81 B 25 (81) dissenting from *Tellis v. Saldanha*, 10 M 69.

instance, to retain their former right to marry more wives than one, or converts from Mahomedanism their former freedom of divorce." (1)

286. The following rules may then be deduced from these cases:—(1)—That Hindu Law applies not only to those who are Hindus, strictly so called but, also to those who though not following the Shastric rituals still conform to some of its outward forms. (2)—That even those who have become converted to another religion, such as Mahomedanism or Christianity, from Hinduism may still continue to retain their old law, customs and usages provided they are not repugnant to their new religion. (3)—Lapses from orthodoxy do not imply abandonment of Hindu Law.

287. It has been stated before that the Hindus are divided into four castes, the first three being *Dwijas* or twice-born and the last the lowest, being the Shudras. It has also been observed that the question whether a person belongs to any of the three regenerate castes is, for all legal purposes, immaterial as the Shastras were written for and equally apply to all. Their serfs and slaves were originally classed as Shudras but in the evolution of Hindu society the aboriginal tribes became absorbed in Hinduism and these became also classed as Shudras. Some of them retained many of their old usages while others became so entirely assimilated to the new civilization that they gave up and in course of time lost all vestiges of their pristine customs. These became crystallized into distinct castes and in course of time they naturally commenced to assert their claim to a higher place in the Hindu theocracy. As many of their members had assisted their Aryan masters in the subjugation of the country, they naturally laid claim to and were freely admitted into the Kshatriya or warrior caste, while others, whose claims were not so admitted still considered themselves entitled to be classed as such. Similarly, those members of the Shudra caste who prospered in trade, commenced to lay claim to be Vaishyas and in this way there arose new castes whose claim to higher status has been made for centuries but which has not been admitted by the popular opinion of the community. But the confusion so caused has led some puritanical priests to even deny the existence of pure Kshatriyas and Vaishyas, but there is no justification for this assumption and the courts recognize the existence of the four-fold classification of Hindu society, (2) while the existence of the Kshatriyas has been vindicated by the highest court of appeal. (3) But while there can be no doubt about the existence of the four castes at the present day, the question which often exercises the courts is not so much their existence but the allocation of a family or person to any of them. This difficulty is further enhanced by the springing into existence of persons of mixed descent. Originally, these gave no trouble as the caste rules were then not so rigid. But as the caste rules became iron bound and the lapses from caste exclusiveness more frequent, there arose the problem how to reconcile these two cross and antagonistic currents. In their quandary the courts have cut the gordian knot by formulating for their own guidance a few working rules which though not inflexible, have become invariable guides in the determination of such cases. These are—(i) what they think of themselves and (ii) what others think of them. So the question arising as to the

(1) *Lopez v. Lopez* 12 C. 706 (722).

(2) *Ambabai, v Govind*, 23 B 257 (262);
Chudhury v. Sahub Purhulad, 7 M. I. A. 18
 (46, 47) where the question is discussed at

some length.

(3) *Chudhury v. Sahub Purhulad Syn*,
 7 M. I. A. 18 (46-48).

caste of an illegitimate son of a Kshatriya by a Shudra woman the Privy Council put the question to that test and held him to be above the Shudra. ⁽¹⁾ In a similar case in Madras it was found that such people form a distinct intermediate caste called the Ugra, ⁽²⁾ higher than that of the mother and lower than that of the father. ⁽³⁾

288. The question is essentially one of opinion. As Chandavarkar, J., pointed out, the membership of a caste is like the membership of a club, with the only difference that entry into one is by birth, while entry into the other is by election. But the members of the one as of the other, are free to continue its membership or leave it : "The caste is as much a voluntary association as a club—the one can frame rules for its guidance and revoke them and make fresh rules as well as the other. It is equally within the power of a club to admit into its fold men not born in it as it is within the power of a club to admit any one it likes as its member. To hold that the membership of a caste is determined by birth is to hold that the caste cannot, if it likes, mix with another caste and form both into one caste. That would be striking at the very root of caste autonomy." ⁽⁴⁾

289. Tests for determining status.—Whenever it is necessary to ascertain the relative position of a caste in the social order the following tests would appear to afford some basis for decision :—

(1) Intermarriage between the two castes. If both are sub-castes of a single caste then men of the higher caste would take wives from the lower, but not *vice versa*.

(2) Interdining—Persons of the higher caste interdine amongst themselves. They will take food cooked by one a degree lower in caste, provided the meal is cooked in clarified butter.

(3) Taking water—Higher castes will drink water touched even by Shudras provided they belong to the well known servile castes, such as Ahirs, Raots, Nais (barbers) and Kunbis. If the caste is lower still, the twice-born will not drink water touched by them.

(4) Certain Shudras, though Hindus, are treated as untouchables. These belong to the well known depressed classes of Chamars, called Pariahs in the Madras Presidency, Mahars, Mehtars (sweepers), also called Lalbegis in Northern India.

(5) In judging of the relative position of castes it is useless to examine witnesses of a rival caste, as each caste considers itself superior to the other.

(6) The opinion of the Shastris is of the least value as the shastric rules have long since become obsolete and no Hindu of the present day can pass that test.

(1) *Chhoturaya v. Sahub Purhulad* 7 M. I. A. 18 (48) *Brindavana v. Radhamani*, 12 M. 72 (78)

(2) So mentioned in Yajnavalkya (Mandlik p. 178).

(3) *Brindavana v. Radhamani*, 12 M. 72

(78, 79).

(4) *Nathu v. Keshwaji*, 26 B. 174 (186 187) following *Advocate General v. Devakar*, 11 B 185 and *Vengamuthu v. Pandaveswara*, 6 M 151 dissenting from *Contra in Jagannath v. Akali Dassia*, 21 C. 463.

290. The courts have adjudicated upon the position of several castes in the Hindu system. Thus for instance, the Bengali Kayasths though claiming to be Kshatriyas ⁽¹⁾ have been held to be Shudras. ⁽²⁾ The same view has been taken of the Kayasths of Behar. ⁽³⁾ In so holding Field, J., pointed out that the question was not one of origin or pedigree but one which depended upon popular recognition and observance of the ceremonial prescribed for the twice born. Such was the view of Babu Shyama Charan Sarkar who in his *Vyavastha Darpan*, explained that while the Kayasths were, according to the preponderance of authorities, of Kshatriya origin, they had become degenerated since several centuries by giving up their surname of "Varna" and taking to "Das" appropriate to the servile class, and by not performing the thread ceremony characteristic of the Dwijas. ⁽⁴⁾ But Mahmud, J. was inclined to doubt this view so far as regards the twelve castes of Kayasths of the United Provinces ⁽⁵⁾ though he confessed that the authorities were against his view. He appears, however, to have been impressed by the fact that Kayasths constitute the literary caste amongst Hindus; but caste is scarcely based upon the modern notion of literacy and social status, though, as previously remarked, these facts are slowly and silently undermining the old barriers. But, as observed by a Census officer, the test of social pre-eminence as a guide to grading the castes is impracticable ⁽⁶⁾.

291. The Lingayats have been held to be Shudras. ⁽⁷⁾ Similarly, the Prabhus who correspond to the Kayasths of the Mahratta country claim to belong to the Kshatriya caste ⁽⁸⁾ but their claim does not appear to have been ever judicially recognized.

292. The Lingayats stand upon the same footing, though they now lay claim to belong to the caste of Vaishyas and though, as observed by Westropp, C. J., "during the present century some of the more wealthy and educated members of the Lingayat caste have, as it advanced in prosperity, manifested a desire to elevate it, and by endeavouring to get rid of practices which are badges of the Shudra tribe, to raise the caste from that class into the next, viz., Vaishyas." ⁽⁹⁾ The learned Chief justice went on, however, to add: "But it is an impossible task for a Hindu to rise from the class whether it be Kshatriya, Vaishya or Shudra, in which he was born, to any class above it." This is, however, only true in an ideal state of society, for, in practice castes are continually rising in the social scale, and there are several castes among Shudras which are now classed as of the twice born (§§ 213 and 228). But so far as the Lingayats are concerned, their efforts to rise to the Vaishya caste have hitherto failed for they have been treated as Shudras in several cases decided at periodical intervals. ⁽¹⁰⁾

(1) Sarkar's *Adoption* (2nd Ed.) 419 c, 419 d.

(2) *Asita Mohun v. Nirode Mchun* 20 C. W. N. 901.

(3) *Raj Coomarr v Bissessur*, 10 C 683 (693-696) doubted per Mahmood, J. in *Tuls Ram v. Behari Lal*, 12 A. 328 (334).

(4) *Vyavasthadarpan*, (3rd Ed.) p 549 et. seq.

(5) *Tulsh Ram v. Behari Lal*, 12 A. 328 (334).

(6) Cited in *Virasangappa v. Rudrappa*, 8

M. 440 (444).

(7) *Steele's Law of Caste* (1st. Ed.) 95 100; *Gopal v Hanmant*, 3 B. 278 (282).

(8) *Steele's Law of Caste* 89.

(9) *Gopal v. Hanmant*, 3 B. 278 (288)

(10) *Gopal v. Hanmant*, 3 B. 278 (288) followed in *Somaselkhararaja v Subha drammai* 6 B. 524 (526); *Basavi v. Lingangauda*, 19 B 428 (465); *Fakirgouda v. Gangi*, 22 B. 277; *Virasangappa v. Rudrappa*, 8 M. 440 (450).

The Lingayats are a heretical sect and are not subject to the Brahminical laws. They are numerous in the Bombay Presidency and a few of them live in the Madras Presidency. The founder of their sect was one Basava (A.D. 1100-1160) in the twelfth century who abolished caste and other Brahminical observances. Any Hindu may become a Lingayat. (1)

293. The religion of the Sikhs (2) was founded by Nanak, a Kshatriya who was born in Lahore in the year 1469. His aim was to reconcile and unite the two great religions then prevalent in India, namely Hinduism and the Islam. In order to achieve this purpose he recognized the divinity of the Hindu deities as also the claim of Mahomed to be the sole accredited prophet of God. His disciple Gobind Singh gave a political turn to the faith and welded the Sikhs into a fighting race by making them take a vow to worship only the one Supreme being, to discard superstition, to practise continence and to live by the sword.

294. Sikhism like other creeds has become divided into many sub-sects—of which the principal sects are the Udasis (or the Sroies), the Nirinaks (or the Pure) and those who take their name from those of their teachers, such as the Gobind Singhas and the Ramrajis.

295. The Sikhs, like the Lingayats and the Jains, are Hindu non-conformists but nevertheless they have always been held to be Hindus (3). This question was put to a severe test in the probate case of the will of one Sardar Dyal Singh, a Punjab Sikh, who died in Lahore in 1898. The three executors named in the will applied for probate under the Probate and Administration Act (4) which necessitated an inquiry into whether the testator had died a Hindu. His widow Ram Bhagwan Koer contested the will on the grounds found in her favour, viz., (i) that the deceased had become a convert to Brahmoism and (ii) as such had lapsed from even Sikhism, because contrary to the tenets of that faith he smoked and trimmed his hair which no Sikh could do, that he ate beef, that (iii) he lived in European style (iv) ate from the hands of Mahomedan and Christian cooks, and (v) had married or kept an Anglo-Indian lady by name Mrs. Catherine Gill. The Punjab Chief Court, however, held these circumstances immaterial to remove the testator out of the fold of Hinduism, and this view was concurred in by Sir Arthur Wilson who, in delivering the judgment of the Privy Council, held "Hindu" to be a generic term as embracing all those who were commonly so known. He laid emphasis on the fact that the opinion of witnesses on both sides agreed in designating Sikhs as Hindus and that the lapses complained of from orthodox practice would not have the effect of excluding from the pale of Hindus one who was born within it and who never became otherwise separated from the religious communion in which he was born. (5)

(1) Per Ranade, J. in *Basava v. Linganganda*, 19 B 428 (457, 458)

(2) Lit. Skt. *Shishya*—disciple—of which Sikh is a corruption.

(3) *Doe & Kissenchunder v. Baidam* (1816) 2 For. Dig. 22 followed in *Bhagwan*

Koer v. Bose, 81 C. 11 P. C. affirming *O A. Bose v. Bhagwan Koer* (1900) P. L. R. 51.

(4) Act V of 1881 S. 2.

(5) *Bhagwan Koer v. Bose*, 81 C. 11 (38). P. C.

296. The Jains ⁽¹⁾ are another sect of Hindu dissenters, who still remain Hindus and to whom the Hindu Law applies. ⁽²⁾ The sect is now a well known sub-division of the Vaishya caste which is divided into Agarwalas, Mahesris and Jains, the two former being orthodox Hindus while the last being classed as Hindu heretics. They are again sub-divided into Digambaris and Sitambaris, the former worshipping their God stripped of all attire, while the latter worship him clothed in costly raiments. The hostility between the two sects is as great as *theologicum odium* can reach. Mount Stuart Elphinstone thus writes of this community: --

"There are two other religions, which, although distinct from that of the Hindus, appear to belong to the same stock, and which seem to have shared with it the veneration of the people of India before the introduction of an entirely foreign faith by the Mohamedans. These are the religions of the Baudhas (or worshippers of Budha) and the Jains. They both resemble the Brahmin doctrines in their character of quietism, in their tenderness of animal life, and in the belief of repeated transmigrations, of various hells, for the purification of the wicked, and heavens for the solace of the good. The great object of all three is the ultimate attainment of a state of perfect apathy, which, in our eyes, seems little different from annihilation; and the means, employed in all, are the practice of mortification and of abstraction from the cares and feelings of humanity. The differences from the Hindu belief are no less striking than the points of resemblance, and are most so in the religion of the Baudhas.....The Jains hold an intermediate place between the followers of Budha and Brahma. They agree with the Baudhas in denying the existence or, at least, the activity and providence of God; in believing the eternity of matter; in the worship of deified saints; in their scrupulous care of animal life and all the precaution, which it leads to; in their having no hereditary priesthood; in disclaiming the divine authority of the Vedas; and in having no sacrifices and no respect for fire. They disagree with the Baudhas in considering a state of passive abstraction as supreme felicity and in all the doctrines which they hold in common with the Hindus. They agree with the Hindus in other points, such as division of caste. This exists in full force in the south and west of India, and can only be said to be dormant in the north-east; for, though the Jains there do not acknowledge the four classes of the Hindus, yet a Jain converted to the Hindu religion takes his place in one of the castes; from which he must all along have retained the proofs of his descent; and the Jains themselves have numerous divisions of their own, the members of which are as strict in avoiding intermarriages and other intercourse as the four classes of the Hindus. Though they reject the scriptural character of the Vedas they allow them great authority in all points not at variance with their religion. The principal objections to them are drawn from the bloody sacrifices which they enjoin and the loss of animal life which burnt offerings are liable (though undesignedly) to occasion. They admit the whole of the Hindu gods and worship them though they consider them as entirely subordinate to their own saints, who are therefore the proper objects of adoration. Besides those points common to the Brahmins or Baudhas, they hold some opinions peculiar to themselves. The chief objects of their worship are a limited number of saints, who have raised themselves by austerities to a superiority over the gods, and who exactly resemble those of Budha in appearance and general character, but are entirely distinct from them in their names and individual histories. They are called Tirtankeras; there are twenty-four for the present age, but twenty-four also for the past, and twenty-four for the future. Those most worshipped are in some places Rishoba, the first of the present Tirtankeras, but everywhere Parasnath and Mahavira (sometimes called Vardhaman or Bramana) the twenty-third and twenty-fourth of the number. As all but the two last bear a fabulous character in their dimensions and length of life, it has been conjectured with great appearance of truth, that these two are the real founders of the religion. All remain alike in the usual state of apathetic beatitude, and take no share in the government of the world. Some changes are made by the Jains in the rank and circumstances of the Hindu gods. They give no preference to the greater gods of the Hindus; and

(1) Lit worshippers of Jinas, the twenty-four immortalized mortals of each of the past, present and future age Wilkins' Modern Hindoos pp 99-101.

(2) *Sheo Singh, v. Dakho* 1 A. 688 P. C; *Bachchi v. Makhautal*, 8 A 55; *Lakhmichand*

v. Gallo Bai, 8 A. 319; *Dalip v. Ganpat*, id 887; *Rukhab v. Chunilal* 16 B. 347; *Amava v. Mahad Gauda*, 22 B 416 (418, 422); *Ambabai v. Govind* 23 B 257 (263, 264); *Mamickchand v. Jagat Settani*, 17 C 518 (533 536); *Mandit Koer v. Phool Chand*, 2 C. W. N. 104.

they have increased the number of gods, and added to the absurdities of the system; thus they have sixty four Indras, and twenty-two Devis. They have no veneration for relics and no monastic establishments. Their priests are called Jatis (Yatis); they are of all castes, and their dress, though distinguishable from that of the Brahmins, bears some resemblance to it. The Jains appear to have originated in the sixth, or seventh century of our era; to have become conspicuous in the eighth or ninth century, got to the highest prosperity in the eleventh and declined after the twelfth. Their principal seats seem to have been in the southern parts of the Peninsula, and in Gujerat and the west of Hindustan. They seem never to have had much success in the provinces on the Ganges. They appear to have undergone severe persecution by the Brahmins, in the south of India at least. The Jains are still very numerous, especially in Gujerat, the Rajput country, and Canara: they are generally an opulent and mercantile class; many of them are bankers, and possess a large proportion of the commercial wealth of India." (1)

297. The Jains differ from the Hindus not only in their tenets but in their practices in consequence. They perform no obsequies after the corpse is buried. They regard the birth of a son as having no effect on the future state of his progenitor, and consequently, adoption is a merely temporal arrangement and has no spiritual object. The Jain widow has consequently an absolute right of adoption and requires no express or implied authority, of her husband or his kinsmen. Her adoption is not controlled by the sacred texts. She may adopt her daughter's son (2) and in fact any one and of any age in accordance with the usage of the sect.

298. Brahmos.—It is now settled that a Hindu does not forfeit his Hinduism by a mere conversion to Brahmoism, (3) though the Brahmos are not Hindus within the meaning of the Civil Marriage Act. (4)

299. The Brahma Samaj was founded by the Hindu reformer Raja Ram Mohan Rai born in 1774. The cardinal tenet of his creed, founded in 1828, was directed against caste and idolatry, by establishing a pure monotheistic religion. But the onslaught on caste split the party into two—the progressive seceding from the parent society in 1862 on the ground that the Brahmos should conduct the services of the Samaj and that nothing should be said in the Samaj expressive of hatred or contempt for other religions. Keshab Chandar Sen was the leader of this secession which became known as the Brahm Samaj while the old party commenced to call themselves the Adi (or original) Samaj. These latter have gradually relapsed into Hinduism and the seceders are the sole torch-bearers of the new faith. It owed its origin to the levelling influences of Christianity and Mahomedanism, and is, therefore, purely eclectic in its doctrine. Keshab Chandur Sen tried to convert it into a proselytizing creed by proclaiming the new dispensation on the New Year's day of 1883, (5) and borrowing some of the rituals of Christianity. But a few years previously Keshab's followers had become restive under his autocratic rule and the growing claim to Messiahship. An offshoot called the Sadharan (Universal) Samaj was the result, who issued a dissenting covenant, (6) and threw up their allegiance to Keshab on the pretext, that finding an attractive match, he had contrary to his precept, married off his daughter at an early age.

(1) History of India (4th ed.) Ch IV p. 108 cited with approval per Westropp, C. J., in *Bhagandas v. Rajmal*, 10 B. H. C. R. 241 (247) approved in *Sheo Singh v. Dakho*, 1 A. 688 (701, 704) P. C.

(2) *Sheo Singh v. Dakho*, 1 A. 688 P. C.

(3) *Bhagwan Koer v. Bose*, 31 C. 11 P. C. affirming *O.A. Bose v. Bhagwan Koer*, (1900)

P. L. R. 51. The contrary conceded by Sale, J. in *Kusum Kumari v. Satya Ranjan*, 80 C. 999 can no longer be maintained.

(4) Act III of 1872, *Smalurni v. Vishnu prasad* 28 B. 597.

(5) Which see set out in Wilkins' *Modern Hinduism* pp. 114-117.

(6) *Ib*, pp 118-119

The followers of Brahmoism are mainly confined to Bengal, two-thirds of whom are to be found in Calcutta.

300. If the Brahmos are Hindus the Arya Samajists are the more so, because though professing to be monotheists they believe in the supremacy of the Vedas. This faith was founded by Pandit Dayanand Saraswati, who like the Brahmos opposed idolatry and caste and advocated female education and the re-marriage of widows. The Arya Samajists are now mainly confined to the Punjab, though they have a few enthusiasts in the other provinces.

Prarthna Samaj. **301.** The same cult is preached by the monotheists of the Bombay side under the name of "Prarthna Samaj." (1)

302. A similar campaign against caste and idolatry was led by the zealous reformer Kabir Das, a disciple of Ramanand, who about the beginning of the fifteenth century, invited both Hindus and Mahomedans to join his faith. Kabir was a disciple of Ramanand who was a Vaishnavite, (2) and his followers are equally treated as belonging to the same sect. (3) This is an extreme instance of the Hindu tolerance of an iconoclastic faith. Though the Kabir Panth is open alike to Hindus as well as Mahomedans, there are no Mahomedan converts to the new gospel, which is kept alive only by its Hindu followers drawn from the Vaishya and Shudra castes who have, moreover, found the tenacity of the caste system too strong for their cult, and so Kabir Panthis of the present day observe their castes, while surrendering their faith in other matters to Kabir. Kabir Das is said to have been a weaver by caste. At any rate, his faith has received much vogue amongst members of that and cognate castes such as those of Telis, Tamolis and Mahars which are only interlarded by a sprinkling of Banias. The most famous work of Kabir is his Bijak or Will the perusal of which is said to have inspired Nanak to found Sikhism. (§ 274)

303. Variations in the worship of Vishnu have been the prolific source of the many Vaishnavite sects, of which the Ramanuja (or Sri Sampradai) sect is the oldest. It was founded by Ramanuj Acharya in the twelfth century. He taught the tenets of his creed at Conjeeveram, the main feature of which was opposition to the Shaiva faith. The essence of the faith consists in upholding the supremacy of the God Vishnu. The Ramanandis are a branch of the Ramanuj sect and lay the same claim for Ramchandra. Yet another offshoot of the same sect is that of the Vallabhacharis or Rudra Sampradayis, who owe their religion to Vallabh Acharya, which is popularly known as the religion of Gokul Gossains. The founder Vishnu Swami, who flourished in the sixteenth century, was a Brahmin sanyasi or ascetic, and inculcated a life of asceticism upon his converts whom he made only from the Brahmin castes. He originally resided at Gokul near Mathura, and then at Brindaban, thence transforming his religion into an Epicureanism in which the worship of Gopal (i.e., the youthful Krishna) was conducted in the most voluptuous surroundings. Vallabh himself married and counselled his followers to do the same. The sect has now adherents drawn both from the Brahmin and the Vaishya castes.

(1) *Lit. Prarthna Prayer and Samajan* vism was Chaitanya who was born in association. 1485.

(2) The worshipper of Vishnu as the Supreme God. The Bengali leader of Vaishna-

(3) Wilkins' *Modern, Hinduism*, 66.

304. The Vaishnavites in Bengal belong to a special sect founded by Chaitanya, a Brahmin of Nadia (born 1485 A. D.), who is now worshipped as Lord Gourang as an incarnation of Krishna. The book of this sect is "Chaitanya Charit Amrit" composed in Bengali metre.

305. The two great sects into which higher Hinduism is divided, owe their origin to the rival claims of the two gods *Shiv* and *Vishnu* to the supreme place in the Hindu pantheon. Those who assign that place to *Shiv* are the Shivites whose implacable foes are the partizans of *Vishnu*. Both these sects have become subdivided into numerous sub-sects dependent upon rituals, the mode of worship and the varying degrees of severity enjoined on their followers, but their leading features remain unaltered. And to the student of law they possess little interest, for with all their differences, they are both Hindus and as such amenable to the Hindu Law.

306. As, however, religious differences are the parent of the several Hindu schools of law, a short notice of these sects should explain the local differences which account for some variation in the interpretation of law which at times puzzles those brought up in a calmer atmosphere of religious toleration.

307. The sects of Shivites is much older than the sect of Vaishnavism which was founded as a rival creed. The high priest of this sect is Shankar Acharya. (1) The religious mendicants and ascetics called the Jogis, Paramhans, Aghoris and the Dandis (2) all belong to this class, while the Lingayast (§ 292) or as they are called Jangamas in Northern India are also devotees of the same phallic symbol.

308. Numerous minor sects, many of mushroom growth, have sprung out of the Hindu religion. Such are the *Satnamis* (or believers in the "True Name") a sect founded by a Chamar named Ghasidas, a follower of Ramanand, now confined to the Chattisgarh division of the Central Provinces. They despise alike idolatry and the idolators, Brahmins in particular, but their hostility to Brahminism has now become mitigated and a new sect has emerged out of the Satnamis who tattoo their heads with the word "Ram" and to whom that word is as the breath of life.

309. Another sect little different from the rest, is that of the Sadhus founded by a Brahmin, named Birbhan who was born near Delhi in 1658. They also worship God as the *Satnam*. The Shiv Narayanas are followers of a Rajput teacher Sheo Narayan who lived in the eighteenth century. Like the Kabir Panthis they make no distinction between Hindus and Mahomedans both being equally admitted to their creed. They inculcate truth, temperance and mercy and repudiate all religious rituals and faiths.

310. Ascetics.—The ascetic castes amongst Hindus are the Gossains, Bairagis, Brahmacharis, Sadhus and Sanyasis who were all pledged to celibacy and religious mendicancy, but many of whom have settled down to the ordinary avocations of the householders. But inasmuch as their original history has engrafted upon their community certain relics of their famous order, it has aroused controversy in the courts as to how far they are amenable to the unadulterated rules of Hindu Law.

(1) *Shankar* is another name for *Shiv* and *Acharya* means priest.

(2) *Lit.* a staff or stick; so called because they carry a small red flag.

According to the Smritis the ascetic is qualified to hold no property ; and whatever little he does is subject to a special rule of devolution, but this is a counsel of perfection ⁽¹⁾ and Hindu ascetics now not only own large estates but actively engage in commerce, marry and beget children, make wills and otherwise dispose of their property. This is one of those cases in which the Shastric rules fail, but as has been already observed, the courts are not to administer all the Shastric rules but only such rules as are still kept alive by usage.

311. Shankaracharya, the founder of the Shivite sect, is said to be also the founder of the sect of Gosavis who accordingly worship Lingum of the God Shiva, as the Bairagis, another sect of the same order, worship Vishnu in his incarnation of Ram.

312. The Gosavis constitute a religious order now divided into several groups such as the *Dundis* or those who carry a staff and still affect mendicancy, the *Dunglee* or the traders and the *Grihast* or *Gharbari* Gosavis who have forsaken the order and relapsed into ordinary life. As such, the Gosavis ⁽²⁾ have long since become subdivided into two classes (a) *Nihang*, or celibates, that is to say those who still conform to the original form and mode of life, and (b) *Grihast* or *Gharbari*, or householders, that is those who have given up their religious vow and entered the confederacy of householders. But nevertheless they also keep up the old form of adoption of a *Chela* or a spiritual disciple ⁽³⁾ who is treated as and passes for, a son.

313. The Gosavis observe no caste, and any Hindu may join the sect. It then follows that any Hindu boy might be taken in adoption but such adoption can only be made by the Gosavi. It cannot be made by the widow. ⁽⁴⁾ The Chela so adopted succeeds to the estate of his adoptive Guru if he was his *mundit* or tonsured Chela even in preference to the natural son, but one son cannot be so adopted to the prejudice of the other and in the absence of an adopted stranger, sons succeed equally. ⁽⁵⁾ Except then as to certain matters which have become established as usages of the sect, the Gosavis are Hindus and as such, governed by the general Hindu Law. ⁽⁶⁾ So are the Bairagis who only differ from the Gosavis in that they worship Vishnu instead of the god *Shiv*. And inasmuch as both the sects admit converts from the Shudra caste, and marry women irrespective of caste, they would be classed as Shudras.

314. Brahmacharis, Sadhus and Sanyasis ⁽⁷⁾ are other sects belonging to the monastic order who are equally subject to the Hindu Law applicable to householders modified by the rules and customs of their respective orders.

(1) *Chhajju Gir v Diwan*, 29 A. 109 (112).
(2) *Lit Skr Go passion and Swami* master i. e., one who has mastered his passions

(3) *Ramdhan v Dalmir* 14 C. W. N. 191; 2 I. C. 385.

(4) *Balgir v Dhondgir*, 5 Bom L. R. 114. In some cases it is held that the *chela* must be nominated by the Mahants of the order *Nirunjun v. Padaruth*, (1864) S. D. A. N. W. P. vol. 1 p. 512; *Madho Das v Kamta Das*, 1 A. 589; *Jugunnath v Bidianand* 10 W. R. 172; *Chhajju Gir v. Diwan*, 29 A. 109; but this is not the invariable rule. *Ramdhan*

v Dalmir, 14 C. W. N. 191, A chela who deserts his Guru manifesting an intention to be permanently absent is not entitled to a share in the succession *Soogunchand v. Gopalgir*, 4 N. W. P. H. C. R. 01; see post "Adoption"

(5) *Chhajju Gir v. Diwan*, 29 A. 109 (115).
(6) *Chhajju Gir v. Diwan Gir* 29 A. 109 (112). For the customs of Gosavis see Steele's L. C. pp 432, 446; as to marriage see *Citabai v. Shivbakas*, 5 Bom L. R. 818.

(7) *Nirunjun v. Padaruth*, (1864) N. W. P. S. D. A., Vol. 1 p. 512; *Madho Das v. Kamta Das* 1 A 589.

The Smritis lay down a special rule for the devolution of property of an ascetic to the following effect : "The heirs of a hermit, of an ascetic, and of a professed student, are in their order the preceptor, the virtuous pupil and spiritual brother and associate in holiness." (1) But this rule postulates adherence of the ascetic to his religious vow. It does not extend to an ascetic who has forsaken the order, and contrary to its precepts and purpose amassed wealth. They cannot be held bound by rules framed for another purpose. (2)

315. Besides the Hindus, properly so-called, and those who are commonly

Aboriginal Hindus. so-called, there remain a number of people belonging to the aboriginal tribes, such as Gonds, Bhils, Kurds, Santals and the like who have become absorbed into the Hindu society and who, consequently consider themselves Hindus, and as such bound by Hindu Law. The test in their case is the same. How do they regard themselves and how are they regarded by the rest of the Hindu community? The test applicable is not the Shastric test which has ceased to be applicable to the most orthodox Hindu. The fact is that the Shastras never contemplated the absorption of non-Aryan plebian people into the Hindu hierarchy. But no Shashtra could stem the tide of human progress, and the non-Aryan races were not slow to take advantage of the Hindu civilization to which they became attached, and in course of time assimilated. Such are the Gonds and Bhils, who though aborigines, are now universally classed as Hindus. They retain their old customs to a certain extent, but they equally acknowledge the supremacy, of the Brahmins, worship some of their gods and have commenced to observe some of their caste conventions. Some of them have intermarried with Hindus, thereby originating distinct castes. So the alliance of Rajputs with Gond women has produced the caste of Raj Gonds, that with Bhils "Bhilahas" of whom quite a number own Jagirs and Zemindaris in the Nimar and adjoining districts of the Central Provinces. All such and similar castes admit allegiance to the Shastras by which they profess to be bound. (3)

316. Non-Hindu followers of Hindu Law.—But outside the circle of those who follow the Hindu religion and those who pass as Hindus, there stands a class of people who though now converted to the religion of Islam were by origin and descent Hindus, and who have, consequently, despite their conversion, continued to follow the Hindu Law of succession.

Such are the Khoja Mahomedans, (4) Kachi Nassaparia, (5) and the Bantwa, (6) Memons, (7) the Sunni Borah Mahomedans of the Dhandhuka Taluq in Guzerat, (8) and the Molesalem Girasias, (9) the Mahomedans of the Satpura plateau in the Central Provinces, (10) who are, as regards succession and inheritance, governed by the rules of Hindu Law; but apart from this, they do not follow it. For instance, the law of joint property is inapplicable to them. (11) The judicial view of these and other similar converts from Hinduism

(1) Yajñavalkya, 87; Mitakshara 8: Daya-bhag XI.6 ss 35, 36; *Chhajju Gir v Diwan* 29 A 109 (112.)

(2) *Nirunjun v. Padaruth* (1861) N. W. P. H. C. R. Vol. 1 512; *Madho Das v. Kamla Das*, 1 A. 539 (541).

(3) Steele L. C. 192, 128

(4) *Ahmedbhoy v. Cassumbhoy*, 13 B. 534; *Rashid v. Sherbanoo*, 29 B. 85.

(5) *Abdul Rahim v. Halima Bai*, 20 C. W. N. 862 P. C.

(6) *Safuran Umar v. Emma*, (1916) 26

Kath, L. R. 174.

(7) *Mahomed Sidick v. Haji Ahmed*, 10 B. 1; *Sahoo Sidick v. Ally Mahomed* 30 B. 270.

(8) *Baiji Bai v. Santok* 20 B. 53.

(9) *Fatesangji v. Horisangji*, 20 B. 181; *Moosa v. Abdul Rahim*, 30 B. 197.

(10) *Umda Bi v. Mahomed Sarwar*, C. P. D.C.R. (Part VIII) 78.

(11) *Mangaldas v. Abdul Rashid*, 16 Bom. L. R. 224; *Advocate General v. Jimbabai*, 41 B. 181.

is settled in a series of cases which lay down the nature of Hindu Law and the extent to which it is applicable in the case of each community.

317. The Khojas, like many other Mahomedans in India, are converts from Hinduism. Their original home was in Sindh from which place they migrated to Cutch and Kathiawar and thence at the close of the nineteenth century to Bombay. In Cutch and Kathiawar their main pursuit is agriculture. But in Bombay they have taken to trade and many of them have amassed considerable fortunes. ⁽¹⁾ The first case on the law applicable to the Khojas and Memons was decided by the supreme court in 1845 ⁽²⁾ and it has been followed since in a succession of cases, ⁽³⁾ from which Ranade, J. deduced the following rules:—(i) that though the Mahomedan Law generally governs converts to that faith from the Hindu religion yet (ii) a well established custom of such converts following the Hindu Law of inheritance would override the general presumption; (iii) that this custom should, however, be confined strictly to cases of succession and inheritance; (iv) and that if any particular usage at variance with the general Hindu Law applicable to those communities in matters of succession, be alleged to exist, the burden of proof lies on the party alleging such custom. ⁽⁴⁾ As to Khojas and Memons and the other Mahomedans, the presumption assumed in (i) is no longer made and the general principles applicable to these communities would have to be re-stated as follows:—(i) that presumably they follow the Hindu Law of succession and inheritance; (ii) that in regard to other matters they are presumably governed by the Mahomedan Law; (iii) but that it is open to them to show that they have adopted any usage of Hindu Law at variance with their own law. The question how far the Khojas were governed by Hindu Law was considered by the Bombay High Court in a case in which the evidence disclosed that the Hindu Law of succession and inheritance as administered in Bombay, that is, according to the Mayukh school of law, in the absence of custom to the contrary, applied to them; but that as regards the law of joint family and partition there was the greatest doubt and difference of opinion, and consequently there could be no presumption in favour of its applicability and he who asserted it had to prove it like any other fact.

318. The case shows that the same community may adopt different usages upon their migration to another place. So while the Khojas of Kathiawar and Cutch recognize in the son a right to obtain his share on partition of the family property both ancestral as well as self-acquired, no such right exists amongst the Khoja settlers of Bombay and for an obvious reason. For while the Khojas of the former place are mere agriculturists those of Bombay are enterprising traders who have acquired valuable estates by their individual capacity and exertion. ⁽⁵⁾

319. The same rules apply equally to the other Mahomedan sects formed

(1) *Ahmedbhoy v. Cassumbhoy*, 18 B. 584 (544).

(2) Perry's Or. cases 110.

(3) *Gangbai v. Thavar Mulla* 1 B.H.C.R. 71; *Hirbai v. Gorbai*, 12 B.H.C.R. 294; *Rahimabai v. Hirbai* 3 B. 34, *Haji Ismail*; (In re) 6 B. 452; *Ashabai v. Haji Tyeb* 9 B. 115; *Abdul Khair v. Turner*, 9 B.158; *Mahomed Sidick v. Haji Ahmed* 10 B. 1; *Ahmedbhoy v. Cassumbhoy*, 18 B. 584; *Baibaiji v. Bai Santok* 20 B. 58 (57); *Rashid v. Sherbanoo*, 29 B. 85; *Saboo Sidick v. Ally Mahomed*, 30 B. 270.

(4) *Baibaiji v. Bai Santok*, 20 B. 58 (57).

(5) *Ahmedbhoy v. Cassumbhoy*, 18 B. 584.

Cutchi Memons. out of Hindu converts, such as the Cutchi Memons, Sunni
Sunni Borahs. Borahs, Molasalem Girasias It will be noted that all
Molasalem Girasias. these retain and follow their own communal law. But
 the case of territorial extension of Mahomedan Law is afforded by the case of
 Mahomedans inhabiting the Satpura plateau of the Central Provinces who
 from their association with the Hindus have adopted their law of succession
 and inheritance. (1)

The cases afford no instance of the Mahomedans absorbing the Hindu Law, in other matters, for instance, adoption, though this would appear to be an attractive field for imitation since the Mahomedan Law itself recognizes sonship by acknowledgment from which adoption might have been another step. But here the intervention of religious beliefs has prevented a further assimilation of the two systems.

320. But while Hindu converts to Mahomedanism retain their freedom of following the Hindu Law of succession and inheritance,
Christian converts. the same cannot be said of Hindu converts to Christianity, who, since the passing of the Succession Act (2) are held to have left no option but to conform to its provisions on the subject of succession. The statutory authority for this view is section 331 which runs as follows:—

S. 2 Except as provided by this Act or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of intestate or testamentary succession.

<p>Succession to property of Hindus, etc., and certain wills, intestacies and marriages not affected.</p>	<p>S 331 The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Mahomedan or Buddhist, nor shall they apply to any will made, or any intestacy occurring, before the first day of January 1866.</p>
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The 4th section shall not apply to any marriage contracted before the same day.

321. The next S. 332, however, empowers the Governor General in Council to exempt the members of any race, sect or tribe in British India, or any part of such race, sect or tribe, to whom he may consider it impossible or inexpedient to apply the provisions of this Act or of the part of the Act mentioned in the order. The combined effect of these sections is that the Succession Act is primarily intended to be the General Law of the land, but Hindus, Mahomedans and Buddhists are exempted therefrom and the Governor General in Council may exempt others.

322. Two questions then arise—are Hindu converts to Christianity "Hindus" within the meaning of S. 331 and do the provisions of the Succession Act necessarily preclude the application of Hindu Law upon matters not directly dealt with in that Act. The Succession Act does not define that term, but there can be no question that after their conversion they cannot be called Hindus even in common parlance. They are, therefore, bound by the Act, (3) and as it saves no usage or custom to the contrary they are inevitably so bound unless they are exempted by Government under S. 332. In this view there is no room for survival of the essentially Hindu doctrines of co-parcenership and survivorship (4) but this has not been acceded to by Sir Lawrence

(1) *Umdabi v. Mahomed Sarwar*, C.P.D. O. R., Part VIII—75.

(2) Act X of 1865

(3) *Vathiar (In re)* 7 M. H. C. R. 121; *Ponnusami v. Dorasami*, 2 M. 209; Ad-

ministrator General v. Ananda, 9 M. 466; *Appavu v. Susaiudayan*, 15 M. L. J. 285; *Dagree v. Pacotti*, 19 B. 783; *Nepembala v. Sithikanta*, 15 C. W. N. 158; 8 I. C. 41

(4) *Tellus v. Saldhana*, 10 M. 69.

Jenkins who in a considered judgment held that notwithstanding the conversion of a family to Christianity it may still continue or become an undivided joint family holding and enjoying property in co parcellership with the right of survivorship which is unaffected by the Succession Act which merely deals with the *devolution* of rights on intestacy and does not purport to enlarge the category of heritable property. ⁽¹⁾ In other words, since the Act merely deals with succession and not survivorship it has not the effect of excluding the possibility of succession by survivorship. The Succession Act is not a consolidating statute, though it must be deemed to be exhaustive so far as it goes. Such however is the Indian Christian Marriage Act, 1872 ⁽²⁾, the provisions of which exclude the possibility of any marriage being solemnized according to Hindu Law, ⁽³⁾ and similarly a marriage so solemnized being subject to dissolution as provided in the Indian Divorce Act ⁽⁴⁾ there is no room for the applicability of Hindu Law so far, and to that extent these Acts are applicable.

323. Conversion to Hinduism.—It has been stated before that Hinduism does not admit converts. This is true. But nevertheless the process by which non-Hindus are admitted into its fold is in its effect, little, if at all, distinguishable from conversion. This result is achieved by acknowledgment and recognition of non-Hindus as Hindus. It is thus that the creedless barbarians of a by-gone age have been brought into its fold. Whole provinces have been thus become Hinduised.

324. The decennial census reports show that the period of transition of the aborigines to Hinduism is at times only 9 or 10 years. So in the census report of 1881, it is said :—“ Looking first at the figures for 1881, the most obvious point to the observer is the large proportion of the class of semi-Hinduised aborigines. Accepting the distribution of 1872, they now appear to number nearly one-fourth of the Hindu population. They are for the most part hewers of wood and drawers of water, and are beyond civil the remnants of the nations whom successive invaders, culminating with the Aryans, found in possession of the country, and absorbed more or less into their system of polity. Those of the aboriginal tribes which were most remote from the scene of the invasion, or were so situated as to be able to withstand it, have retained to this day their primeval language and customs, and their tribal faiths. Those, on the other hand, who were most exposed to the wave of conquest, who were least able to resist, or who were most ready to amalgamate with the new comers, were absorbed into their community, but relegated to its lowest grades, and employed in its most menial offices. Such was the treatment which the inhabitants of the country received at the hands of Hindu invaders. The question of absorption is only one of time and opportunity. Many of the castes shown as low-caste Hindus, and now universally accepted as such, have peculiarities which give rise to the suspicion that they are not pure Hindus of the Aryan type; but they are to all intents and purposes low-caste Hindus and are treated as such without question. The class of semi-Hinduised aborigines are only a stage behind them in their progress towards Hinduism. What many of the low-caste Hindus once were, the semi-Hinduised aboriginals are now: and in the lapse of time they, too, will recruit the ranks of the

(1) *Ghosal v Ghosal*, 31 B 25 (82) following *Navroji v Perzabai*, 28 B 80 dissenting from *contra* in *Tellis v. Saldhana*, 10 M. 69.

(2) Act XV of 1872.

(3) *Ib.*, s. 4.

(4) Act IV of 1869.

Hindus, as inter-marriage and social intercourse gradually obliterate more and more their distinctive characteristics."

325. The Manipuris were so converted wholesale to Hinduism only about a hundred years ago by a wandering Sanyasi who converted one Garib Niwaz, the founder of the family of the present Raja, and all Manipuris to Hinduism by declaring that they were all Hindus but had forgotten their privileges and duties. After ordering the people to bathe and make expiatory offerings for their long neglect, he declared them all to be good Hindus of the Kshatriya caste. (1) The people of Cachar were similarly converted.

326. The Privy Council had recently to consider the status of one Jung Bahadur Singh, the illegitimate son of a Kshatriya Taluqdar of Balrampur by a Mahomedan mistress who had been brought up as a Hindu, professed that religion, and married a Kshatriya lady of whom the defendant was the issue. He had previously kept a Mahomedan mistress of whom was born the plaintiff Sher Bahadur Singh. The parties' grandfather, the Maharaja, had by his codicil bequeathed a certain estate to his illegitimate son, the parties' father Jung Bahadur and to his "issue" for maintenance. The plaintiff claimed to be such "issue" and sued for possession on the ground of primogeniture. The defendant denied the plaintiff's legitimacy on the ground that he was merely the son of a Mahomedan mistress. The plaintiff pleaded *Nikah* but it was not proved and thereupon both the courts in India threw out his suit. The Judicial Commissioner however, refrained from recording any finding on the defendant's legitimacy dependent upon the legality of his father's marriage with a Hindu lady. The defendant contended before the Privy Council that parties' father could not have married a Mahomedan as he was a Hindu. He wore *tilak* on his forehead, was invested with a sacred thread, ate from the hands of a Hindu cook and scrupulously performed all the Hindu ceremonies. The Maharaja ate with him and was anxious to see him pass for a Hindu. Their Lordships upheld the decision of the courts in India on the ground that the plaintiff's mother had never in fact been married to his father, which dispensed with the necessity of having to decide the further question raised, *viz.*, whether such a marriage was ever possible. They equally refrained from going into the defendant's legitimacy, but they appear to have thought that there was nothing in Hindu Law to prevent Jung Bahadur from being treated as a Hindu. (2) Nor is this view unsupported by authority. (3) Such a case may be treated as one of conversion, a process which accounts for the development of Hindu Society by incorporating into it the mixed and aboriginal races. (4) Even direct conversion is being attempted by the Arya Samajis and other Hindu reforming societies, and it is only a question of time when the status of such converts will become undisputed and indisputable.

327. The Jains are no exception to the rule. (5) Like the rest of the Hindus they also carry on migration their own personal laws with them. But inasmuch as being traders and merchants they have for generations

(1) Wilkin's *Modern Hinduism* 178.

(2) *Sher Bahadur v. Ganga Baksh*, 86 A. 101 (116) P. C.

(3) Sir A. A. William's *Religious thought and life in India* Pt. 1, p. 57; Sir Alfred Lyall's *"Asiatic Studies"* pp. 101, 104; W. J. Wilkin's *"Modern Hinduism"*, p. 177; Carnegie's *"Notes on the races, tribes and*

castes of Oudh" (1868), pp. 37-40, 50.

(4) *Muthusami v. Massiamani*, 88 M. 842 (849).

(5) *Bhagvandas v. Rajmal*, 10 B H. C. R. 241; *Sheo Singh v. Dakho*, 1 A 688 P. C.; *Chotay Lall v. Chunnoo*, 4 C. 741 (752, 758) P. C.

become settled in all parts of India it is not always possible to ascertain the law of their origin. In that case their personal law would be the law of their domicile, in others words, the *lex loci*.⁽¹⁾

328. The process of conversion was incomplete when the Cooch Behar Raj case went up for decision to the Privy Council. In that case the dispute related to the succession of a Zemindari called the Baikantpur Raj and the question their Lordships had to determine was as to the validity of the defendant's adoption to the deceased Zemindar. It was found that the family of Cooch Behar to which the parties belonged originally belonged to the Cooch aboriginal tribe which had abandoned their old customs, altered the name of their country to "Behar," called themselves Rajbansi Kshatriyas, adopted Hinduism as their religion and a divine ancestry for the chief was even manufactured by the Brahmins who traced his pedigree to the God *Shiv*.⁽²⁾ Upon this the High Court presumed that the parties were Hindus and cast upon the plaintiff, a rival claimant, the burden of proving the invalidity of the defendant's adoption. On a review of the family history their Lordships held that it showed "that, although they affected to be Hindus, they had retained and were governed by family customs, which as regards some matters, were at variance with Hindu Law." They therefore held the family subject only to customary law, and as no custom in favour of adoption was proved, the defendant lost his estate though he held an adoption deed from the deceased Zemindar, but which failed to convey the property to a *personi designata*.⁽³⁾ This decision has naturally had the effect of arresting the indirect conversion of this family to Hinduism but in another case of Rajbansis the court held the conversion complete and applied the ordinary Hindu Law.⁽⁴⁾ The distinction between the two cases was however, only this, that while in the one case the origin and history of the family was known, in the other case it was not, and there being nothing to show that the conversion of this family was incomplete the court assumed the ostensible state to be the real state and held them to be Hindus bound by the *lex loci*, adding:—"It must be taken that they have adopted in its entirety one form or other of that law, and it being uncertain which form they adopted, it is not unreasonable to infer that they adopted the form which prevailed in the locality."⁽⁵⁾

329. Buddhists.—India was the birthplace and cradle of Buddhism, which though an exile from its native land, has vanquished almost the entire continent of Asia and whose followers number a third of the human race. In India itself the Buddhists as such do not number more than half a million all told, but it has left a permanent mark on the religious history of Hindustan. Its founder Sakya Muni, who afterwards became known as the Gautam Buddha was born in Behar in 563 B. C. where he fasted, taught and died. His religion fast spread throughout the land till in the third century B. C. it became the state religion under the great monarch Asoka whose kingdom extended from Kandahar to the mouth of the Ganges, and whose ambassadors converted Ceylon to Buddhism and dictated terms to four Greek Kings. It remained the dominant creed for about a thousand years. But in the fifth century A. D. Brahmanism, which had been continuously carrying on a

(1) *Rukhab v. Chunnilal*, 16 B 347; *Amava v. Mahadgauda*, 22 B 416; *Ambabai v. Govind*, 28 B. 257 (263); *Lalla Mahabeer v. Mt. Kundun*, 8 W R. 116; *Chotay Lall v. Chuno Lal*, 4 C. 744; *Mavik Chand v. Jagat Settani*, 17 C 518.

(2) *Fanindra v. Rajeswar*, 11 O. 468 (475) P.C.

(3) *Ib.*, pp. 476, 485.

(4) *Ram Das v. Chandra Dassia*, 20 C. 409 (412).

(5) *Ib.*, p. 418

struggle with it, gained ascendancy, and it was first driven out from Benares and Behar and in the ninth century of the Christian era it was deserted by the State, its votaries persecuted and the religion itself disfigured and disguised by a debased and ignorant priesthood, till it ceased to attract the people and the only vestige that remains of that sublime faith is in its offshoot the Jainism, the Vaishnavism as inculcated by Chaitanya ⁽¹⁾ and in the small number of its other adherents. ⁽²⁾

330. In the light of these facts the question whether Buddhists are Hindus can only admit of one answer. Whatever may be its association and affinity with Hinduism, it is a creed apart, and Buddhists cannot be classed as Hindus both because they do not regard themselves as such, nor are they so regarded by other Hindus.

331. Jainism claims to be the precursor of Buddhism, but it is only its child. It is in reality a compromise between Buddhism and Hinduism, an adaptation made by those who could not receive the new faith, but who nevertheless found refuge in a creed, which while retaining its traditional connection with Hinduism, has borrowed from Buddhism its doctrines and religious practice. In course of time as Buddhism lost its hold on India, its waning influence continued in Jainism till it relapsed into a form of Hinduism, into which its individuality became eventually merged and practically lost. ⁽³⁾

Hindu Law personal.

2. (1) Hindu Law is personal and is not affected by a change of domicile.

Law of origin.

(2) All Hindus are primarily governed by the law of their origin.

Explanation.—The “law of origin” means and includes the law established in the original domicile of the ancestors of the family, and not merely of any members thereof, as determined by the caste, race and language of the family before its migration and the connection since maintained therewith.

Synopsis.

- (1) *Personal law why saved* (332-334). (4) *Personal law when applicable* (336).
 (2) *What personal law is saved* (333-334). (5) *Law of Domicile when applicable* (337).
 (3) *General Rule* (335).

332. Analogous Law.—The tenacious adherence of Hindus to their customs and usages and their territorial diversity justify the rule here enacted. ⁽⁴⁾ In this sense there is a *lex loci* as stated in clause (1). But the *lex loci* only applies to persons of which it is the domicile of origin. ⁽⁵⁾ This is presumed to be as stated in S. (3). It follows the linguistic test. For

(1) Census of India, 1901, Vol. 1, § 686, p. 861.

(2) Bengal Census Report, 1881, Vol 1 § 210. The history of survivals of Buddhism in Bengal is given in the Census of India, 1901, 649, pp 869-871.

(3) See Bengal Census Report, 1881, Vol. 1, 215, pp. 87, 88.

(4) *Soorendranath v Heeramones*, 12 M.I.A.

81(96); *Parbati v Jagadis Chunder* 29 C. 433 (452) P. C.; *Govind v. Radha*, 81 A 477 (479) P.C.; *Nobin Chunder v. Janardhan* (1862) W. R 67; *Otun Chunder v. Obhoy Churn*, W. R (Sp.) 67 (68); *Koomud Chundur v Sesta-kant* (1863) W R (Sp.) 75; *Sonatum v Ruttun*, (1864) W. R (Sp) 95;.

(5) *Ramdas v. Chandra Dassia*, 20 C 409 (418).

instance, those who speak Bengali will presumably be governed by the Dayabhag Law wherever they may happen to reside, for Bengal was and remains their "domicile of origin." This term has been defined in the Succession Act as the country in which at the time of a person's birth his father was domiciled. ⁽¹⁾ But this is not the sense in which a Hindu takes with him his personal law and therefore a different term had to be coined to describe it.

333. The preservation of personal law is the necessary corollary to the preservation of religious rites and worship with which the Hindu Law is inextricably blended. The question was considered by the Privy Council as far back as 1839 when affirming the finding of the Sadar Diwani Adalat, their Lordships said that in a case where a family migrates from one territory to another if they preserve their ancient religious ceremonies, they also preserve the law of succession. ⁽²⁾ It should be noted that this presumption only applies to persons as to whose nationality or race there is no dispute; and there may be cases where the same degree of presumption cannot be made as for instance in the case of persons of mixed descent or of those whose assimilation to the Hindu society is yet incomplete. Such was the case of a branch of the Cooch Behar family who belonged originally to the Koch aboriginal hill tribe but had for over a century become converted to Hinduism. A divine ancestry for the chief was manufactured by the Brahmins, but nevertheless the family had retained some of its aboriginal customs. In this state of the law Jogendra the Zemindar of Baikantpur Raj died in 1878. The plaintiff claimed the estate by right of descent, the defendant by adoption, and the question was whether the validity of an adoption allowed by Hindu Law could be presumed in favour of the defendant. Their Lordships held that if the family had been out and out Hindus such would have been indubitably the presumption. But it could not be applied to the parties whose conversion to Hinduism was yet incomplete and therefore it was on the defendant to prove his adoption as supported by custom, which he failed to do. ⁽³⁾

334. It has been held that the personal law by which a party is bound is the personal law in vogue at the time of his migration and not any subsequent development of that law which may have come into prevalence after his migration. ⁽⁴⁾ But it is submitted that this is a limitation by no means in accord with the principle underlying the rule. The reason why a Hindu is permitted to carry his personal law with him is founded on the fact that that law is disseverably connected with his religion and that Hindus are notoriously conservative in the matter of their religious observances. Consequently, they are held free to take with them both their religion and their law wherever they go. Now it cannot be denied that if they had not migrated they would have been bound by any changes and development which that law might undergo from time to time. If so how can they be the less bound merely because

(1) Act X of 1865, S. 7.

(2) *Rutcheputti v. Rajender* 2 M. I. A. 132; *Soorendranath v. Heeramonee*, 12 M. I. A. 81 (92); *Prabati v. Jagdis Chunder*, 29 C. 493 (451) P. C.; *Otium Chunder v. Janardum*, W. R. (F. B.) 67 (68); *Kocmuā Chunder v. Seetakanth*, ib., 75 (76); *Lukkea v. Gungabobind*, 8 W. R. 56; *Pirtheesingh v. Sheo Soonduree*, 8 W. R. 261; *Huro Pershad v. Shilo Shunkuree*, 18 W. R. 47; *Sonatam v. Ruttum* ib., 95; *Govind v. Radha*, 81 A 477 (479); *Murli Das v. Manicka*, 5 M. L. T

181; *Ambabai v. Govind*, 28 B 257; *Jagannath v. Narayan*, 31 B 558 (557, 558); *Vasudeva v. Secretary of State*, 11 M. 157 (161, 162); *Mallathi v. Subbaraya*, 24 M. 650; *Bhagbati Sohodra*, 18 C. W. N. 884; 18 I. C. 691; *Kulada Prasad v. Hari Prasad*, 40 C 407 (416).

(8) *Fanindra v. Rajeswar*, 11 C. 468, 481 (182 P. C.)

(4) *Vasudevan v. Secretary of State*, 11 M. 157 (162).

they have changed their domicile. Moreover, the rule assumes a continuous connection with the place of origin in spite of the change of domicile. Moreover, the change may be a mere correction of an erroneous view of law ; or it may be the revival of an old custom. So where in a case of migration proved to have taken place before the composition of Mayukh, their Lordships referring to that work, said : " Although the migration of the Ahban Thakurs took place before the Mayukh was written it may well be that the rule was in force in earlier times and that on this point the Mayukh only embodied and defined a pre-existing custom." (1) While a person is entitled to his personal law, he cannot simultaneously have two such distinct and inconsistent laws, for example, one governing his rights in respect of property taken by him from paternal ancestors, and the other in respect of properties received by him from maternal ancestors. (2) The *lex loci* as set out in S. (3) governs a person whose place of origin is unknown. (8)

335. Principle.—Ordinarily, all persons living in any locality are subject to the law there in force. (4) And as regards immovable property, the general rule is that it is subject to the *lex rei situ*. (5) But inasmuch as Hindus are now declared by law to be bound by their own personal laws, (6) it follows that they are equally entitled to be judged by those laws wherever they may be living. This is of some consequence as Hindus are to be found scattered all over India and if their laws were to be altered by each movement of their domicile or in accordance with the rule of *rei situ*, then they might be subjected to a variety of rules as divergent as the schools of Hindu Law. Moreover, that rule only applies to countries which possess a more or less uniform territorial law. Such laws now exist in this country, and so far as they are applicable, they apply to the exclusion of Hindu Law (§177) They, however, still leave Hindu Law intact on several subjects here dealt with ; and on those the rules here prescribed, hold good. But since the statutes reserving this law only extend to India, a Hindu migrating beyond the shores of India, e.g., to Africa, England or elsewhere cannot carry his personal law with him, but would be bound by the *lex loci* prevailing in the land of his domicile. But a Hindu migrating from foreign territory to India is entitled to carry his personal law with him. (7)

336. Personal law when applicable.—This section lays down a rule in consonance with the unanimously accepted view of the courts (§ 332). It declares that a Hindu is primarily governed by the law of his origin. Such law is set out in S. (3). Consequently, persons who have long lived rooted to the soil of any province and speak the language and follow the customs there prevalent, are governed by the *lex loci*. But in the case of migrating families who leave the place of their origin to settle down in another place where the prevalent law is different, the rule is that their own personal law follows them on migration. But this is merely a presumption and may be rebutted by proving that the family had by its adoption of the customs and usages of its domicile, declared its intention to abandon its law of origin and follow that of the domicile. (8) But the mere adoption of local customs, festivals and

(1) *Chandika v Muna Kunwar*, 24 A. 278, (1900) P.C.

(2) *Bhagabati v. Sohodra*, 16 C. W. N. 884; 18 I. C. 691.

(3) *Ram Das v. Chandra*, 20 C. 409 (412).

(4) *Lalla Mahabir v. Mt. Kundun*, 8 W. R. 116 (118, 119).

(5) *Nobin Chander v Janardhan*, W. R. (F. B.) 67.

(6) Government of India Act, 1915, S. 112 (5 & 6 Geo. 5, c. 61) and the statutes previously cited.

(7) *Mailathi v. Subbaraya*, 24 M. 650.

(8) *Byjnath v. Kopilmon*, 24 W. R. 95 (96).

ceremonies of the people around is not sufficient to displace this presumption. (1) The real test is whether the family has continued to adhere to the essential ceremonies of its place of origin, such as those performed at the time of birth, marriage and death, (2) especially the last which Hindu Law regards as the most important. (3)

337. Law of Domicile when applicable.—It has been stated before that a Hindu is only presumably bound by the law of origin and that that presumption is rebuttable and may be rebutted by proof of adoption of the law of domicile in essential ceremonies, such as those attending birth, marriage and death. The question in each case is one of fact. Where a family originally subject to the Mithila Law, migrated to Bengal and had for several generations intermarried with Bengal women, though the rites and ceremonies connected with funerals and marriages had been sometimes performed according to the Bengal Shastras, the court held the fact of intermarriages sufficient to justify the application of the law of domicile. (4) But the converse proposition does not necessarily hold good, since a family may have for generations become merged in the local population and yet it may not be permitted to intermarry with the people of that locality; but if in such case the law of succession be in accordance with the *lex loci* then the court would presume that the family had abandoned its law of origin and adopted that of domicile. (5) But this statement requires to be qualified. The fact that a Hindu is entitled to carry with him his communal law depends upon the fact that in spite of the change of domicile he still remains a member of his community and attached to his original home. He visits it on the occasions of birth, marriages and funeral obsequies and it would be strange if he were bound by one law, his wife by another and his children by its latest development. Moreover, in such a case a preliminary enquiry into the period of migration and the state of the law then current would be almost a necessary prelude to every such litigation. Fortunately, as the old fiction of interpretation still obtains and as interpretation of law is not its alteration, it follows that Hindus are entitled to insist upon administration of their personal law with all its latest “interpretations”.

3. In the absence of anything appearing to the contrary

Lex Loci.

the natives of each of the following provinces are governed by the schools of law noted against them:—

- i. Bengal and Assam ... Dayabhag, supplemented by the Mitakshara.
- ii. United and Central Provinces ... Mitakshara.
- iii. Mithila ... Mitakshara, supplemented by Vivadchintamani and Vidvadratanakar.
- iv. Bombay Presidency, Berar and Guzerat Mitakshara, modified by the Mayukh.

(1) *Huro Pershad v. Shibo Shunkuree*, 13 W. R. 47.

(2) *Koomud Chunder v. Seetakanth*, W. R. (F. B.) 75 (76); *Login v. Princes Gouramm*, 11 J. (O. S.) 109; *Pudmavati v. Doolar Singh*, 4 M. I. A. 259

(3) *Ram Bromo v. Kaminee*, 6 W. R. 295

(296).

(4) *Raj Chunder v. Gocul Chand*, 6 I.D (O.S) 42; (1801) 1 Sel. R. S. D. A (Macnaghten) 48; *Koomud Chunder v. Seetakanth*, W. R. (F. B.) 75 (76)

(5) *Chundro Sekhur v. Nobin Soondur*, 2 W. R. 197.

- v. Madras Presidency ... Mitakshara modified by (1) Smriti Chandrika, (2) Parasar Madhav, (3) Virmitroday.
- vi. The Punjab ... Customary law supplemented by the Mitakshara.

Synopsis.

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| (1) <i>Lex Loci</i> (338). | (5) <i>Law in the U. P. and the C. P.</i> (342). |
| (2) <i>Law on migration</i> (339). | (6) <i>Law in Mithila</i> (343). |
| (3) <i>Law in Bengal, Behar and Assam</i> (340). | (7) <i>Law in Madras</i> (344). |
| (4) <i>Law in Bombay and Guzerat</i> (341). | (8) <i>Law in Punjab</i> (345). |

338. Analogous Law.—The general history of the Hindu schools has already been given (§§ 255 257). Strictly speaking, there is no *lex loci* in Hindu Law, since the existence of a *lex loci* is inconsistent with the existence of personal communal law.

Lex Loci.

Take for instance, the case of Calcutta. The Bengali Hindus resident there are governed by the Dayabhaga not because they are residents of Calcutta but because they are Bengali Hindus and as such they would be so governed whether they were resident in Calcutta or Cawnpur. ⁽¹⁾ Similarly, the Marwadi Hindus from Rajputana would be governed by their personal law whether it is the Mitakshara or custom, and the Sikh from the Punjab would similarly follow his ancestral customs. But while with the heterogeneous population of an Indian town it is not safe to premise that any people resident therein are subject to any particular school of law, still there is the *lex loci* in the sense that the indigenous natives of a particular place are presumably subject to the school of law which has by common consent been held to bind that locality.

339. Though strictly speaking, there is no such thing as *lex loci*, as regards the personal law applicable to any community, the courts administer the personal law obtaining in any locality to a Hindu living there unless there is evidence to show that he has adopted any other law or custom. ⁽²⁾

A family, migrating from Guzerat where the Mayukh prevails, to Madras where the Mitakshara is supreme, will be presumed to continue to be bound by the Mayukh.

340. Books of Local Authority.—The Bengal school, also known as the Gauriya school, dominates the Bengali speaking provinces of Bengal and Assam in both of which provinces the primary the authority is that of *Dayabhaga*. ⁽³⁾ The Mitakshara is treated there with respect but it holds only a secondary place merely supplementing the Dayabhaga together with its commentaries ⁽⁴⁾ upon

(1) *Kulada v Hari*, 40 C 407; *contra* a general statement in *Bhadia v. Bhaji*, 10 N. L. R. 84 is unsound.

(2) *Ramdas v. Chundra*, 20 C. 409; But see *Murle Das v. Manick* 5 M. L. T. 181.

(3) *Uma Sunker v. Kali*, 8 C. 256 (268); *Abhai Churn v. Mangal* 19 C. 691 (698); *Basanta v. Jogendra* 33 C. 971 (975).

(4) The leading commentaries are by

Srinath Acharya Chudamani; Achyuta Chakravarti; Raghunandan, Maheshwar and Shri Krishna (1700 A. D.) of which Raghunandan's ranks highest *Ramnath v. Durga*, 4 C. 550 (554); *Ramananda v. Raj Kishore* 22 347 (351); Shri Krishna also ranks high—*Raj Kishore v. Gobind*, 1 C. 27 (39); *Hari Dayal v. Girish Chunder*, 17 C. 911 (914); *Ramananda v. Raj Kishore*, 22 C. 347 (358).

points upon which they are silent. (1) Of these the two following are considered as commentaries of great authority :—

- (1) Dayatatwa by Raghunandan (2);
- (2) Daya-krama-sangrah by Sri Krishna. (8)

The two works on adoption—

- (3) The Dattak-mimamsa, and
- (4) The Dattak-chandrika are equally considered as works of highest authority in Bengal, (4) but in case of conflict the Chandrika is preferred to the Mimamsa. (5)

341. The preferential position accorded to the Dayabhag in Bengal is accorded to the Mayukh in Bombay, Berar and Guzerat, though with this qualification that the two works should be sought to be reconciled as far as possible, and the Mayukh view only accepted where such reconciliation is impossible or the Mitakshara is silent. This appears to be the prevailing view (6) though in the earlier cases the Mayukh was assigned only a second place, the Mitakshara being regarded as paramount. (7)

342. The authority of the Mitakshara (§§ 141-150) is paramount in the United (8) and the Central Provinces. (9) Other works governing the same school are :—

(1) Vir-mitrodai—a work of special authority. (10) It is a collection of notes concisely elucidating the obscure passages of the Mitakshara. (11)

(2) Subodhini—by Visheshwar Bhatt, author of Madan-parijat, an authority in Mithila. Subodhini is only a collection of notes explanatory of obscure passages in the Mitakshara.

(3) Madan-parijat.

(4) Keshav-vaijyanti.

(1) *Bhugwandeem v. Myna Bai*, 11 M. I. A. 488 (507, 508); *Collector of Ramnad v. Moottoo Ramalinga* 12 M. I. A. 397 (435)

(2) *Ramananda v. Rai Kishore* 22 C. 347 (351)

(3) *Raj Kishore v. Gobind* 1 C. 27 (39).

(4) *Padma Coomari v. Court of Wards* 8 C. 302 (311) P. C.; *Puddo Kumari v. Jugut Kishore* 5 C. 615; *Uma Sunkar v. Kali*, 6 C. 256.

(5) *Collector of Madura v. Mootoo Ramalinga* 12 M. I. A. 397 (437).

(6) *Collector of Madura v. Mottco Ramalinga* 12 M. I. A. 397 (438); *Vinayak v. Lakshmi-bai* 1 B. H. C. R. 117 (122) approved O. A. *Vinayak v. Lakshmi-bai* 9 M. I. A. 516 (536, 537); *Bhagwanden v. Myna Bai* 11 M. I. A. 487 (508); *Krishnaji v. Pandurang* 12 B. H. C. R. 65; *Rahi v. Govind* 1 B. 97 (106); *Bhagtrath v. Kanujirav* 11 B. 285 (295) F. B. in which West J. explains the reasons for the ascendancy of the Mayukh; *Gojabai v. Shahajirao*, 17 B. 114 (118); *Bai Kesser Bai v. Hunsraj*, 80 B. 431 (442); *Tukaram v. Narayan*, 86 B. 889 (897); *Basanta v. Jagendra*, 88 C. 371 (375); *Narayana-swamy v. Kuppasami*, 11 M. 48 (48)

(7) *Vallabh Ram v. Bai Hariganga*, 4 B. H. C. R. (A. C.) 135 (138); *Narayan v. Nana* 7 B. H. C. R. (A. C.) 153 (166, 167); *Rakmabai v. Radhabai* v. 5 B. H. C. R. (A. C.) 181 (185); *Bachha Jha v. Jugmon Jha* 12 C. 348 (355); *Balkrishna v. Lakshman* 14 B. 605 (612).

(8) *Bhyah Ram v. Bhyahugur* 13 M. I. A. 373 (390); *Sri Balusu v. Sri Balusu* 22 M. 398 (410) P. C.; *Bachira Ju v. Venkatappadu*. 2 M. H. C. R. 403 (406); *Tulshi Ram v. Behari Lal* 12 A. 328 (335); *Bhagwan Singh v. Bhagwan Singh*, 17 A. 294 (347); *Debi Sahai v. Sheo Shankar Jai* 22 A. 358 (355).

(9) *Jagannath v. Ranjit Singh*, 25 C. 254 (266).

(10) *Collector of Madura v. Mootoo Ramalinga* 12 M. I. A. 397 (438); *Girdhari Lal v. Bengal Government* Ib. 448 (466); *Mineram v. Kerry Kolutany* 5 C. 776 (786) P. C.; *Bachha v. Jugmon* 12 C. 348 (353, 35). *Ranjit Singh v. Jagannath* Ib. 375 (381); *Joglamba v. Secretary of State* 16 C. 367 (374); *Abhal Churan v. Mangal Jana* 19 C. 684 (698); *Tulshi Ram v. Behari Lal* 12 A. 328 (340, 341)

(11) Cole. Preface to Mitak. p. VIII.

(5) Balam Bhatt Tika—work by a Brahmin Lady named Laxmi Devi, (§ 144) overstrains the text to favour the rights of women. (1) In other respects neither this commentary nor the Vaijyanti can equal the Virmitrodai. (2)

(6) Vaijyanti—See Balam Bhatt.

(7) Vyvhar-madhav.

(8) Kalpataru.

(9) Vivad-tandav—author Kamlakar—contemporary of Nilkanth and said to be his cousin—deals only with inheritance and followed, if “his work is not in conflict with any higher authority.”

(10) Visheshwar—author of the Tika on Mitakshara.

343. As previously observed, except the Bengal, Eastern or Gauriya School whose text book is the Dayabhog, and the Mitakshara **Mithila.** school which favours the Mayukh, the rest of India is subject to the Mitakshara and its sub-schools of which the Mithila school its nearest neighbour, is least dissentient. The country comprised in the ancient Mithila is variously described, some holding it to correspond to the whole of modern Behar (8) while others hold it to comprise only North Behar including Tirhoot (4) and Purneah. (6) According to Messrs. Golap Shastri and D. Chatterjee translators of the Vivad Ratnakar the province of Mithila is that territory which lies between the rivers Gandak and the Coosee. (6) Whatever may be the exact boundaries of Mithila, it was at one time the seat of great literary activity. Yajnavalkya the author of the Institutes annotated in the Mitakshara lived and taught here; and it still boasts of a distinct sub-school which has been prolific in the production of treatises which, though professedly commentaries on the Mitakshara, do not fail to introduce small local variations under the license of interpretation. But the Mitakshara remains there as the paramount authority, the following works being regarded as merely supplementing it and as such entitled only to local preference:—

(1) Vivad-ratnakar—composed by or under the superintendence of Chandeshwar. Leading text-book of the school.

(2) Vivad-chintamani—by Vachaspati Misra is also a leading text-book. (7) It follows the Ratnakar.

(3) Vivad-chandra—By Misaru Misra—holds a high place. (8)

(4) Krito-kalpadruma.

(1) *Tulshi Ram v. Behari Lal*, 12 A. 328 (368); *Ananda v. Nounit Lal*, 9 C. 315 (824); *Jogdamba v. Secretary of State*, 16 C. 367 (372); *Dwarka v. Sarat Chandra* 39 C. 319 (386).

(2) *Ananda v. Nounit Lal*, 9 C. 315 (824).

(3) Tagore's Preface to Vivad Chintamani, p. XXVII.

(4) *Thakoor Deyhee v. Rai Baluk Ram*, 11 M. I. A. 189 (176); *Bhagwandeem v. Myna Bai*, 11 M. I. A. 487 (507).

(5) *Rutheputty v. Rajunder*, 2 M. I. A. 183 (155).

(6) Babu Golap Shastri in his Law of

Adoption treats Mithila as co-extensive with Tirhoot (2nd Ed.), 92

(7) *Thakoor Deyhee v. Rai Baluk Ram*, 11 M. I. A. 189 (174, 175); *Dhendru v. Jagannath* 1 B. H. C. R. (A. C.) 47 (49); *Balwant Singh v. Rani Kisanori* 20 A. 267 (290) P. C.; *Damodar v. Senabutty* 8 C. 537 (511); *Birajun v. Luchmi Narain*, 10 C. 392 (399); *Bachha v. Jugmon* 12 C. 348 (351); *Sunimani v. Mulla* 13 M. I. A. 265 (268); *Mari v. Chinnammal*, 8 M. 107 (118).

(8) *Rutheputty v. Rajunder*, 2 M. I. A. 182 (156).

(5) Madan-parijat—written by Visheswar Madan Upadhaya—better known as the author of Subodhini.

(6) Dwaita-parishishtah—By Keshav Misra.

(7) Smriti-sar.

(8) Smriti-samuchai.

} —By Hari Nath Upadhaya.

But though these are all text-books of this school, in case of conflict between any of them, the Mitakshara alone is regarded as the final guide. ⁽¹⁾

344. In the Madras Presidency ⁽²⁾ the supreme authority of the Mitakshara, though unshaken, ⁽⁸⁾ is supplemented by the following works:—

(1) The Smriti-chandrika—ranks highest after the Mitakshara ⁽⁴⁾ though it cannot override its explicit provisions. ⁽⁵⁾

(2) Vir-mitro dai.

(3) Subodhini.

(4) Saraswati-vilas.—of some authority in Madras. ⁽⁶⁾

(5) Parasar-madhaviyam—written by Narainswamy—especially esteemed in the Canara District. ⁽⁷⁾

(6) Vyavhar-nirnai.

(7) Vaithinath Dikshatiyam.

345. In the Punjab, in all questions relating to adoption, guardianship, succession, women's property and female relations such as betrothal, dower, marriage, divorce and bastardy, family relations, partitions, gifts, wills and legacies, religious usages and the rights of alluvion and diluvion, the first rule of decision is custom ⁽⁸⁾ which is recorded in the Riwayat-i-Am prepared by the settlement officers charged with this duty. ⁽⁹⁾ But in the absence of ascertained custom, the Punjabi Hindus are governed by the Mitakshara, though the scope for its applicability is much limited by the considerable body of customary law which has become crystallized into well ascertained rules.

(1) *Bachha v Jugmon* 12 C. 348 (866).

(2) Various called the Peninsula, the Dravida District or the southern school.

(3) *Collector of Masulipatam v Cavalry*, 8 M. I. A. 500 (522); *Katama Nachiar v Srimut Raja Mootoo*, 9 M. I. A. 539 (606, 607); *Nagalinga v. Subhiramaniya*, 1 M. H. C. R. 77 (80); *Srinivasa v. Kuppan*, 1 M. H. C. R. 180 (192); *Bachiraju v. Venkatappadu*, 2 M. H. C. R. 402 (403).

(4) *Bhagwandeem v Myna Bae*, 11 M. I. A. 487 (508); *Collector of Madura v. Muthu Ramalinga*, 2 M. H. C. R. 206 (319); O. A. 12 M. I. A. 897, 487; *Kissen v Javallah*, 8 M. H. C. R. 346 (851); *Gajapathi v. Gajapathi*, 1 M. 290 (299) P. C.; *Muttu v. Dora Singha*, 8 M. 290 (302) P. C.; *Mari v Chinnammal*, 8 M. 107 (128); *Subramania v. Muthuswamy* 21 M. L. J. 556 (861); *Appandai v Bagubali*,

33 M. 489 (441).

(5) *Summani v. Mullammal*, 8 M. 265 (269); *Muthoppannarayan v Ammani*, 21 M. 58 (62); *Rau Gramony v. Amani* 23 M. 859 (860); *Chinnasami v. Kunju*, 25 M. 152 (159).

(6) *Kattama v. Deraswamy*, 6 M. H. C. R. 310, 333; *Jijyomb v. K. Makshi*, 8 M. H. C. R. 424 (452); *Appandai v Bagubali*, 33 M. 489 (441); *Chinnasami v. Kunju*, 25 M. 152 (159).

(7) *Collector of Madura v. Muttu Ramalinga* 2 M. H. C. R. 206 (320); O. A. 12 M. I. A. 897; *Bhagwandeem v. Myna Bae* 11 M. I. A. 488 (508).

(8) S. 2, Reg. XI of 1825; S. 5, Punjab Laws Act (Act IV of 1872); *Krishna Singh v. Nur Din* (1917) P. W. R. 156; 42 I. C. 198; *Rattigan's Dig. Civil Law Punjab*, pp. 1-4.

(9) *Beg v. Alla Ditta*, 44 C. 749 P. C.

CHAPTER II.

CUSTOMARY LAW.

Custom defined.

4. Custom is an established practice at variance with the general law.

Synopsis.

- (1) *Custom in Hindu Law* (348). (2) *Its place in other systems* (349).

346. Analogous Law.—The definition in this section is taken from the undernoted case. (1) The following text from Manu (2) shows the place of custom in Hindu Law :—

108. Immemorial custom is transcendent law, approved in the sacred scripture, and in the codes of divine legislators; let every man, therefore, of the three principal classes, who has a due reverence for the supreme spirit which dwells in him, diligently and constantly observe immemorial custom.

109. A man of the priestly, military, or commercial class, who deviates from immemorial usage, tastes not the fruit of the Veda; but, by an exact observance of it, he gathers the fruit in perfection.

110. Thus have holy sages, well knowing that law is grounded on immemorial custom, embraced, as the root of all pious good usages long established.

347. Colebrooke in his Digest (3) extracts the following quotations :—

78. A decision must not be made solely by having recourse to the letter of written codes; since, if no decision were made according to the reason of the law, or according to immemorial usage (for the word *Yukti* (4) admits both the senses), there might be a failure of justice. (5)

98. A man should not neglect the approved customs of districts, the equitable rules of his family, or the particular laws of his race. (6)

99. In whatever country, whatever usage has passed through successive generations, let not a man there disregard it; such usage is law in that country.

Other sages have similarly emphasized the sanctity of custom. (7)

348. It is thus clear that Hindu Law which is itself founded on immemorial customs, naturally assigns a high place to communal customs and usages. This is recognized by the Courts. So the Privy Council in one case said, " Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence ". (8)

(1) *Harpershad v. Sheo Dayal*, 26 W. R. 55 (70) P. C.

(2) Manu, Ch. 1 Ss. 108-110 See also *Ib.*, Ch. VII. S. 208, Ch. VIII, Ss. 41, 46.

(3) 1 Dig., pp. 187, 162.

(4) " Ratiocination "

(5) *Vrihaspati* cited in the *Vyvhar Tatwa*.

(6) *Waman Puran*, cited by *Vachaspati* and *Raghunandan*.

(7) *Yajurveda* ii S. 4, 6; (*Mandlik's*

trans) p. 198; *Brihaspati* 38 S. B. E. pp. 262, 287; *Mitaksara* Ch. 1 S. 1-25 1-ii 1, S. 2; *Narad* Intr. S. 40; *Gautam* Ch. XI S. 20 (S. B. E. II, p. 237); *Vashishth* Ch. S. 1-10 (S. B. E., XIV, p. 2) *Baudhayan* (S. B. E. XXIX, pp. 147, 167); *Saraswati Vilas* (Foulkes Tr.) pp. 16, 99, 100 (*Vir Mitroday* Ch. ii, p. ii S. 19) *Sarkar's* Tr., p. 127.

(8) *Ramalakshmi v. Sivanatha*, 14 M. I. A. 570 (585).

(In this and other cases) the courts have used the two terms "custom" and "usage" as interchangeable; but they are clearly distinguishable on the grounds stated in the sections, and apparent from the following descriptions given of them by the same high tribunal.

349. The rule that custom overrides the law is not merely a rule of Hindu Law, but is equally the rule in England and America and **Custom in other** even in countries possessing the advantage of codified **laws.** laws. In England several attempts have been made to define custom but most of these definitions describe it rather by its effect than by its essential attributes.

The following are some of the best examples :—

"A custom...is, in effect, the common law within that place to which it extends, although contrary to the general law of the realm" Per Tindal, C. J. (1)

"A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality". (2)

"It is a just *non scripta* and made by the people in respect of the place where the custom obtains"

Custom may be defined to be a law or right not written, which being established by long use and consent of our ancestors has been and daily is in practice". (3)

A custom which extends to the whole country or embraces every member of the public ceases to be a custom, but passes into the common law of the land. (4)

There is as much confusion in the indiscriminate use of the two terms "custom" and "usage" in England as there is in this country. (5) Ordinarily, the term "usage" lacks three of the distinguishing features of custom properly so called: (i) it need not have existed from time immemorial; (ii) it need not be local; (iii) it cannot override the positive law. But on close examination none of these tests would stand scrutiny; since the first two are not exclusive and the last is equally applicable to custom.

The real distinction is stated in the definition and when the two terms are not interchangeably used, as they very often are, those appear to be the leading attributes of usage. This term is however frequently used to denote a local custom. (6) It is used in this sense in the Evidence Act. (7) It will however, be used in this code in the definite sense assigned to it in the section.

In the ethnological development of law usage usually precedes custom. Many customs have so developed; and sometimes the custom of a particular community remains no more than a usage of another.

Nature of Custom **5.** (1) A custom varying the general law may be a general, local, tribal or family custom.

Explanation 1.—A general custom includes a custom common to any considerable class of persons. (8)

(1) *Lockwood v. Wood* (1844) 6 Q. B. 50 (64) adopted per Jessel M. R. in *Hamonorton v. Honey* (1876) 24 W. R. 608.

(2) *Tenistry case* (1698) Dav. Ir. 29 (81, 82).

(3) *Termes De la Ley. sub voce*

(4) Co.-Litt. 110b; *Coventry (Earl) v. Willes* (1868) W. R. 127; *Gifford v. Yar-*

borough (Lord) 5 Bing. 168 (164).

(5) 10 Halsbury's L. E. 7th Custom, S. 422, p. 221.

(6) The term "usage" is so used in S. 28. Bengal Tenancy Act (VIII of 1885); *Sati Prasad (Raja) v. Mammatha*, 6 I. C. 291.

(7) Cf. Ss. 48, 49, Act I of 1872.

(8) *Ib.*, S. 49 Exp.

Explanation 2.—A custom which is applicable to a locality, tribe, sect or a family is called a special custom.

Synopsis.

- (1) *Varieties of custom* (350, 351). (3) *Family customs* (354).
 (2) *Local customs* (352). (4) *Primogeniture* (355, 356).

350. Analogous Law.—Custom has been defined as some established practice at variance with the general law. ⁽¹⁾ Now such practice may be universal ⁽²⁾ or confined to a particular people ⁽³⁾ or locality, ⁽⁴⁾ or again, it may even be confined to a particular family. ⁽⁵⁾

351. A universal custom is the common law of the people, ⁽⁶⁾ and is soon transformed into the statute law, for its universality is itself a guarantee of its popularity and what is popularly done is the common law of the people. Such may be said to be the custom of polygamy prevalent amongst the Hindus.

The existence of a general custom as distinct from law is, however, possible and is assumed in the Evidence Act ⁽⁷⁾ where it is thus described :—

“ The expression general custom or right includes customs or rights common to any considerable class of persons.” ⁽⁸⁾

352. A local custom is a custom confined to a particular locality. Such is, for instance, the custom of observing no caste in the matter of eating and drinking, in Jagannath, the custom of pre-emption and such is the custom of polyandry which is confined to Malabar. The custom of intercaste marriages was pleaded in a case from Gorakhpur in which one Bhikh Raja Brahmin had married a Kshatriya lady by whom he had an issue. The legitimacy of the latter was disputed, but he pleaded the validity of his parent's marriage with reference to custom which permitted such marriages in their native country of Nepal. The court however found that the family was not indigenous Nepalese though they had been long resident in Nepal and there was nothing to show that they had adopted that custom or carried it with them to their new domicile. ⁽⁹⁾ This is then an example of a custom which, though once general, latterly became confined only to one locality. The Punjab is full of such local customs.

353. A tribal custom is a custom confined to a particular tribe, caste or community. Such was the custom proved in the case of an Agarwal Bania of Zira in the Ferozpur District amongst whom an unequivocal declaration of adoption followed by subsequent treatment of the adoptee as a son was held to constitute a valid adoption. ⁽¹⁰⁾ So while adoption is not recognized by the Mahomedan law it is customary amongst the village community of Ramsar. ⁽¹¹⁾ So amongst the Bajwa Jats of the Sialkot District a person adopted into another family does not thereby forfeit his right to succeed in his natural family as against collaterals. ⁽¹²⁾

(1) S. 4.

(2) General Intr. § 4-6.

(3) *Vasudevan v. Secretary of State*, 11 Mad 157; *Padam v. Suraj*, 28 A. 458.

(4) A local custom is called a *Deshachar*.

(5) Which is then called *Kulachar*; *Urjun Singh v. Ghunsiam*, 5 M. I. A. 169; *Gunesh v. Moheshur*, 6 M. I. A. 164; *Soorendro Nath v. Heeramonee*, 12 M. I. A. 81 (92); *Chintamun v. Nowlukho*, 1 C. 168 P. C.; *Nanaji v. Sundrabai*, 11 B. H. C. R. 249 (269, 270).

(6) Co. Litt. 110 b.

(7) S. 48.

(8) *Ib. Expl.*

(9) *Padam Kumari v. Suraj Kumari*, 28 A. 458 (461)

(10) *Chiman Lal v. Hori Chand*, 40 C. 879 P. C.

(11) *Abdulla v. Sunda*, 11 I. C. 70; *Niama v. Nura* (1911) P. W. R. 95; 10 I. C. 388.

(12) *Jiwan v. Dil* (1912) P. R. 49.

So as regards marriage, intercaste marriages are customary in the Punjab.

354. Family Custom.—A Kulachar or family custom is a custom the existence of which is confined to a single family. Such a custom may relate to impartibility ⁽¹⁾ or inalienability ⁽²⁾ of its property or succession to it by a special mode of devolution, e.g., by primogeniture ⁽³⁾ or other special mode of descent. ⁽⁴⁾ At one time the validity of such a custom was doubted on the ground that the Privy Council had in a case incidently remarked that, in their opinion, there does not exist in any persons the power of making laws of inheritance for themselves. ⁽⁵⁾ But whatever doubt there may have been on the subject, there can be no longer any doubt about their validity, and the Privy Council have themselves upheld such customs in several cases, though like all customs and even more than all customs, they must be strictly and sufficiently proved. ⁽⁶⁾ The fact that they are recorded in the *Wajibularz* is not sufficient, since it often connotes merely the personal views of those who would like to see the practice prevailing rather than the ascertained fact of a well established custom ⁽⁷⁾ as distinct from a mere arrangement for peace or convenience made or acquiesced in by the family. ⁽⁸⁾ Custom proved to exist in a family may be presumed to exist in every branch of it. ⁽⁹⁾

355. To understand the custom of primogeniture in India we have to understand the doctrine of Feudal law of which it is a child. On the fall of the Roman Empire in the 4th, 5th and 6th century A.D. a number of barbarous tribes then inhabiting Germany overran that decipit empire which the conquering hordes parcelled out amongst their adherents on condition that they were to rally to the support of the community against hostile aggression. The terms upon which these lands were let out were at first in the nature of service grants which in later years became known as *feuds*—a German word—which signified a stipendiary estate the *proprietas* or sovereignty of which was retained by the sovereign. The interest of the feudatory or holder of the *feud* was at first limited to his own life. But in course of time it gradually improved in stability and acquired an hereditary character, and the feudatory imitating the example of his sovereign carved out similar subordinate estates which established the practice of sub-infeudation and these in turn created other subordinate estates leading to a continuous chain of vassals who were tied by similar

(1) *Chintaman v. Nowlukho*, 1 C. 153 P. C.; *Ramrao v. Yeshwant*, 10 B. 327.

(2) *Sivasubramania v. Krishnammal*, 18 M. 287.

(3) *Shidhojirao v. Nikojirao*, 10 B. H. C. R. 228; *Adrishappa v. Gurushappa* 4 B. 49 P. C.; *Gopalrao v. Trimbakrav*, 13 B. 598; *Nirajpal Singh v. Jaipal Singh*, 19 A. 1 P. C.; *Rup Singh v. Pirbhu*, 20 A. 587.

(4) *Beerchunder v. Neelkissen*, 1 W. R. 177; *Mahendr v. Jokha Singh*, 19 W. R. 211; *Burjore v. Bha Gama*, 10 C. 567 P. C.; *Antamma v. Kaveri* 7 M. 575; *Narayan v. Nana*, 7 B. H. C. R. (A. C.) 163; *Bhau v. Sundarbat* 11 B. H. C. R. 249; *Atmaram v. Bholagir*, 1 C. P. L. R. 54.

(5) Per Frere and Holloway JJ. in, *Tara-chand v. Reeb Ram* 8 M. H. C. B. 54 (56 58) quoting *Abraham v. Abraham*, 9 M. I. A. 195; *Ganesh Dul v. Mohashur Singh*, 6 M. I. A.

164 followed in *Madhav Rav. v. Balkrishna*, 4 B. H. C. P. (A.C.) 118; *Contra Per West, J. Bhaw Nanaji v. Sundarabai*, 11 B. H. C. R. 249 (271).

(6) *Suriya Rao v. Raja of Pittapur*, 5 M. 499; *Basava v. Lingangauda* 19 B. 428 (458); *Garurudhwaj v. Suparandhwaj*, 28 A. 87 P. C.; *Chandika Baksh v. Mana Kunwar* 24 A. 278 (281) P. C.; *Anant Singh v. Durga Singh* 32 A. 868 P. C.

(7) *Anant Singh v. Durga Singh* 32 A. 868 (873) P. C.; following *Muhammad Imam Ali v. Hussain Khan* 26 C. 81 (92) P. C.; *Parbati v. Chandrapal*, 31 A. 457 P. C.

(8) *Bhaw Nanji v. Sundarabai* 11 B. H. C. R. 249 where the law is discussed in detail per West. J.

(9) *Lal Gajandra v. Lal Matharnath* 20 C. W. N. 876; 1 Pat L. J. 109; 85 I. C. 888.

ties to their Lords. The first extension of the rights of the feudatory was permitted in the succession to the feudatory of his sons and in course of time feuds began to be so granted, and latterly the feuds began to be granted to a man and his heirs whereupon the estate became descendible to all male descendants, who alone were considered as of the feudatory's blood. (1) But this led to the weakening of the feudal union and a reaction therefore set in by limiting the succession only to one person. The necessity for this limitation was also accelerated by the creation of honorary feuds, or titles of nobility, which being indivisible could only be inherited by the eldest son; and this led in the rule of primogeniture applicable to all feuds whether territorial or titular.

The feudal system was introduced into England by William the conqueror and feuds were fully established in the eleventh and twelfth century. This same rule of convenience established a similar system in India. The military conquerors of the country, anxious to quell local disturbances promised largesses to their tenants to whom on the general conclusion of peace lands were allotted on feudal tenure. These in their turn created undertenures and so in India as in Europe, the system of feudalism grew up with its necessary modification in the law of Hindu succession. The Mogul conquerors moreover used to collect land revenue by taking a share of the actual grain heap on the threshing floor which was in later times commuted for a money payment levied on each estate or each parcel of land as the case may be. Revenue Collectors were appointed and stationed all over the country for this purpose and these were paid by grants of land which in course of time developed into hereditary tenures. Later on with the decline of the Mogul Empire and the dwindling Imperial revenues these latter were farmed out and revenue farmers came into existence. (2) Then again local officials commenced to set up a rule of their own and so in time when the British took possession of the country they found a hierarchy of officials already in possession of the soil whose rights were ascertained and mostly recognized.

356. The fact that these royal grantees, officials, farmers, squatters and hangers on had become rooted to the soil was a fact which could not be ignored by any conqueror. The fact that they were all bound by ties of fealty to the paramount power was in itself a guarantee of peace and the policy of the British Government, consequently, was and has been to recognize the *status quo*. After the lapse of a century or more, these principalities remain though the terms and conditions of their grant are obsolete. One relic, however, of their pristine tenure still lingers in many estates and petty principalities and it is the custom of primogeniture and the exclusion of women is similarly accounted for. Of such exceptional custom the courts require not only strict proof but precise pleading (3) and the more remote from the ordinary law the custom pleaded is, the more cogent must be the proof in support of it. As Markby, J. put it: "In order to establish a *Kulachar* or family custom of descent, you must at least show one of two things - either a clear, distinct, and positive tradition in the family that the *Kulachar* exists, or a long series of instances of anomalous inheritance from which the *Kulachar* may be inferred". (4) It must be proved by the best available evidence (5) which must not merely

(1) Wright Tenures 188.

(2) Maine, Early History of Institutions, p. 156.

(3) *Heeranath v. Burm Narain Singh*, 15 W. R. 375 (388); *Serumah v. Palathan*, 15

W. R. 47 P. C.

(4) *Heeranath v. Burm Narain Singh*, 15 W. R. 375 (388).

(5) *Ib.*, p. 391.

consist of what the persons opine, not of what ought to be, but of what is and which they have seen in practice. It must not be merely evidence of a past tradition but of a living custom; proved not by irresponsible outsiders who have nothing to lose by their evidence but by the evidence, if possible, of relations who depose to their prejudice. (1)

The Courts look askance at customs varying the natural law, *e.g.*, the exclusion of females from succession which is a mere relic of an ancient prejudice against the weaker sex.

Custom cannot override express law. **6.** (1) Custom has the effect of modifying the general personal law, but it does not override the statute law unless it is expressly saved by it.

(2) Such custom must be ancient, uniform, certain, peaceable, continuous and compulsory.

Synopsis.

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| (1) <i>Custom and Statute law</i> (357). | (4) <i>Uniform</i> (361-364). |
| (2) <i>Elements of valid custom</i> (358-359). | (5) <i>Certain</i> (367-369) |
| | (6) <i>Peaceable</i> (370). |
| (3) <i>Must be ancient</i> (360). | (7) <i>Compulsory</i> (371-372). |

357. Analogous Law.—The reason which entitles the Hindu to preserve his personal law is the reason for allowing him to retain his customs which, by their very nature, are a part of his personal law. As such, both of them are subject to the commands of the Legislature. (2) So it has been held that custom cannot override the provisions of the Limitation Act (3) and generally, no evidence of custom can be admitted in regard to matters upon which the Legislative enactments have superseded the personal law.

Again as has been already pointed out while custom has the effect of modifying the general personal law, it can do so only to the extent it is proved; over and beyond it the general law remains. (4)

358. The various attributes of a custom are thus described. It must, it is said, be ancient, immemorial, uniform, unaltered, uninterrupted, invariable, constant and continuous, certain, definite and notorious, peaceable consistent, and compulsory. In a sense a custom must possess all these elements—nay many more, it must not be unreasonable, illegal, immoral or opposed to public policy.

Of these a custom must certainly be ancient or immemorial. It must also be uniform, which implies that it must be unaltered, uninterrupted, invariable, constant and continuous all of which are merely attributes of its uniformity. So again, if it is certain it must necessarily be definite and consistent. No custom can fail to be notorious and peaceable if it is ancient, uniform and certain, from which it follows that it must be necessarily compulsory, for if one is free to follow or disregard a custom according to his whim or convenience it must necessarily cease to be uniform and certain. All these

(1) *Serumah v. Palathan*, 15 W. R. 47 (48) P. C.

(2) *Mohanlal v. Amratlal*, 8 B. 114 (177)

(3) *Ib.*; *Tunji Orain v. Leda Orain*, 1 Pat

L. J. 225; 20 C. W. N 1082; 36 I. C. 206.

(4) *Neel Kisto v. Beerchunder*, 12 M. I. A 523 (542); *Sartaj Kuari v. Deoraj Kuari*, 10 A. 272 (285) P. C.

elements of custom are, therefore, reducible to the three main heads, *viz.*, it must be ancient, uniform and certain, but it is well to know what these terms imply. For though they are verbal variations to convey the same idea, they enlarge its meaning and tend to emphasize the nature and extent of the uniformity and certainty which is of the essence of custom.

As for the provision that custom must not be unreasonable, illegal and immoral or opposed to public policy—it rather affects its validity but is not of the essence of its constituent elements. They have, therefore, been made the subject of a separate section.

359. Elements of a valid custom.—Clause (2) sets out the necessary elements of a valid custom. A custom possessing these elements is *prima facie* valid, though it may be unenforceable owing to reasons set out in the next section.

Assuming however that the custom is not open to that objection, it must still possess all that this section requires. These requirements may be now considered seriatim.

360. The first essential of a valid custom is that it shall be ancient. This is necessary otherwise any person could defy the general law by setting up a special custom of his own. ⁽¹⁾ The custom must, in theory, at least, be of an origin as ancient as the law itself to which it constitutes an exception. The courts will, from uniform modern usage, presume an indefinitely ancient usage of the like kind, in the absence of circumstances leading to a contrary inference. ⁽²⁾

The rule that a custom must be ancient is equally the rule of English Law, but with this difference, that while under English Law that word has an artificial meaning as dating back from 1189 A. D., *i.e.*, the commencement of the reign of Richard I which is regarded as the legal memory ⁽³⁾ there is no such fixed date to determine its antiquity in this country. ⁽⁴⁾ Even in England though the rule remains, it is in effect circumvented by a legal presumption created in its favour by a mere proof of the existence of custom as far back as living memory can go ⁽⁵⁾ which is all that is equally necessary in this country to establish its antiquity. ⁽⁶⁾ All that the law requires is that the custom must have been in existence for a time immemorial, that is to say, for a time as far back as one can remember, which again, in England has been held to be as short as 20 years ⁽⁷⁾—a period which the Privy Council regard as sufficient even for this country upon which the Jury would, and indeed, should presume its immemorial existence ⁽⁸⁾ provided there is no evidence to the contrary. Such would be the

(1) *Basantrav v. Mantappa*, 1 B. H. C. R. Appx. 42 (47).

(2) *Per West, J. in Bhau Nanaji v. Sundra Bai*, 11 B. H. C. R. 249 (271).

(3) *Chapman v. Smith* (1754) 2 Ves. S. 505; as to how this date became fixed see *Dalton v. Angus* 6 A. C. 740 (810, 811).

(4) *Kuar Sen v. Mammen* 17 A. 87; *Mohidin v. Shiv Lingappa* 23 B. 666 (669, 670); *Gopal v. Maheshwari* 2 A. L. J. 790.

(5) *Per Cockburn C. J. in Angus v. Dalton*, 8 Q. B. D. 85 (104); *Trura Corporation v. Rowe* [1901] 2 K. B. 870 (877); *Bastard v. Smith*, 2 Moo. & R. 129.

(6) *Ramasami v. Sundarlingasami*, 17 M. 422 (448); *Doe d. Juggomohun v. Nemoo Dossee* (1881) Clarke's R. 101 (118, 114); 1 I.

D. (O. S.) 358 (364).

(7) *Maharaja Mahtab v. Government*, 4 M. I. A. 466 (499) *R. V. Jolliffe* 2 B. & C. 54; *Brookle's ank v. Thomson* [1908] 2 Ch. 344 (350). The period of 20 years in England fixed by the Statute known as Lord Tenterden's Act as a rule of prescription which inspired a similar period in S. 15 of the Easements Act. *Per Garth, C. J. in Parmeshwari v. Mhd. Syed*, 6 C. 608 (615).

(8) *Dheeraj v. Government of Bengal*, 4 M. I. A. 466 (499); *Bhau Nanaji v. Sundarbai*, 11 B. H. C. R. 249 (271); *contra in Doe d. Juggomohun v. Nemoo Dossee* (1881) Clarke's R. 101 (118, 114); 1 I. D. (O. S.) 358 (364) is no longer law.

case where the family is one of comparatively modern origin or where the practice can be traced to a recent agreement. ⁽¹⁾ In other words, the existence of a custom for twenty years or more creates only a presumption in favour of its antiquity ⁽²⁾ which may be rebutted by tracing it to its recent origin. ⁽³⁾

361. Uniform.—From the fact that the custom is ancient it follows that it must be uniform and not variable, definite and continuous,

(2) **Uniform.**

for these are the elements to establish its immemorial user. ⁽⁴⁾ If there is a discontinuance, such discontinuance destroys its stability, it being immaterial whether the discontinuance was accidental or intentional. ⁽⁵⁾ In its effect it amounts to an abandonment of the custom. ⁽⁶⁾ When it is said that the custom must be uniform what is implied is that within its circle of authority it must have been given effect to as often as there was occasion to have recourse to it. If it was followed only on occasions of convenience and ignored on other occasions then it ceases to be both a continuous and uniform custom such as the courts will give effect to.

A custom is not either uniform or continuous if its authority was challenged each time that the occasion arose for its enforcement; and it does not become uniform if as the result of compromise a right was conceded. ⁽⁷⁾

362. This essential element of a valid custom is variously expressed. It is said that the custom should have continued as an invariable, unaltered, uninterrupted and a continuous custom. ⁽⁸⁾ All these adjectives are sometimes used to emphasise the same fact that the identity of the custom should not suffer in its passage through time. Take an example. The history of the law of primogeniture already given shows how the right owes its origin to the establishment of feudalism. Now in the development of that custom the stages were (i) the grant was a personal grant which lapsed with the grantee, (ii) it was extended to and shared by the grantee's sons, (iii) and then it descended only to his eldest son. If in this process the order were ever reversed and the grant were at times heritable by all the sons and then say in times of rebellion by only the eldest son, the custom which impresses upon the tenure its incident of peculiar succession though ancient, would not be uniform or invariable. So it is usual both in England and in this country to close all private thorough-fares once a year to prevent the public from acquiring a customary right of way. But a single discontinuance is not necessarily fatal to the establishment of custom. ⁽⁹⁾ The right of procession is a common law right, but the right to carry it along a certain route or past a certain mosque or temple is a customary right, and its existence depends upon its uninterrupted continuance and its validity is frequently put to the test by interrupting its enjoyment.

(1) *Umrithnath v. Goureenath*, 18 M. I. A. 542 (549, 550); *Bhanu Nanaji v. Sundar Bai*, 11 B. H. C. R. 249; *Lurga Charan v. Raghnath*, 18 C. L. J. 559 (561); *Rajalakshmi v. Suryanarayana*, 8 M. L. J. 100 (106).

(2) *Gopal v. Hanmant*, 6 B. 107 (109); *Vythilinga v. Vijayathommal*, 6 M. 48 (48); *Mills v. Colchester Corporation*, L. R. 2 C. P. 476; *Mercer v. Denne* [1904] 2 Ch. 584. (555)

(3) *Mahamaya v. Haridas* 12 C. 455; *Mills v. Colchester Corporation*, L. R. 2 C. P. 476; *Lockwood v. Wood*, 6 Q. B. 50 (68); 10

Hals. L. E. § 425, p. 298.

(4) *Saperundhwaj v. Garuradhwaj*, 15 A. 147 (167); *Basava v. Lingangaouda*, 19 B. 438 (488)

(5) *Rajkishan (Raja) v. Ramjog*, 1 C. 186 (195, 196) P. O.

(6) *Id* p. 12.

(7) *Ramakanta v. Shamananji*, 86 C. 590 (608) P. C.

(8) *Jamelah v. Pagul Ram* 1 W. R. 251; *Ramakakshmi v. Sivanatha* 14 M. I. A. 570.

(9) *Sarabjit v. Indarjit*, 27 A. 208.

363. A caste custom was pleaded for the Kadwa Kunbis of Ahmedabad denying the right of widows to adopt. It appeared that on two occasions widows had adopted without any protest from the caste people, and generally the custom was in a state of flux there being no evidence that the caste people forbade such adoptions or treated them as invalid, whereupon the Court refused to uphold the custom holding that a uniform and persistent usage had not moulded the life of the caste. (1)

364. A custom is not uniform if it is intermittent and not continuous. But law distinguishes the interruption of a right (2) from the interruption of its enjoyment. (3) If there is an interruption of the right, no matter for how short a period the right is extinguished, and if the right is revived it may become the starting point of a new custom, but it ceases to be the continuance of the old custom, and if the new right arose within the time of legal memory so that its commencement is known, it ceases to be an ancient custom.

365. From the fact that custom must be uniform it follows that it must be consistent. Two contradictory customs cannot exist in the same place with reference to the same people. But customs of the various tribes, castes and sects may otherwise be, in fact they sometimes are, divergent and often contradictory.

366. The third ingredient of a custom is that it shall be certain, a term which is varied in its expression by the statement that it shall be definite and constant. When it is said that a custom must be certain, what is meant is that it should be certain (i) in respect of its nature ; (ii) in respect of its locality ; and (iii) in respect of the persons whom it is alleged to affect. (4) In one sense a custom proved to be ancient must be necessarily certain, for, as Willes, C. J., observed in a case, "how can anything be said to have been time out of mind when it is not certain what it is." (5)

367. In the first place the right asserted as a customary right must be clearly defined and definitely certain. For if the right is uncertain the custom itself cannot be proved. So where a person claims the customary right to fell timber or quarry stones, earth or other minerals from the land of another the nature of the right claimed must be first defined. Every tenant has the right to graze his agricultural cattle on the village common. If, therefore, he establishes a cattle breeding farm, or maintains milch cows or buffaloes he has no right to turn them on to the common for the purpose of grazing. So again the right to carry stones means a right limited to personal use, and does not imply a right to remove them in unreasonable quantities for the purpose of sale. (6) So a right to stack coals near to certain pits was held to be too indefinite to support a customary right. (7) On the same ground the Court disallowed a custom to play "any rural sport" as too general and uncertain. (8) So in a case where the plaintiff claimed by the ordinary Hindu Law

(1) *Patal Vandrayan v Patel Manilal* 16 B 470

(2) *Mercer v. Denne* (1905) 2 Ch. 538.

(3) *Scates v. Kay* 11 Ad. & E. 819 (825).

(4) Per Tindal, C. J. in *Tyson v. Smith* 9 Ad. & El. 406 (421) ; *Mercer v. Denne* (1904) 2 Ch 534 (551) O.A. (1905) 2 Ch. 538.

(5) *Broadbent v Wilks* (1742) Willes 830.

(6) *Blewett v. Tregonning* (1885) 8 Ad & El. 554 (574)

(7) *Broadbent v. Wilks* (1742) Willes 860 (868) but see *Carly v. Lovering* (1857) 1 H & N. 784 (800).

(8) *Millechamp v. Johnson* (1746) Willes 205 N.

property against the defendant who claimed by the rule of primogeniture, the Privy Council found that whenever the holder of the estate died leaving more than one son, the right of the eldest son was challenged in the courts, and the litigation invariably ended in a compromise under which the younger sons obtained a share of the estate very much in excess of the maintenance to which, had the custom existed, they would have been entitled. In their Lordships' opinion, this rendered the custom uncertain and consequently invalid.⁽¹⁾ It is, however, submitted that the case was rather one where the custom was not peaceably enjoyed.

368. Secondly the custom must be certain as regards the locality where it is alleged to exist, for a custom which is universal in extent

(b) **Certain as to the locality.**

is no custom at all, for it then becomes the common law.⁽²⁾ Its local extent must then be defined with reference to the geographical division of land, such as a province, district, town, tahsil or village, zemindari family or the like. The area affected by the custom may, however, consist of any defined space, and its boundaries may vary from time to time, provided the area is sufficiently and clearly defined at any particular moment.⁽³⁾ Where a custom is proved to exist in a district it will be deemed to exist in a village comprised in the district, but not *vice versa*.

369. Thirdly the custom must be certain in respect of the persons or classes

(c) **Certain as to the people.**

of persons to whom it is made applicable. A custom which binds an uncertain or undefined class of men or the public at large is neither certain nor enforceable and it therefore, ceases to count as a custom. So where a custom was alleged that the "poor house-holders" of a town had the right to free wood from a close, the court refused to enforce it on the ground that the term "poor house-holders" was too vague and uncertain.⁽⁴⁾ But in another case the court upheld the right of the inhabitants of a parish to enter upon the land of another at any time in the year, to erect a maypole thereon and dance round and about it on the ground of preponderance of authorities.⁽⁵⁾ A class is certain though its number may fluctuate; e.g., travellers, worshippers and the like. So again it is no blot on the validity of a custom if the class of persons to whom it applies is definite, though no such class exists for the time being.⁽⁶⁾

370. Another requirement of a valid custom is that its continuance must be uninterruptedly peaceable. In fact the binding force of

(4) **Peaceable.**

custom lies in the fact that for a time out of memory all affected by it have unquestionably accepted it as a binding custom. If therefore it was challenged as often as it was invoked its enjoyment was not peaceable.⁽⁷⁾

371. So again its enjoyment must be "as of right, and therefore neither by violence nor by stealth, nor by leave asked from time to time."⁽⁸⁾ It is not necessary that the enjoyment should

(5) **Compulsory.**

be free, for a reasonable customary fee may be claimed

(1) *Ramakanta v. Shamanand*, 36 C. 590 (608) P. C. reversing, *Shijamanand v. Ramakanta*, 82 C 6.

(2) Co-Litt. 110b.

(3) 10 Hals L.E. Tit. "Custom and usage."

§ 434, p. 280.

(4) *Selby v. Robinson*, 2 Term R. 758.

(5) *Abbot v. Weekly* (1665) 1 Lev. 176; 88 E. R. 357; *Pitch v. Rawling*, 2 H. B. L.

393; *Hall v. Nottingham*, 1 Ex. D. 1 (8); contra *Bell v. Wardell Willes* 202.

(6) 10 Hals. L. E. 436. 281; but the cases cited do not support the text.

(7) *Ramakanta v. Shamanand* 36 C. 590 (608) P. C.

(8) Per Willes, J. in *Mills v. Mayor of Colchester*, L. R. 2 Q.P. 479 (486).

by grant, or by prescription ; but what is necessary is that the enjoyment should be because of the right and not because of the fee which is merely incidental to the custom and need not have been fixed before legal memory. ⁽¹⁾ Where, however, the enjoyment of a right is dependent upon the payment of a fee, the court has to find whether the payment is the price of the enjoyment or is merely paid as a customary fee. If it is the former, then there can be no custom, since the enjoyment was precarious and not as of right, and the several acts of enjoyment were consequently not an uninterrupted exercise of the same right but were in the nature of independent acts lacking in continuity which is of the essence of custom. ⁽²⁾

372. An act which a person may have done but which he is at liberty to stop does not support custom. So where a custom was alleged restraining widows of a certain caste from adopting but the evidence showed that there was no caste decision to that effect and that widows had adopted on two occasions without incurring any caste penalty, the Court threw out the suit refusing to uphold the custom holding that a uniform and persistent usage had not moulded the life of the caste. ⁽³⁾

Invalid Custom. **7.** No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy.

Synopsis.

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|---------------------------------------|------------------------------------|
| (1) <i>Invalid customs</i> (373-376). | (4) <i>Unreasonableness</i> (381). |
| (2) <i>Illegality</i> (376-378). | (5) <i>Public policy</i> (382). |
| (3) <i>Immorality</i> (379-380). | |

373. Analogous Law.—The legislature has elsewhere recognized the general principle underlying this rule. ⁽⁴⁾ A custom is not illegal merely because it contravenes the express texts or the general principles of Hindu Law, since all Hindu Law is declaredly subject to custom (§ 247). For the same reason custom does not necessarily become illegal because of the existence of a statute on the subject unless the latter contains provisions which make the continuance of the custom necessarily illegal. Of course, the court cannot enforce an immoral custom any more than it will enforce an immoral contract inasmuch as both are destructive of society.

374. The provisions that the custom must not be unreasonable or opposed to public policy also control an English custom. ⁽⁵⁾ The reasonableness of a custom is a question of fact dependent upon its nature and the society to which it is made to apply. So Tindal, C.J. in one case observed : "Several customs which have been adjudged void in our books as unreasonable against common right, or purely against law, if their nature and liability be considered, will be found injurious to the multitude and prejudicial to the commonwealth, and to have their commencement (for the most part) by oppression and extortion of lords and great men. ⁽⁶⁾"

(1) *Ib.*, pp. 484, 485; *Tyson v. Smith* 9 Ad. and E. 406.

(2) *Ellwood v. Bulluk* (1844) 6 Q. B. 888.

(3) *Patel Vandran v. Patel Manilal*, 16

B. 470 (476).

(4) S. 28 Contract Act (IX of 1872).

(5) Co. Lit. 62 a.

(6) *Tyson v. Smith*, 9 Ad. & El. 406 (422).

It has been held that public policy has little force now in invalidating contracts, the question of public policy being regarded as one for the legislature rather than for the courts. But the question of custom stands on a different footing. It makes law and public policy controls all laws.

375. Principle.—The invalidating ingredients set out in this section are sometimes treated as part of the elements constituting custom. But they affect its operation rather than its formation and have, consequently, been relegated to a section of its own.

376. Invalid customs.—A custom may answer all the tests mentioned in the last section; and yet it may be invalid, because it is obnoxious to the provisions of this section, the operation of which may now be considered.

377. It is a well established principle that though a custom has the effect of overriding law which is purely personal, it cannot prevail
(1) **Illegal Custom.** against a statutory law unless it is thereby saved expressly or by necessary implication. (1)

So law has swept away many customs, *e.g.*, the practice of *Sati* (2) infanticide, (3) slavery, (4) beggar or forced labour, (5) human sacrifice, (6) while it has attempted to strengthen the law against the dedication of minors as dancing girls of a pagoda it being notorious that these girls are consigned to lifelong prostitution. (7) On a similar ground the court refused to recognize the adoption of a girl by a woman of the prostitute class as illegal. (8)

378. A customary cess levied on all purchases and export of cotton was held to have become illegal by reason of an Act which abolished “cesses on trades and professions of every kind” under whatever name levied. (9) So the custom that a tenancy lapsed on submersion of the land and on the tenants’ failure to pay rent and that on its reappearance the landlord became entitled to possession was held to be of no avail against the express provisions of the N. W. P. Rent Act. (10) So no custom can override the provisions of the Limitation Act. (11)

379. A custom like a contract is void for immorality. The question what customs are “immoral” must be left to the conscience of the court. Morality is a necessary social convention as to which all agree up to a certain extent—but beyond it, it is a matter of opinion. This is specially so as regards the relation of the sexes. A European would regard both polygamy and polyandry as highly immoral, but both these institutions are deep rooted in the soil and though polyandry is now fast dying out polygamy is a popular oriental custom not solely confined to the Hindus. But in judging of the validity of such customs the court adapts itself as far as possible, to the standard of morality of the sect, tribe or caste to which the custom is sought to apply, remembering always that it has not only

(1) *The Magistrates of Dunbar v. The Duchess of Roxburghe*, 8 Cl. and Fin 335; 6 B. R. 1462; *Noble v. Durell*, 8 T. R. 271; 100 E. R. 569.

(2) S. 306 Indian Penal Code

(3) *Ib.*, S. 304 A.

(4) *Ib.*, Ss. 367, 370, 371.

(5) *Ib.*, S. 374.

(6) *Ib.*, S. 302.

(7) *Ib.*, Ss. 372, 373; *Sanjivi v. Jalajakshi*, 21 M. 229; but see *Tara Naikin v. Nana*

Lakshman, 14 B. 90 (92, 93).

(8) *Guddati v. Ganpati* (1912) 28 M. L. J. 498 (494); *Public Prosecutor v. Kannammal* (1918) 18 M. L. T. 181 (184, 187, 189), *contra Venku v. Mahalinga* 11 M. 898.

(9) *Kalyanraji v. Mofussil Co., Ltd.*, 15 B. 526 (531) P. C.

(10) Act XII of 1881, Ss. 18, 31, 34b, 95 (n); *Kupil Rai v. Radha Prasad* 5 A. 260; as to *Punjab Puran v. Beja* (1770) P. R. 73.

(11) *Mohan Lal v. Amrat Lal*, 8 B. 174.

to pay due regard to the sentiments of the community but also to the general welfare of society. Such is the custom of remarriage of a married woman without the permission of her husband on payment of a fine to the caste ⁽¹⁾ or the custom of selling daughters ⁽²⁾ or of the succession of an illegitimate son by an adulterous ⁽³⁾ or incestuous intercourse ⁽⁴⁾ or of an association of women to enjoy a monopoly of the gains of prostitution. ⁽⁵⁾ The plaintiffs who were *Dev Dasis* attached to a temple sued the manager restraining him from admitting two other *Dev Dasis* into the temple without their consent. In short, they claimed a monopoly of the right which the court refused to grant them on the ground that it was immoral. ⁽⁶⁾

A custom which attributes to mere co-habitation all the legal effects of a marriage is invalid as it tends to confound concubinage with marriage. ⁽⁷⁾

380. A custom in favour of remarriage upon desertion ⁽⁸⁾ or divorce by mutual agreement is neither immoral nor opposed to public policy. ⁽⁹⁾ So the exchange of children in marriage is neither immoral nor opposed to public policy. ⁽¹⁰⁾

Not immoral.

381. A custom may not be illegal or immoral; but it may nevertheless be invalid on the ground of its unreasonableness. A custom which any honest or right minded man would deem to be unrighteous is bad as unreasonable. ⁽¹¹⁾ One ground for holding a custom unreasonable is that it is injurious to the multitude and prejudicial to the commonwealth. ⁽¹²⁾ A custom for the inhabitants of several adjoining or contiguous parishes to exercise the right of recreation over land situate in one of such parishes is bad as placing an unreasonable burden upon one parish. ⁽¹³⁾ On the same principle the court refused to give effect to a custom by virtue of which all the inhabitants of a Zemindari were alleged to have a prescriptive right to fish in certain jhils of the plaintiffs. ⁽¹⁴⁾ So the agent cannot be heard to justify his departure from the instructions received by him from his principal on the ground of custom. Such was held to be the case of the principal who ordered his agent in Mauritius to ship to him a cargo of 500 tons of sugar. Instead of shipping it in a single vessel he shipped 400 tons in different vessels when the principal cancelled the order due to a falling market. He however, justified it on the ground that his instructions had been contravened. The shipper appealed to custom but the court held that it could not override the express instructions of the principal. ⁽¹⁵⁾

(1) *R. v. Karson* 2 B. H. C. R. 117; *Uji v. Hathi* 7 B. H. C. R. (A. C.) 133, *Narayan v. Laving* 2 B. 140, *Indar v. Jewa* (1890) P. R. 49. But such marriage contracted after consent and divorce would be good—*Sankaralingam v. Subhan* 17 M. 479, *Vencatachella v. Parvatham* 9 M. H. C. R. 134; *Dalip v. Ganpat* 8 A. 387.

(2) *Kalavagunta v. Kalavagunta* 32 M. 185.

(3) *Rahi v. Gobinda*, 1 B. 97.

(4) *Datti v. Datti*, 4 M. H. C. R. 204; *Soundararajan v. Arunachalam*, 39 M. 185.

(5) *Chinna v. Tegarai*, 1 Mad. 168.

(6) *Pirithi Singh v. Bhola* (1888) P. R. 29; *Hakim v. Jagat Singh* (1898) P. R. 87; *Dina v. Karamchand* (1899) P. R. 52, *Lalchand v. Mt. Thakur Devi* (1908) P. R. 49; but see *Chanda Singh v. Mela* (1897) P. R. 78.

(7) *Chinna v. Tegarai*, 1 M. 163 (170, 171).

(8) *Virasangappa v. Rudrappa* 8 M. 440.

(9) *Sankaralingam v. Subhan*, 17 M. 479; *Sinammal v. Administrator General* 8 M. 169.

(10) *Amirchand v. Ram* (1908) P. R. 50.

(11) *Paxton v. Courtenay*, 2 F. and F. 181.

(12) *Tamistry case* (1808) Davis 29 (38); *Mahamaya v. Haridas*, 42 C. 455 (475).

(13) *Edwards v. Jenkins*, (1896) 1 Ch. 308.

(14) *Lutchmeput Singh v. Sadaulla* 9 C. 698 (704) following *Lord Rivers v. Adams*, L. R. 9 Ex. D. 361 distg. *Parbutty v. Mudho*, 3 C. 276 on the ground that the persons there were ascertained.

(15) *Ireland v. Livingstone*, L. R. 5 Q. B. 516; *Arlapa v. Narsi*, 8 B. H. C. R. (A. C.) 19.

A custom upheld by the courts cannot be attacked on the ground of its unreasonableness. (1)

382. A custom otherwise good may be void on the ground of public policy.

Such is the custom recognizing the right of a person who had murdered (2) or abetted the murder of his ancestor to succeed to his estate. (3) So it is against public policy to permit trafficking in public or religious offices (4) and a custom which permitted it would be obnoxious to this rule. (5) But this does not mean that a religious office may not be transferred to a qualified person standing in the line of succession. (6) A custom is arbitrary and, therefore, unreasonable which sanctions expulsion of a man from caste without hearing him. The maxim *audi alteram partem* is a rule of elementary justice and applies as much to custom as it does to judicial procedure. Since law favours marriages as necessary to perpetuate the human species, any custom tending to restrain it is invalid as one opposed to public policy. Such was held to be the custom which sanctioned the levy of a marriage cess on the remarriage of widows. (7) But there can be no objection to a customary offering to a temple on marriages performed in a particular locality of a customary fee to which the village Joshi is entitled on all marriages within his jurisdiction whether his services are requisitioned or not. (8) The distinction between the two being that the one is a tax while the other is a customary offering for the maintenance of the temple from which all worshippers derived benefit. (9)

Pleading and proof of Custom

8. (1) He who relies upon custom varying the general law, must plead and prove it.

(2) Custom must be established by clear and unambiguous evidence.

Synopsis.

(1) *Plea of custom* (384).

(3) *Proof of family custom* (390).

(2) *Proof of custom* (385-389).

383. Analogous Law.—The first clause of this section is abundantly supported by authority, (10) and so is the second clause, (11) while the section as

(1) 10 Hals. L. E. § 429, p. 228; S. 42 Ev. A; *Shimbu v. Gayachand*, 16 A. 379.

(2) *Shah Khanam v. Kalandhar*, (1900) P. R. 74; *Muhammad Khan v. Sis Bano*, (1906) P. R. 41.

(3) *Vedamayaga v. Vedammal*, 27 M. 591 but the disqualification is personal—*Gangu Chandrabhagabai*, 32 B. 275.

(4) *Rajah Vurmah v. Ravi Vurmah*, 1 M. 285 P. C; *Kuppa Gurukul v. Dorasami*, 6 M. 76; *Narayana v. Ranga* 15 M. 188; *Mahmaya v. Haridas* 42 C. 4 5 and cases cited at 470, 471.

(5) *Mahamaya v. Haridas* 42 C. 455.

(6) *Sitarani Bhat v. Sitarani*, 6 B. H. C. R. 250; *Mancharam v. Pranshunk* 6 B. 298; *Annasami v. Ramkrishna*, 24 M. 219; *Nirad v. Shiddas*, 83 C. 975; *Mahamaya v. Haridas*, 42 C. 455, 471.

(7) *Lala v. Hirasingh*, 2 A. 49; *Madan v. Erlandi*, 5 M. H. C. R. 147; *Ganeta v. Khwaja Mohommad* (1880) P. R. 64.

(8) *Vithal v. Amant*, 11 B. H. C. R. 6; *Dina Nath v. Sadashiv*, 3 B. 9; *Raja v. Krishnabhat* 232; *Waman v. Balaji*, 14 B. 167 (169).

(9) *Madan v. Erlandi*, 5 M. H. C. R. 147.

(10) S. 103 Ev. Act; *Girdharee Singh v. Koolahul*, 6 W. U. 1. C; *Mohendra (Raja) v. Jokha Singh*, 19 W. R. 211; *Thakur. Titmath v. Loknath*, 19 W. R. 239; *Natukher v. Chowdhry Chintamun*, 20 W. R. 247; *Hirbai v. Gorbai*, 12 B. H. C. R. 294; *Rahmat Bai v. Hir Bai*, 3 B. 34; *Gopal v. Hanuman* 8 B. 278; *Adrishappa v. Gurushidappa* 4 B. 494.

(11) *Gossain Rambharti v. Surajbharti*, 5 B. 582; *Ahmedbhai v. Cassumbhai*, 18 B. 534; *Bai Baijee v. Bai Santokh*, 20 B. 58; *Abdul Hussain v. Habibullah*, (1906) P. R. 18; *Gaurad-waja v. Superundwaja* 28 A. 37 P. C.

(12) *Shidhojirav v. Naikojir*, 10 B. H. C. R. 229; *Rama Lakshmi v. Sivanatha* 14 M. I. A. 570 (585, 586); *Desai Ranchhoddas v. Rawal Nathu Bhai*, 21 B. 110 (116, 117).

a whole is supported by the authority of the Privy Council. (1) Custom being a departure from the ordinary law must be both pleaded and proved, and proved by evidence which must be both clear and unambiguous.

384. Plea of Custom.—It is incumbent upon a party relying upon a custom to plead it as a part of his case. This does not mean that he should set out the evidence upon which he rests his plea. But his plea must be sufficiently specific to give his adversary notice of the custom he was relying on. (2) A party is at liberty to plead custom and the general law in the alternative. (3) But the parties are not at liberty to depart from their pleadings, nor the court at liberty to rest its decision upon facts never pleaded, (4) or upon facts only partially pleaded. So where the plaintiff launched his case with the plea that custom excluded both widows and daughters from succession, he was not allowed to hold fast to the custom which proved that daughters only were excluded. (5)

385. Proof of Custom.—The standard of proof required to establish custom is higher than what is required to determine an ordinary issue. Custom should not be decided upon a mere balance of probabilities, for in the language of the Privy Council it must be supported by "clear and unambiguous" evidence, which means evidence approximating to a certainty that the custom exists and not merely pointing to a probability of its existence. As Farwell, J., observed: "Not only ought the Court to be slow to draw an inference of fact which would defeat a right that has been exercised during so long a period as the present, unless such inference is irresistible, but it ought to presume everything possible to presume in favour of such a right." (6)

The proof must extend to all the points which constitute its necessary ingredients. Of these the most important are—(a) that it is ancient, (b) uniform, (c) certain, (d) continuous and (e) compulsory.

386. A custom will be presumed to be ancient if it is proved to have existed for a time immemorial, that is to say for at least 20 years and that its origin is unknown (§ 360). This only raises a presumption in favour of its antiquity which may be rebutted. A custom shown to have had an origin within living memory, even though existing in fact is void at law; because it lacks its prime attribute. (7) The uniformity of custom should be proved by numerous instances in which it has been invariably followed: a few instances only will not suffice to establish the custom.

387. Custom must be established by numerous instances of its conscious application. (8) A few instances only will not suffice. (9) But this rule should not be construed too strictly; for the custom may be a local one; it may be

(1) *Rai Manickchand v. Madho Ram*, 18 M. I. A. 1; *Rama Lakshmi v. Sivanatha*, 14 M. I. A. 570 (585, 586).

(2) *Serumah v. Palathan*, 15 W. R. 47 P. C.; *Basava v. Lingangauda*, 19 B. 428.

(3) *Muhammad v. Shamsunniessa*, 36 A. 456 (458) distg. *Muhammad Salim v. Sadal-rudain*, 7 A. L. J. 660; *Daya Ram v. Sohail Singh*, (1908) F. R. 110; *Nihala v. Bhuti*, 23 I. C. (F) 418.

(4) *Eshenchunder v. Samachurn*, 11 M. I. A. 7 (22-25).

(5) *Lesathes v. Newitt*, 4 Price at p. 370 cited in *Desai Ranchhodass v. Rawal Nathu-*

bhai, 21 B. 110 (115).

(6) *Mercer v. Denno*, (1904) 2 Ch. 584, 556.

(7) Bl. Comm. 76; *London Corporation v. Com. L. R. 2 H. L. 289* (259).

(8) *Lachaman Rai v. Akhar Khan*, 1 A. 440. *Sarabjit v. Inderjit*, 27 A. 203. *Gopal v. Hanmani*, 8 B. 273; *Durgacharan v. Regunath* 18 C. L. J. 559 (562).

(9) *Puncha v. Bindeswari*, 87 I. C. (O) 980. Three instances insufficient—*Bhagvandas v. Rajmal*, 10 B. H. C. R. 241 (261); *Desai Ranchhodass v. Rawal Nathubhai*, 21 B. 110 (116, 117).

confined to a family where numerous instances may from the very nature of the case be impossible, or may be difficult to get. Oral evidence as to the existence of custom should be tested by ascertaining the grounds of the witness's opinion (1) the extent or limits of his knowledge and how far he is deposing to facts, and how far he is merely voicing his opinion, which apart from facts, is of little value. (2) When a custom is proved as generally applicable to the parties it is open to proof that certain individual members were exempt from its operation on personal grounds. (3) If it has already been pointed out that a custom of origin follows a person upon migration to his new domicile. (4) But where one relies upon the local custom of his domicile he has to prove that he had adopted it. (§ 336)

The question of custom is a mixed question of fact and law, depending as it does, upon the relevancy of evidence and the inference legally deducible therefrom. (5)

388. Proof of uniformity implies proof of the invariable application of custom whenever there was occasion for it. Uniformity implies continuity which does not, however, mean that there should be no interruption at all, provided that the interruption be in possession and not in the right (6) or that it be only temporary (7) by consent or for the sake of temporary convenience (8) or from necessity as where the subject of the right is submerged for a time and is therefore incapable of enjoyment. (9) Then again, continued custom would be deemed uniform, if it is traced to a recent date. It is not necessary that it should be proved up to date. As Lord Denman, C. J., said; "The finding of the jury that the custom had existed till 1689, was the same in effect as if they had found that it had existed till last week, unless something appeared to show that it had been legally abolished. (10)"

389. The quantum of evidence acceptable to the court depends upon the custom pleaded. Very slender evidence will suffice to establish a custom which is only a slight departure from the normal law (11) but very cogent evidence supported by unquestionable and numerous instances would be required to convince the court to make a wide departure from it. (12)

390. In this respect the court has special rules for the determination of family customs. As these customs are necessarily personal the court not only applies the most stringent tests to the evidence offered, but it is reluctant to depart from the general law unless the custom has been proved in all its bearings. The

(1) *Leahman Rai v. Akhar Khan*, 1 A. 440 See for an example of analysis of such evidence *Basava v. Langagauda*, 19 B. 428.

(2) *Rahimabhai v. Hirbai*, 8 B. 84 followed in *Parbati v. Chandarpal*, 81 A. 457 P. C.

(3) *Gitabai v. Shivabakas*, 5 Bom. L.R. 818.

(4) § 334; *Surendra Nath v. Hiraman*, 12 M.I.A. 81; *Priithee Singh v. Sheo Sundares*, 8 W. R. 261; *Parbati v. Jagadis*, 4 Bom. L. R. 865.

(5) S. 584 (b) C. P. P. 1882; S. 100 (b) C. P. C. 1908; *Palaniappa v. Daivasikhamony*, 40 M. 709 P.C.; *Kumarappa v. Maravala*, 41 M. 874 F. B. overruling *Kakarla v. Venkata*, 29 M. 24; *Hashim Ali v. Abdul Rahman*, 28 A. 698; *Ram Bilas v. Lal Bahaqur*, 20 A.

811; F. B.; *Giraj Singh v. Hargobind*, 32 A. 125; *Ram Harakh v. Ishar Dat*, 8 I. C. (A) 558; *contra* held *Hureshur v. Judoonath*, 10 W. R. 153; *Syud Ali v. Gopal Dass*, 18 W. R. 420; *Burjara v. Bha Gana*, 10. C. 557 P. C. is no longer the law.

(6) 1. Bl. Comm. 77.

(7) Co. Lit. 114 b; 1 Bl. Comm. 77: "An interruption of the possession for ten or twenty years will not destroy the custom: it only becomes more difficult to prove."

(8) 10 Hals. L. E. § 444, p 225.

(9) *Mercer v. Denno*, [1904] 2 Ch. 584 O. A. [1905] 2 Ch. 588.

(10) *Seales v. Key*, 11 Ad. & El. 819 (825).

(11) *Johnson v. Clark*, [1908] 1 Ch. 308 (809).

(12) *Ib*,

reported cases show how rare it is for the court now to admit as family custom a practice which has not already received its *imprimatur*. The same remarks apply to local customs.

**Proof and disproof
of Custom.**

9. A custom may be proved or disproved in any of the following ways :—

(1) Judgments, orders and decrees relating thereto. ⁽¹⁾

(2) Entries in any public document made—

(a) by a public servant in the discharge of his official duty, or

(b) by any other person in performance of a duty especially enjoined on him by the law of the country in which the public document is kept, ⁽²⁾

(3) a published work dealing therewith, ⁽³⁾

(4) any transaction by which the custom in question was created, claimed, modified, recognized, asserted or denied or which was inconsistent with its existence, ⁽⁴⁾

(5) particular instances in which the custom was claimed recognized, exercised or in which its existence was asserted, disputed or departed from ⁽⁵⁾

(6) opinions of—

(a) persons knowing of its existence or non-existence; ⁽⁶⁾

(b) persons likely to have known of the custom, given before any controversy as to the custom had arisen, and who are either dead or cannot be called without unreasonable expense or delay; ⁽⁷⁾

(c) a number of persons ⁽⁸⁾

(d) experts, ⁽⁹⁾

(7) previous deposition of witnesses examined *inter partes* who cannot be called for reasons stated in clause (6) (b) ⁽¹⁰⁾

(8) admissions of persons adversely affected thereby, ⁽¹¹⁾

(9) acts and conduct which make the existence or non-existence of the custom highly probable or improbable. ⁽¹²⁾

(1) S. 42 Ev. Act

(2) *Ib.*, S. 85

(3) *Ib.*, S. 87; *Collector of Madura v. Mootoo Ramalinga*, 12 M. I. A. 397 (411);
Vallabha v. Madusudanam, 12 M. 495 (499,
500)

(4) *Ib.*, S. 18 (a).

(5) *Ib.*, S. 18 (b).

(6) *Ib.*, S. 48.

(7) *Ib.*, S. 32 (4).

(8) *Ib.*, S. 32, (8).

(9) *Ib.*, S. 49

(10) *Ib.*, S. 38.

(11) *Ib.*, S. 21.

(12) *Ib.*, S. 11.

Synopsis.

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|---|--|
| (1) <i>Evidence of custom</i> (391). | (6) <i>Actual instances</i> (396). |
| (2) <i>Judgments</i> (392). | (7) <i>Opinions</i> (397). |
| (3) <i>Entries in public records</i> (393). | (8) <i>Admission and conduct</i> (398-399). |
| (4) <i>Published works</i> (394). | (9) <i>Proof of General custom</i> (400-401). |
| (5) <i>Transactions</i> (395). | (10) <i>Local and communal custom</i> (402-403). |

391. Analogous Law.—This section is consolidated and condensed from certain sections of the Evidence Act dealing with the proof of custom. In order to understand its scope reference must be made to a work on that subject. It is not proposed to annotate this section with any degree of exhaustiveness, and the following paragraphs are confined to the discussion of cases bearing only on the evidence relating to Hindu customs.

392. The section permits custom to be proved by a judgment, decree or order not *inter partes*, in which it was recognized. But the mere production of judgments however relevant is never sufficient to prove custom ⁽¹⁾ upon which other evidence is necessary. Even as regards its weight, much must necessarily depend upon the nature of the question, the evidence adduced and the decision given thereupon. A judgment given *ex parte* cannot command the same value as one given after contest, or one suffered on compromise resulting after a contest. ⁽²⁾

393. An entry in a public record may suffice to establish a custom. It all depends upon the record and the entry. For instance, the *Riwaj-i-am* in the Punjab is a record of local tribal customs prepared by an officer deputed for that purpose. It has been consequently held to be of itself sufficient to create a presumption of the custom therein recorded. ⁽³⁾ But the same cannot be predicated of a *wajibu'arz* in the United or Central Provinces. Their value depends upon the information available to and availed of by the Settlement Officer. As the Privy Council observed: "It has been pointed out more than once at this Board that there is no class of evidence that is more likely to vary in value according to circumstances, than that of the *wajib-ul-arzs* ⁽⁴⁾—and where as here, from internal evidence, it seems probable that the entries recorded connote the views of the individuals as to the practice that they would wish to see prevailing rather than the ascertained fact of a well established custom, the learned Judicial Commissioners properly attached weight to the fact that no evidence at all was forthcoming of any instances in which the alleged custom had been observed." ⁽⁵⁾ Much must in each case depend upon the nature of the duty and the inquiry which preceded the record and the care taken to ascertain the facts and eliminate therefrom preconceived ideas and opinions. For instance, records of custom prepared by officers deputed to make an ethnological survey of a locality would be necessarily entitled to greater weight than a similar record prepared by a Settlement Officer or a

(1) S. 42. *Ev. A. Labh Singh v. Gurcharan*, 1918 P. R. 54; 19 I. C. 731; *Bai Baiji v. Bai Saniok*, 20 B. 58 (57, 58); *Sri Ganesh v. Keshavarav*, 15 B. 625 (635); *Kali Krishna v. Secretary of State*, 16 C. 173; *Sheo Churn v. Goodur*, (1868) N. W. P. H. C. R. (188); *Lachman v. Akbar*, 1 A. 440; *Gurdayal v. Jhandu*, 10 A. 585 (586); *Shimlu v. Gayanchand*, 16 A. 379; *Harimath v. Mandal*

Das, 27 C. 379.

(2) *Durga Devi v. Ramyan*, (1911) P. R. 91.

(3) *Beg v. Alladitta*, 44 C. 749 P. C.

(4) *Muhamad Imam Ali v. Husain Khan*, 26 C. 81 (92) P.C.; *Parbati v. Chandarpal*, 81 A 457 P. C.

(5) *Anant Singh y. Durga Singh*, 82 A. 368 (373) P. C.

Collector of folk-lore for insertion in a popular gazetteer. The admissibility of the record prepared under this clause does not depend upon the personal knowledge of the public servant or other person concerned. ⁽¹⁾

394. The courts freely admit into evidence published works of repute on the subject of custom. But, of course, such works must be those compiled to instruct and not merely to entertain readers. Works such as Sherring's Law of Caste, Steele's Law of Caste, and Tupper's Punjab customary law fall into the latter category and command serious attention. But there are other works which, though professedly written to portray customs, are ill-disguised epitomes of these works and of the Census Reports and the Reports of the Ethnological Survey so that the courts would rather prefer go to the originals than to their abridgements.

395. This is a very wide clause ⁽²⁾ and would include judgments, decrees and orders in civil, criminal ⁽³⁾ and revenue cases in which a custom was claimed ⁽⁴⁾ decreed ⁽⁵⁾ or disallowed ⁽⁶⁾ and in fact any business ⁽⁷⁾ or dealing in which the question of the custom was gone into.

Not only judicial and quasi-judicial records but acts, conduct and proceedings of such bodies as the caste panchayat, arbitrators and the like would be admissible under this clause. So any document bearing on the custom may be proved in evidence. For instance, receipts for payment of the customary dues, diaries and private records, account books, and memoranda, and in fact any other fact or matter which has any bearing on the question of custom.

It should be noted that while under clause (1) judgments are relevant *qua* judgments and as embodying judicial opinion on the subject of custom, this clause lets in not only the judgment but the entire litigation or proceeding as such *i.e.*, not merely the judicial opinion but also the claim made and its subsequent course from its very inception. ⁽⁸⁾

396. This is a most important clause and one upon compliance with which the courts insist upon. "The most cogent evidence of custom is not that which is afforded by the expression of opinion as to its existence, but the examination of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private records or receipts that the custom has been enforced." ⁽⁹⁾ The acts required for the establishment of custom must be plural, uniform and continuous. Two or three instances will not suffice where numerous instances were possible. ⁽¹⁰⁾ In a general custom what the court has to find is whether the custom is accepted and used

(1) *Lekraj v. Mahpal*, 5 C. 751 (753, 754).

(2) *Dinomoni v. Brojomohini*, 29 C. 187 (198) P. C.; *Bhito Kunwar v. Kesho Prasad*, 19 A. 277 P. C.; *Rani Ranjam v. Ram Narain*, 22 C. 588 P. C.

(3) *Koondoo Nath v. Dheer Chunder*, 20 W. R. 815.

(4) *Diamoni v. Brojo Mohini*, 29 C. 187 P. C.

(5) *Hanutullah v. Romonikoni*, 15 C. 238; *Ramasami v. Appavu*, 12 M. 9.

(6) *Bhaya Dirgaj v. Pande*, 8 C. L. J. 521; *Parbutty v. Purno Chander*, 9 C. 586.

(7) *Sarappalli v. Fota*, (1914) M. W. N. 779; 26 I. C. 747.

(8) *Gujju Lal v. Fateh Lal*, 6 C. 171 (175, 185) F. B.

(9) *Lachman v. Akbar*, 1 A. 440; *Rahimat Bai v. Hirbai*, 3 B. 31; *Tarohand v. Resh Ram*, 3 M. H. C. R. 57; *Desai Ranchoddas v. Rawal Nathubhai*, 21 B. 116 (117).

(10) *Gopal v. Hanmani*, 3 B. 273; *Sarabjit v. Indarjit*, 27 A. 203; *Chandika Bakshi v. Muna Kunwar*, 24 A. 273 P. C.; *Durga Charan v. Raghunath*, 18 C. L. J. 559 (567).

by the people as their private law in preference to their general law. This can best be proved by establishing their obedience to it.

In the case of local or tribal custom the best evidence is that of the elders of the village or of the sect or tribe. People as old as can be got should be examined to prove such customs, while in the case of family customs the evidence must not only tend to show that the custom existed but that it still exists. Since the difference between this and the other customs is that while the latter cannot be materially affected by individual lapses, a family custom disclosing such lapses would fail of its effect either because these lapses would destroy its continuity or prove its abandonment. (1) But where both are otherwise satisfactorily established, the mere fact that it was not enforced in an isolated instance would not affect its validity. (2)

To establish a *Kulachar* or family custom of descent one at least of two things must be shown, either a clear, distinct and positive tradition in the family that the *Kulachar* exists (3) or a long series of instances of anomalous inheritance from which the *Kulachar* may be inferred. (4)

397. Opinions as a rule are inadmissible in evidence, as a witness is required to depose to facts of which he knows, and not merely of what he thinks. But this clause is an exception and it must be understood with its necessary safeguards, namely that while a witness is free to depose to his opinions, it is for the court to appraise their evidentiary value which depends not so much upon what he thinks, but upon the logic of facts upon which he bases his opinion. Opinion then, is valueless, without the grounds upon which it is based. (5) And this is true alike of an expert as of a layman witness. Both must disclose the *data* which the court is free to examine. (6) The opinion must not be merely the repetition of a hearsay but a reasoned conclusion drawn from facts and conduct, tradition, observation inquiry, research and study upon which a reasonable man forms his judgment. An opinion after all is only a judgment of a private person formed on materials available to him. These he must disclose so that if his judgment be wrong the court may reject it; if right, the court may follow it.

As regards the admissibility of the previous statements of persons who are not called, its admissibility is contingent upon proof of the fact that the statement was made *ante litem motam* (7) and its value must depend upon his credibility and the means of knowledge available to him. It is in any case insufficient of itself to prove any custom.

The statements of a crowd of persons is admissible even though the latter be alive and available as witnesses, on the ground that it is a statement of their common sentiment. (8)

398. Law attaches considerable value to the admissions of a person made (7) **Admission and estoppel.** against himself and in cases where evidence is conflicting, it is decisive of the case. (9)

(1) *Raja Nugandur v. Raghunath*, (1864) W.R. 20; *Nitr Pal Singh v. Jaipal Singh*, 19 A. 1 P. C.

(2) *Ekradeswar Singh v. Janeshwari*, 42 C. 582 (606) P.C.

(3) *Maharani Hiranath v. Baboo Ram Narayan*, 9 B. L. R. 274 (291).

(4) *Sumurun Singh v. Khedun Singh*, 2 Sel. Rep. (N.E.) 147.

(5) S. 51 Ev. A. *Ekradeswar Singh v. Janeshwari*, 42 C. 582 (604, 605) P. C.

(6) *Ib.*

(7) *Ekradeswar v. Mt. Janeshwari*, 42 C. 582 P. C.

(8) *Q. v. Ram Dutt*, 28 W. R. (Cr.) 35 (34); *Chandra Nath v. Nil Madhab*, 26 C. 236.

(9) *Chandra Kunwar v. Chaudhri Narpal Singh*, 19 A. 184 (194, 195) P. C.

- 399.** On the same ground stand acts and conduct of a person which are a mere outward manifestation of his inward conviction. But
(8) Acts and Conduct. the acts and conduct must be unequivocal and ordinarily, *ante litem motam*.

400. This section deals with the admissibility of evidence. Closely connected with the question of admissibility is the question of its value, which largely depends upon a variety of considerations, the age and status of the witnesses, their impartiality and disinterestedness, their power of observation and means of knowledge and the nature and grounds of their opinions. These are mainly questions of fact but as in the evidence of custom, the question of relevancy is so intimately blended with the question of credibility that it is not often possible to state when the facts end and the law begins. Moreover, it is not always possible to prove a custom in all the several ways enumerated in the section and a short discussion on the *quantum* of evidence which the courts have considered sufficient may therefore be subjoined.

401. It has been held that general customs which affect a large number of persons and are therefore in the nature of public rights may be proved by evidence of common notoriety, ⁽¹⁾ or by the production of a judgment ⁽²⁾ public document, ⁽³⁾ treatises or other record in which the said custom was proved, and the court may even take judicial notice of such a custom ⁽⁴⁾ if it is well known ⁽⁵⁾ to save needless cost to parties. ⁽⁶⁾ So the court will take judicial notice of a custom which has been held proved in the reported cases ⁽⁷⁾ provided they are not contradictory. ⁽⁸⁾

At any rate, formal evidence will ordinarily suffice to prove such custom. ⁽⁹⁾

402. Evidence of the existence of the custom in the neighbourhood of the place is admissible if there is reason to believe that like
Local Custom. customs prevailed in both. ⁽¹⁰⁾

403. The fact that other communities have equally exercised the right claimed by a special custom is admissible to disprove the
Communal Custom. custom. ⁽¹¹⁾

10. Usage is a practice at variance with the general law, and differs from custom in that it need not possess the antiquity, uniformity or notoriety of custom, provided it is well known and
Usage defined.

(1) *Taylor's Ev.* ss. 609, 620; *Weeks v. Sparke*, 1 M. and S. 679; *Crease v. Barrett*, 1 O. M. and R. 919; *Lord Dunraven v. Llewellyn*, 15 Q. B. 811.

(2) *Fresman v. Phillips*, 4 M. and S. 486; *Reed v. Jackson*, 1 East 385; *Earl De Lawarr v. Miles*, 17 Ch. D. 535.

(3) *Sturla v. Freccia*, (1880) 5 A. C. 628; (648) *Mercer v. Denno*, [1905] 2 Ch. 538.

(4) 10 Hals. L. E. § 448 p. 287; *Rechenoweth*, [1902] 2 Ch. 488.

(5) *Moult v. Halliday*, [1898] Q. B. 12; (125); *Goodwin v. Roberts*, L. R. 10 Ex. 387 O. A. 1 App. Cas. 476; *Nelson v. Dahl*, 12 Ch. D. 568; (575); *Postlethwaite v. Freeland*, 5

App. Cas. 599 (616).

(6) *Per Mellish L. J. Re Mathews, ex parte, Powell*, 1 Ch. D. 501 (506); *Edelstein v. Schuler & Co.* [1902] 2 K. B. 144, (155, 156).

(7) *Per Brett, M. R. In re Parkar, ex parte Turquand* 14 Q. B. D. 636 (645); *Rama Row v. Raja of Pittapur*, 40 M. 778 (P. C.)

(8) *Per Mellish, L. J. In re Mathews ex parte Powell*, 1 Ch. D. 501 (507).

(9) *Johnson v. Clark*, [1908] 1 Ch. 803 (807).

(10) *Anglesey v. Hatherton*, 10 M. & W. 218.

(11) *Earl De la Earr v. Miles*, 17 Ch. D. 585; *Lord Rivers v. Adams*, 3 Ex. D. 861.

(12) *Manu*, Ch. I, S. 108.

acquiesced in by the community to whom it is made applicable.⁽¹⁾

Synopsis.

- (1) *Distinction between usage and custom* (404-405). (2) *Proof of usage* (406).

404. Analogous Law.—"Immemorial custom is transcendent law, approved in the sacred scripture, and in the codes of divine legislators; let every man, therefore, of the three principal classes, who has a due reverence for the supreme spirit which dwells in him, diligently and constantly observe immemorial custom. (2)" Referring to custom, the Privy Council observed in a case, "A custom is a rule which, in a particular family, or in a particular district, has from long usage obtained the force of law."⁽³⁾ In another case referring to a mercantile usage they said: "To support such a ground, there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract".⁽⁴⁾

A usage is something more than practice, but something less than custom. It is merely the habit of doing a thing in a particular way without advertence to its propriety or legality.⁽⁵⁾ Practice may amount to no more than an individual habit, or it may be the established habit of a particular class or community. Distinguishing these two it was observed in a case: "To constitute a usage it must apply to a place rather than to a particular bank; it must be the rule of all the banks of the place or it cannot consistently be called a usage. If every bank could establish its own usage, the confusion and uncertainty would greatly exceed any local convenience resulting from the arrangement."⁽⁶⁾

405. It will be noticed that the definition of custom framed by the courts in the foregoing cases was with special reference to the facts of the cases before them. The section defines custom generally. The fact that it has the force of law is no part of its essential attribute; for it may be unenforceable for any of the reasons set out in the section. But it does not on that ground cease to be a custom. In point of law all customs have not necessarily the force of law, still less usages. But a custom otherwise unexceptionable has the force of modifying the general law to the extent it is applicable.⁽⁷⁾ So the Privy Council observed: "Under the Hindu system of law clear proof of usage will outweigh the written text of the law".⁽⁸⁾

For the origin and growth of customs generally, reference is invited to the General Introduction (§§ 192-198).

(1) *Juggomohun Ghose v. Manickchand*, 7 M. I. A. 263 (282); *Dalglis v. Gusuffer Hassan*, 28 C. 427 (429); *Sariatullah v. Pran Nath*, 26 C. 184 (187).

(2) *Manu* Ch. I S. 108.

(3) *Hurpershad v. Sheo Dyal*, 26 W. R. 55 (70) P. C.

(4) *Juggomohun Ghose v. Manickchand*, 7 M. I. A. 263 (282).

(5) *Mirabivi v. Vajrayanna*, 8 M. 464

(486).

(6) *Adams v. Otterback*, 15 Howard (U. S. A.) 545 cited per *Curiam Mana v. Rama*, 20 M. 274 (277).

(7) *Neelkisto v. Beerchunder*, 12 M. I. A. 523 (542); *Sariat Kuari v. Deoraj Kuari*, 10A 272 (288) P. C.; *Chhatradhari v. Saranvati*, 22 C. 166.

(8) *Collector of Madura v. Mookoo Ramalinga*, 12 M. I. A. 397 (486).

406. Proof of Usage.—Usage is a generic term and has a wider application as implying practice supplementing a mercantile agreement or contract, usage of the trade and country, and usages forming part of the common course of affairs.

Leaving out of account all usages, not falling within the scope of Hindu Law, the term may be confined to connote a practice of a country, caste, community, sect or tribe which is notorious and acquiesced in by them. But the term is often used to mean no more than custom, from which it is clearly distinguishable, but of which it is an essential element, since user is a test of the continuity of a custom, and its non-user furnishes evidence of its discontinuity or abandonment. (1) Notoriety does not imply knowledge of the party against whom custom is proved. All it implies is that it is generally known.

CHAPTER III.

MARRIAGE.

407. Topical Introduction.—The history of Hindu marriage has already been set out (§§ 27-32). It is the history of promiscuity to marriage. In the Mahabharat the Pandus tell their wife that at one time women consorted with men like cattle until Svetaketu son of the sage Uddalak introduced the institution of marriage. (2) But it was not marriage as we now understand it. Polyandry and Polygamy was the next stage (3) and traces of it are to be found in the Rigveda (4) which, however, was compiled when the institution of marriage had become established, and monogamy had become the rule (5) though polygamy was still customary. (6) Marriage was then compulsory. Without re-marriage a widower could not perform any sacrifice. The Vedic marriage was with adults and the wife selected her husband. (7) The sole ceremony enjoined was the grasping of the hand (8) before the sacrificial fire (9) The position of the wife was that of the chosen friend. (10) The elaborate symbolism which constitutes the Shastric marriage is a later development born of the *Sutra* period. (11) But even then the *Grihya Sutra* took care to add that "the usages of the country should be followed in marriage." (12) This was a concession to the usage which had already overlaid the ritual texts and the traditional law. For instance, Manu regarded polygamy as an exception (13) but it has become the rule. Re-marriage of wives and widows was ruthlessly reprobated but the one has become customary and the other legalized by legislation. Similarly, the Vedic age was the age of courtship and marriage but the growth of caste with its inter-caste jealousies aided by the sacerdotal puritanism established the institution of early marriages which tendency became aggravated in later ages as the doctrine received support from the popular cry "give the girl no chance to go wrong."

(1) *Jenkins v. Harrey*, 2 C. M. & R. 393.

(2) *Mahabharat Adiparv*, Ch. 122, 1, 147, p. 2.

(3) *Ib.* v. v. 30 35.

(4) *Muir's Sanskrits*, Text Vol 5, pp. 234-243 where the subject is discussed in detail.

(5) *Rigveda* (Max Muller's Trans.) Vol. 2 p. 609.

(6) *Ib.* p. 546

(7) *Ib.* Vol 6, p. 509.

(8) *Ib.* Vol. 6, p. 202.

(9) *Ib.* Vol. 6, p. 206.

(10) *Ib.* Vol. 5 p. 546 ('Sakha' i.e. friend).

(11) There were 27 principal ceremonies—Mandlik's H. L., p. 401.

(12) *Grihya Sutra*, 1-7, I p. 25.

(13) *Manu*, IX-77-83.

408. It is a trite saying that India is a continent with its vast and varied population in different stages of social evolution. Probably no other country in the world presents such sharp contrasts or such a bewildering variety of customs as the inhabitants of the Indian Peninsula. For in what other country can one find millions of people practicing celibacy and rigorous ascetism, side by side with millions who practice polygamy, some of whom on a business principle, maintaining a register of their hundred or more wives, and paying to their consorts periodical visits, finding them flourishing with a numerous growing progeny of which the husband is proud, but which he had done nothing to deserve. Where again can one find polyandry flourishing on a wholesale basis as it flourishes amongst the Todas, Kurumbas and other races inhabiting the Malabar Coast. (1) Where again can one find the laws of hospitality stretched to the point they are in Beluchistan, where the host presents his unmarried daughters to his honored guest. (2) Where again is the custom of the levirate yet as green as it ever was amongst the Jews. (3) Where again can one find premarital communism practised by the young under the patronizing care of the old. (4) Where again can one find a custom which permits the marital duties of the son to be performed by the father till the son is old enough to take care of his wife. (5) These and innumerable other marriage customs are the special feature of Hindu society. The sage idealizes marriage as a sacrament, the savage practices it as a pastime. The ideal is high—sometimes too high for human attainment. It is the reality that counts and it is with reality that law holds commerce.

409. The decennial census reports and reports of the several ethnographic surveys published by the authority of Government record a mass of information and details about the numerous local customs regarding marriage. They establish the following facts. (1)—That no generalization is possible about the marriage laws and customs. (2)—That the Shastric conception of marriage is to all intents and purposes dead. (3)—That Hindu Law permits polygamy and custom sanctions polyandry as it was at one time common amongst the Nairs and is still a veiled custom amongst them (6) while it is openly practised by the low caste people in Southern India. (4)—That widow marriage is inconsistent with the Hindu theory of sacrament, but the prohibition is confined only to the twice-born castes, and even amongst them widow re-marriages are becoming more common. (7) Where widow marriage is allowed the general rule is to give the younger brother the first refusal. (5)—Widow marriages are as a rule celebrated at night in the dark half of the month. (8) (6)—As a rule, marriage is by purchase. The high castes ordinarily pay for the husband and the low castes for the bride. (9) (7)—That infant marriages are both customary and common, the average age for marriage being 8-12 but there is a tendency in reformed circles towards later marriage. (10) (8)—Inter-caste marriages once permitted within limits have long since fallen into desuetude, but they are nevertheless performed in the Punjab, where the bonds of custom were never tight. (9)—But inter-sub-caste marriages are everywhere legal though not equally popular in all castes. (11) (10)—But Shudras of all castes can freely intermarry.

(1) **Census of India, 1911-Vol. 1** 839.

(2) **Ib.** §§ 290 294.

(3) **Ib.** § 306.

(4) **Ib.** § 300.

(5) **Ib.** § 295.

(6) **Census of India, 1911 Vol. I** § 296.

(7) **Ib.** p. 241 *f.n.* 2.

(8) **Ib.** § 299.

(9) **Ib.** § 300.

(10) **Ib.** § 313

(11) **Ib.** § 314.

Marriage defined.

11. Marriage is an alliance between a man and a woman recognized by law.

Synopsis.

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| (1) <i>Marriage under the English and Hindu Law</i> (410). | (4) <i>early Hindu Law</i> (414-415). |
| (2) <i>Marriage, a sacrament</i> (412-413). | (5) <i>What is marriage</i> (416-417). |
| (3) <i>Eight forms of marriage in</i> | (6) <i>Betrothal</i> (418). |
| | (7) <i>Marriage Contract</i> (420). |
| | (8) <i>Marriage brocage</i> (421). |

410. Analogous Law.—Under English law marriage is a contract between a man and a woman by which they naturally promise to marry one another, the promise of each being the consideration for the promise of the other.⁽¹⁾ In other words, the English notion of marriage implies a mutual contract, which naturally implies that the contracting parties are *sui juris*. Consequently, a minor cannot be sued on such a contract even if ratified after coming of age⁽²⁾ though he or she may sue thereupon the other party, if major. (3)

In both these respects Hindu Law differs, since the marriage of Hindus needs and implies no mutual promise and no theory of consideration underlies it to make it a binding contract. Under Hindu Law marriage is a gift by the father of his daughter to the husband. The daughter has no choice, she need not consent and may not even be conscious of the nature of the act and its effect upon her life, and she cannot refuse to live with her husband howmuch-soever she might detest him.

411. Under the English Law both lunacy (4) and impotency (5) at the time of the marriage render a marriage void; but under Hindu Law neither would seem to be a bar to marriage unless the lunacy of the husband had prevented him from accepting the bride at the time of the marriage ceremony or understanding its nature. (6)

412. According to the text of Yajñavalkya cited and explained in the Mitakshara⁽⁷⁾ and a text of Brihaspati quoted in the Mayukh⁽⁸⁾ marriage is one of the *Samskars* (9) or consecrating rites which an Aryan owes to his ancestors to perform.⁽¹⁰⁾ It has the same effect in the case of women as the *Upnayan* (or the thread-ceremony) has in the case of men.⁽¹¹⁾

(1) *Veneall v. Veness*, 4 F. & F. 344.
(2) *Ditcham v. Worrall* 5 O.P.D. 410; *Coxhead v. Mullis*, 3 C.P.D. 434.

(3) *Purshotam Das v. Purshotam Das*, 21 B. 23; *Surjyanmoni v. Kali Kani*, 28 C. 37; *Tekait v. Basanta*, 28 C. 751; *Dhurandhar v. Ghose*, 17 C. 298; *Kateeram v. Gendhenoe*, 23 W. R. 178; *Sitanath v. Harmabutti*, 24 W. R. 377; *Paigi v. Sheonarain*, 8 A. 78; *Binda v. Kaunsilia*, 13 A. 126.

(4) *Marriage of Lunatics Act*, 1811 (51 Geo. 3 C. 37); *Turner v. Meyers*, 1 Hag. Con. 414.

(5) *Turner v. Thompson*, 18 P. D. 37; *Elliott v. Gurr*, 2 Phillim 16; subsequent impotency however is no ground for relief; *Brown v. Brown*, 1 Hag. E. C. C. 523; malformation of the female organ rendering coition impossible entitles the husband to rescind marriage, *G v. G*, L. R. 2 P. & D. 287; *E. v. E.*, 50 W. R. 607; *S. v. S*, 24 T. L. R. 258.

(6) *Monjilal v. Chanadralli* 38 C. 700 (706) P. C.; *Muthusami v. Masilamani*, 38 M. 342 (355); *Per Ghose, J.*, in *Tekait v. Basanta*, 28 C. 751 (758).

(7) S. VII, v. 3.

(8) Mandlik p. 48 ll. 22-26.

(9) Lit. Skt. "Purification" "purity" "making perfect" "refining" "purified by sacred rites."

(10) *Sundrabai v. Shivanarayan*, 32 B. 81 (93) *contra* *Govindarazulu v. Devarabhotta*, (Per White, C. J., and Moore, J.) 27 M. 206 dissented from; *Khusalchand v. Bai Mani*, 11 B. 247 (252, 253) *Tekait v. Basanta* 28 C. 751 (757, 758) per Shankar Nair, J., in *Muthusami v. Masilamani*, 38 M. 342 (355); *Kameswara v. Veerachariu*, 34 M. 422 (432, 439); *Janki v. Nand Ram*, 11 A. 194 (204-209); *Binda v. Kaunsilia*, 13 A. 126 (149, 156).

(11) *Manu*, II-67

According to Vijnaneshwar all Hindus must adopt one or the other of the following four orders of life viz., (1) that of the celibate or student (*Brahmacharya*) (2) that of the householder (*Grihast*) (3) that of the hermit (*Vanprasth*); and (4) that of the ascetic (*Yati* or *Sanyasi*). One is not confined to a single order all his life, for he may pass from one to the other; but one cannot exist without an order (*Anashrami*). If he does so he becomes an outcaste (*Vratya*) and dies without a right to any funeral. If a person cannot be a celibate he must marry, which is, therefore, a religious necessity. And since a Shudra is debarred from entering the first, third and fourth orders to which the twice-born alone are privileged, it follows that marriage to him is a prime necessity. But though in the conception of the Smritikars marriage was regarded as a purely religious rite, its secular purpose and character is now well settled, (1) though it is now given a dual character, being regarded both as a rite as well as a civil contract. But this duality leads to certain necessary results. Inasmuch as it is a sacrament the nuptial tie is permanent and indissoluble. It can admit of no divorce. (2) If the husband dies, the wife must immolate herself upon his pyre. This was the ideal termination of conjugal happiness which even the Rig Veda enjoined in the following hymn: "Om! Let these women not to be widowed, good wives, adorned with collyrium, holding clarified butter, consign themselves to the fire, whose original element is water." (3) When the ideal of the *Smritis* enjoins self-immolation as the high way to heaven, it is not surprising that the Smritikars all extol the act as the only befitting termination of a married life. (4) With this ideal before them the later Smritikars necessarily deprecated re-marriage even after the husband's death, (5) and each later writer strengthened the law till re-marriage became viewed as an odious example of incontinence.

413. But in the case of men the process was reversed. Originally the husband could not take a second wife unless his first wife had failed to beget sons or perform sacrifices or was otherwise ineligible. (6) But polygamy soon became the rule and the sacred restrictions against it were ruled out as merely directory and not mandatory. (7) With polygamy another usage for which the Smritikars found support in the sacred writings was creeping into the midst of Hindu society. Ethnologists feel baffled at the causes which led to the practice of early marriages. But the cause is not far to seek. The device was suggested as a curb upon incontinence. In the vedic times early marriages were contracted after courtship and were, ordinarily, dictated by mutual love. But with the admixture of races the multiplication of castes, their iron exclusiveness

(1) Per Shankar Nair, J., in *Muthusami v. Masilamani*, 38 M. 342 (365); Per Ghose, J., in *Tekait v. Basanta*, 28 C. 751 (758).

(2) *Yajnavalkya*, 1 S. 81, 79; *Kudomee v. Joleeram*, 3 C. 305 (306); *Srinamal v. Administrator General* 8 M. 169 (178); *Administrator-General v. Anandachari*, 9 M. 466 (470). *Thapita v. Thapita*, 17 M. 235 (242); *Binda v. Kamsilia*, 13 A. 126 (158). It is submitted that the inference of indissolubility drawn from the mere fact that marriage is a *Samskar* or purificatory rite is a *non-sequitur*.

There is no express authority in the entire range of early sacred writing declaring a marriage indissoluble. It is a mere creation of the glossators; an artificial restriction sanctioned by usage and sought to be sancti-

fied by religion. See 1 M. L. J., p. 630.

(3) Translated in I. Colebrooke's *Essays*, 116.

(4) A large number of texts to this effect will be found collected by Colebrooke in his *Miscellaneous Essays*, Vol. I, Essay, on the duties of a faithful widow pp 114—122; 4 As. Res. 209—219.

(5) *Manu*, V. Ss. 161, 163; VIII—226; *Apastamb*, 2 S. B. E. p. 181; *Narad*, 38 S. B. E. 184, 185; *Yajnyavalkya*, 1 S. 75.

(6) *Bhagirathi v. Jokhu*, 32 A. 575 (579, 581).

(7) 1 Strange. H. L., p. 56; *Virasami v. Apparwami* 7 M. 187; *Thapita v. Thapita* 17 M. 235 (237, 239, 244); *Kushalchand v. Bai Mani*, 11 B. 247 (258).

and the decay of morals, the only check upon undesirable *laisons* was to give children no chance of having a will of their own. Hence the later inculcation that a girl must be married before she attains puberty. In this respect the usages have outrun the Smritis so far that while the latter enjoin a marriage before puberty ⁽¹⁾ usage favours marriages even of infants aged two to eight and the Census Report records a custom of marriages performed of children even before they are born. ⁽²⁾ Even in Gautam's time this tendency was growing, for while enjoining the marriage of all girls before they attained puberty, he adds : "Some declare that a girl shall be given in marriage before she wears clothes" ⁽³⁾ and on this Vashishth sagely remarks : "Out of fear of the appearances of menses, let the father marry his daughter while she still runs about naked." ⁽⁴⁾

414. Further to facilitate marriages, the Smritikars recognized eight forms of marriages already set out (§§ 80, 81, 91, 100, **Eight forms of marriage.** 104, 116, 117, 124). Of these all except the Brahma and the Asur form are said to be obsolete. But it is submitted that the Brahma form, as such, is equally obsolete. Manu describes this marriage thus: "The gift of a daughter, after decking her with costly ornaments and honouring her by presents of jewels, to a man learned in the Vedas and of good conduct whom the father himself invites, is called the Brahma rite." ⁽⁵⁾ Now, since marriages are performed before the boy attains sufficient maturity of understanding he cannot be "learned in the Vedas." *Secondly*, the Vedas are not now read at all, and boys go to school to master quite a different curriculum which puts into his mind the reverse of vedic learning. The fact is that custom and the altered outlook of life have entirely outgrown these archaic forms, and it is idle to disguise the fact, for even the license of interpretation has limits, and all that can be safely predicated of modern marriages is that amongst the higher classes they approach the Brahma form, if at all. As regards the Shudras the usual form is the *Asur*--that is the form in which the bridegroom pays for the bride.

415. This section defines marriage to be an alliance or union between a man and a woman recognized by law. The necessity of legal recognition was perceived by Apastamb who says : "The union of the husband and the wife is effected through the law." ⁽⁶⁾ Law in this connection as elsewhere in the Code, necessarily of course, includes custom. Consequently, the legality of a marriage depends upon its legal recognition, and since in the case of Hindus, Law has declared its resolve to accept their personal law and custom as binding upon itself, it follows that for the purpose of validating a Hindu marriage recourse must be had to that law for the purpose of testing its validity.

(1) Manu, IX 88 "To an excellent and handsome youth of the same class, let every man give his daughter in marriage, according to law; even though she have not attained the age of eight years."

Vyas, Ch. II-7, "The sin incidental to an act of procuring abortion is committed, if through the negligence of her giver a girl menstruates before her marriage. He who does not give away a daughter in marriage before she attains her puberty, becomes degraded." (Dutt's Tr. p. 508).

Yama, S. 22, "The father who gives away in marriage his maiden daughter after she

has attained the twelfth year drinks her menstrual blood month after month."

Vishnu, Ch. XXIV 41. "An unmarried girl who menstruates while living in her father's mother's house should be regarded as a degraded man, a woman commits no sin by carrying her away from the custody of her guardian.

(2) Census of India, 1911 Vol. 1. S.

(3) Gautam, XVIII. S. 23: 2 S. B. E. 269.

(4) Vashishth, XVII-70: 14 S. B. E. p. 91.

(5) Manu, III Sc. 27-34.

(6) II 6-13; 2 S. B. E. p. 132.

416. What is marriage.—This section defines “marriage” as an alliance between a man and a woman recognized by law. The first essential of marriage is then an alliance, union or compact between persons of opposite sexes. Such alliance may be formed in a variety of ways, and for a time, limited or unlimited. The various ways in which the alliance is formed in a marriage constitute its ceremonies. They vary from the most complicated as prescribed in the Shastras to the free love which under the name of *Sambandham* is taken for a marriage in Malabar. The question of marriage is mainly of form and intention. If the intention was to treat the woman as wife and the form prescribed by the sect or caste as the outward expression of that intention is conformed with, then the union would amount to marriage and recognized as such by law.

417. The question of legal recognition is all in all. It has been thought best to leave the details of this subject to subsequent sections. Legal recognition depends upon the law and custom to which the parties were subject, the ceremonies, if any, performed and the observance of other rules as to consanguinity.

418. There are two stages in the Hindu, and for that matter, in all marriages, the betrothal and the actual ceremony of marriage.

(1) Betrothal

It has already been stated that infant marriages are now customary amongst Hindus, though amongst the educated and reformed classes there is a tendency in the direction of adult marriages even preceded by courtship. Leaving these out for the moment, the orthodox Hindu first bethinks himself of the marriage of his daughters as soon as they are four or five years old. Eleven or twelve years being the normal period for the attainment of puberty in this country, most Hindu girls must be married off within a margin of puberty, and the rule is to marry them between 6 to 8 years. A year or two before, negotiations commence with the father of the boy selected. Emissaries comprising a Brahmin and a barber accompanied by a friend or relation proceed to view the prospective husband. This is a distinct ceremony in some parts of the country. If the boy is approved and it depends upon the presence of other eligible rivals, then preliminary negotiations begin with the two fathers through the same intermediaries. Amongst the three higher castes it is usual for the boy's father to stipulate for a definite sum as the bridegroom's dowry. This is a comparative equation between the attractions of the boy and those of the girl, combined with the wealth, position and other circumstances of her parents. But on this point, as on all others relating to marriage, local customs widely differ. As is observed in the last Census Report (1) “As a rule marriage is by purchase. The high castes ordinarily pay for the bridegroom and the low castes for the bride. But there are many exceptions. Some times even high castes, such as the HaviK Brahmins of Bombay, pay a bride price while low castes such as the Bhangi (sweeper) of the United Provinces occasionally pay a bridegroom price. In some cases the payment is nominal, but in others very large sums are paid, especially where polygamy (2) prevails or if there is a great shortage of women. In recent times the bridegroom price has been affected very largely by the

1 Census of India, 1911, Vol. 1 § 330 p.257.

(2) A word coined by Mr Coldstream when reporting on the caste customs of the Punjab in connection with the census of 1891, is used to designate the rule whereby, when a caste is divided into several sections of different

status, parents are obliged to marry their daughters into an equal isogamy or higher section, and if they fail to do so they are themselves degraded to the level of the section in which their daughters marry—Census of India, 1911, Vol. 1. 309, p. 251.

educational qualifications of the bridegroom. A Kayasth graduate in Bengal usually fetches from Rs. 500 to Rs. 1,000, but there are said to be instances of as much as Rs. 10,000 having been paid. Even where the bride is usually bought, the parents of a girl are sometimes willing to pay for an educated bridegroom. With the aboriginal tribes it is almost invariably the bride who is paid for, and sometimes the rate is very high; the Lushais have been known to give as much as Rs. 200 for their wives. A virgin usually fetches a higher price than a widow, but an exception is found amongst certain artisan castes whose women help them in their work. The amount occasionally varies with the age of the bride. The Baniyas of the Punjab pay no bride-price for a girl up to the age of eight, but after that, payment is made at the rate of Rs. 100 for every year of her age up to thirteen, which is regarded as the age of puberty. Where marriage by purchase prevails brides are often exchanged. Thus in the Baroda State when a man of one of the lower castes gives his daughter in marriage, he often does so on condition that a girl is given to his family in return." (1)

419. But apart from custom, the Shastric rule, and one favoured by public opinion, is to take no bride-price and to pay a suitable dowry if possible to the husband. A marriage so contracted is now taken to be a *Brahma* marriage which is presumed of every marriage till the contrary is shown. (2)

But though the Asur form is not favoured or presumed, the Court is constrained to recognize its validity however indisposed it may be to countenance it. (3)

The question whether the marriage is in one form or the other would have been immaterial but for its effect upon the devolution of the woman's property which depends upon whether she was married in the approved *Brahma* form or the disapproved *Asur* form. (4)

420. The contract of marriage hitherto considered is the contract between parents on behalf of their minor children. But there may be cases, and such cases are more likely to be fostered by the reforming zeal of the present generation, when the contract of marriage is made directly by the parties immediately interested. In that case the contract culminating in an engagement could not be distinguished from any other contract, giving rise to similar rights and liabilities; though the age of discretion in such case is not that prescribed by the Indian Majority Act, which, as already stated, does not affect the capacity of any person to act in matters of marriage, dower, divorce and adoption. (5) The effect of this enactment is, that so far as regards these matters, the question of majority must be determined as if the Indian Majority Act had not been passed. Apart from that Act, there is however no clear provision in the Hindu texts prescribing the age of majority, and what little there is to be found on the subject is limited to males, there being no provision for females

(1) Census of India, 1911, Vol 1, S 313, p. 257.

(2) *Jaikisondas v Harkisondas*, 2 B. 9. (14); *Moosee Haji v. Haji Abdul Rahim*, 80 B. 197; *Chumital v. Surajram*, 83 B. 433; *Jagan-nath v. Narain*, 84 B. 558; *Jagannath v. Run-jit Singh*, 25 C. 354; *Athikesavulu v. Rama-nujam*, 32 M. 512; *Munni v. Umrao Singh*, (1909) P. R. 89; *Ram Prasad v. Mt Sibu Bai*, 4 N. L. R. 31 (83); *Govind v. Davalat*, 6 N. L. R. 3 (5); *Chandrabhaga v. Vishwanath*,

9 N. L. R. 102 (108).

(3) *Dholidas v. Fulchand*, 23 B. 659 (664); *Vaithinathan v. Gangarazu*, 17 M. 9 (10); *Ven-kata Krishnayya v. Lakshminarayana*, 32 M. 185 (190).

(4) *Bhao v. Raghunath*, 80 B. 229, (*Brahma* devolution) *Dwarika v. Saratchandra*, 39 C. 319. (*Asur* devolution) See post "Inheritance to Stridhan".

(5) S. 2 (a), Indian Majority Act (IX of 1875).

whose lifelong dependence upon men is repeatedly insisted on. However, as an age for majority was necessary, the courts have held that the completion of the sixteenth year fixed for boys should be held equally to apply to girls. On the attainment of this age Hindu boys and girls should be treated as *sui juris* and competent to contract for their own marriage. There is no prohibition in Hindu Law against such contracts. On the other hand, post-puberty marriages were the only marriages known in the vedic times and even in the degenerate days of the Smritis, such marriages are expressly contemplated and provided for: "Three years ⁽¹⁾ let a damsel wait, though she be marriageable; but after that term, let her choose for herself a bridegroom of equal rank; if not being given in marriage, she chose her bridegroom neither she, nor the youth chosen, commits any offence." ⁽²⁾

421. Cases in which match-makers stipulate for a reward for themselves are even more immoral than those in which a price is paid to the guardians of children to bring about their marriages. All agreements to pay them for their services have been consequently held to be immoral and opposed to public policy and as such void.

12. A contract to marry cannot be enforced by specific performance or an injunction, but a party suffering loss thereby may recover damages for a breach of contract.

Synopsis.

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| (1) <i>Remedy for breach of contract to marry</i> (422-423). | (3) <i>Jurisdiction of Courts in matters relating to marriage</i> (425). |
| (2) <i>Parent's duty to marry their children</i> (423). | |

422. Analogous Law.—No person can be compelled by law to marry another⁽³⁾ and it would be against public policy and in restraint of marriages which law favours, if the party resiling therefrom were restrained by an injunction from marrying another. ⁽⁴⁾ The only remedy open to the disappointed party suffering by the breach is compensation in money awarded as penalty for a breach of contract to one suffering therefrom. But on this head any presents of clothes, money and jewels made to the parents of the other party may, it seems, be not recovered, being, as they are, unconditional and in the nature of voluntary offerings. ⁽⁶⁾ As such presents made to and for the benefit of parents, not being in the nature of a settlement on the wife, undoubtedly tend to induce the exercise of parental influence from corrupt motives and encourage the buying and selling of children. ⁽⁶⁾ As such they should be held, and have been held to be irrevocable, though there are cases which lay down otherwise ⁽⁷⁾

(1) Skt. "Ritu" lit. "seasons" which Sir W. Jones translates to mean years, but which in the Sacred Books of the East is translated as "seasons" "monthly periods". If the word "ritu" means the revolving year then 18 being the age of puberty, a girl would attain her years of discretion like the boy, on completion of her sixteenth year.

(2) *Mānu*, IX-9091; *Vishnu*, XXIV-40; 7 S. B.F. 109; *Gautam*, XV11120; *Narad*, XII-24.

(3) S. 21 (b) last Illn. Specific Relief Act (1 of 1877); *Umed v. Nagindas*, 7 B. H. C. R. (O. C.) 122 (192); *Norbut Singh v. Lad*

Koer, 5 N. W. P. H.C.R. 102 (105); *Gunput* (1n re) 1 C. 74.

(4) *Gunput* (1n re) 1 C. 74 (76, 77, 78).

(5) Per Markby, J. in *Asgar v. Mahabhat*, 18 B. L. R. App. 84 (86) followed in *Gunput* 1 C. 74 (76).

(6) *Buldeo v. Mohamaya*, 15 C.W.N. 417; 9 I. C. 652; *Devarayan v. Mulhuraman*, 87 M. 898; *Venkata v. Lakshmi*, 82 M. 185; F. B. ; *Girdhari v. Neeldher*, 10 A. L. J. 159; *Buldeo v. Jumna*, 28 A. 496; *Dulari v. Vallubhdas*, 18 B. 126.

(7) *Jogeswar v. Panch Kauri*, 5 B. L. R. 895; *Rambhat v. Timmaraya*, 16 B. 673 (675).

even where the recipients of such gifts were not the guardians of the children whom they had agreed to offer in marriage. ⁽¹⁾ But these cases really follow precedents ; and none of them was a flagrant instance of parental power when alone the rule could have been tested. They, however, stand on firmer ground when they decree return of presents made for the bride in which case their return on the breaking off of the match is a matter of course. ⁽²⁾

423. So again the father or other guardian of the bridegroom may legitimately recover any expense of the marriage of his son or ward which the father or guardian of the bride had agreed to pay ⁽³⁾ and marriage expenses being a legitimate charge on the family they are payable therefrom. So where the defendant improperly neglected to get his niece married, whereupon her mother married her and then sued him for expenses out of the joint estate of her deceased husband, the Court decreed the claim overruling the objection that the plaintiff was not legally entitled to marry her daughter. ⁽⁴⁾

Where the bride elect dies it is but just that the husband elect should be able to get back the presents and this contingency is expressly provided for in the Mitakshara ⁽⁵⁾ which however allows deduction therefrom the expenses incurred by the girl's father. ⁽⁶⁾

424. Parent's duty.—The Court does not recognize the *Asur* marriage as valid, and though if it is performed it has to be treated as valid on the ground of *factum valet*, but till it is performed no contract relating thereto can be enforced whether for the payment of the brideprice stipulated, or for damages for non-performance of the marriage, though if the money is actually paid and the marriage ceremony completed, the money cannot be recovered back. ⁽⁶⁾ There is nothing in the textual law regarding the selection of the bridegroom and the person by whom he is to be selected. This duty must, therefore, be presumed to arise out of the general rights of guardianship. As such, the father and in his absence, the mother must make the selection, ⁽⁷⁾ as it is their duty to see that their children are suitably matched. While the contract is in the course of negotiation neither party is of course legally bound by the terms exchanged but as soon as a definite contract is made that stage is marked by performance of the ceremony of engagement or betrothal, ⁽⁸⁾ between which and the actual marriage the couple are engaged and the parents held under contract to marry them. Even this period is nowhere covered by textual authority. Consequently, it is held subject to the ordinary civil law of contracts. As such the parents are at liberty to terminate the engagement for any reason which should justify it in law. Force, fraud, undue influence and misrepresentation are, amongst others, its chief dissolvents. ⁽⁹⁾ Even if the contract has been illegally broken

(1) *Umed v. Nagindas*, 7 B H C R. (OC) 122; *Mulji v. Gombi* 11 B. 742; *Rambhat v. Timmayya*, 16 B. 673 (675).

(2) *Jaisondas v. Harkisondas*, 2 B. 9 (15); *Amrallal v. Bapubhai* (1887) B. H. C. P. J. 207; *Rambhat v. Timmayya*, 16 B. 673 (675).

(3) *Vaikuntam v. Kallapiran* 23 M 512; Post nuptial expenses allowed in the same case in 28 M 497

(4) *Id.* ii, Sec X1 S. 29, 30; *Gulabchand v. Fulhar*, 3 I. C. (B) 748; *contra Hira v. Jowala* (1915) P. L. R. 27; 27 I C. 1008

(5) *Id.* S. 30.

(6) *Chunilal v. Suraj Ram*, 33 B. 488; *Kalavagunta v. Kalavagunta*, 32 M. 185 F. E. following *Dholidas v. Fulchand*, 22 B. 658; *Itamachand v. Audaito*, 10 C. 1054 overruling *Visvanathan v. Saminathan* 18 M. 83; *Vaithinathan v. Gangarazu*, 17 M. 9; *Boldeo v. Sumna*, 23 A 495 merely followed *Visvanathan v. Saminathan*, 13 M. 83, since overruled.

(7) *Acha Ranganaki v. Acha Ramanuja*, 35 M. 728.

(8) Called "Sagai"

(9) *Asar Ali v. Mahabhat Ali*, 13 B. L. R. (App.) 84.

the only remedy is damages. (1) There cannot be specific enforcement of a contract to marry, and for obvious reasons. (2) Nor for the same reason, can another marriage be restrained by injunction. (3) Nor is there any case for damages consequential on the mere breach of a contract of marriage as a Hindu father has always the option to put an end to his daughter's engagement should a more suitable match be available. (4) This he is at liberty to do till the very last moment; and where the ceremony is required and marriage is completed only with the *Saptapadi* or the taking of seven steps round the marriage pole (5) then before this last irrevocable step is taken, he may break off the contract though if the seventh step is taken, the marriage is completed and becomes indissoluble.

425. Jurisdiction of the Court.—The jurisdiction of the court on the subject of Hindu marriages is limited mainly to giving effect to the ascertainment of facts and declaring them *inter partes*. But in contracts relating to a marriage the jurisdiction of the court is unrestricted by any consideration of personal law as all such contracts are subject to the provisions of the statutory enactments. So the court may award damages for a breach of contract to marry but since a party cannot compel another to marry him there can be no decree for specific performance. And where a marriage has in fact taken place the court will entertain a suit for jactitation of marriage, that is, a suit for the establishment of marriage relationship, such a suit for instance, as seeks a declaration that the defendant is or is not married to plaintiff (6) or being married, whether the marriage is or is not valid, because it was procured by fraud or force or celebrated without the consent of the necessary parties or without the formalities necessary to render it a binding marriage according to Hindu Law. (7) Should the court hold a marriage valid, it becomes necessarily entitled to restrain by an injunction the parents from marrying the bride to another person. (8) The question whether the plaintiff has the right to betroth and marry a minor belongs to the domain of personal guardianship on which the courts undoubtedly possess jurisdiction. (9)

A suit for damages for a breach of contract to marry is not cognizable by the Court of Small Causes. (10)

(1) *Mulji v. Gonti*, 11 B 412; *Rambhat v. Timmayya*, 16 B. 673; *Colquhoun v. Smither* 83 M. 417.

(2) *Shriulhar v. Hiratal*, 1 C. 74; *Umed v. Nagindas*, 7 B. H. C. R. (O. C.) 122; *Purshotam v. Purshotam*, 21 B 23; *Ma v. Ngme Yin v. Maung Po Taw*, 7 Bur. L. R. 14; 23 I. C. 876; *Newbut v. Lad Koer*, 5 N. W. P. H. C. R. 102; *Contra* *Narad XII 35*; 33 S. B. E. p. 172 ordains forcible marriage of the recalcitrant bridegroom but not *vice versa*; but this drastic penalty is opposed alike to law and policy and is not saved by the Specific Relief Act (1 of 1877) S. 21 (b), the last illustration to which is exactly in point.

(3) *Purshotam Das v. Purshotam Das*, 21 B. 28 (84) dissenting from *contra* in *Khooshal v. Bhugwan*, 1 Borr. 155.

(4) *Mit. II-II-27*; *Umed Kika v. Nagindas*, 7 B. H. C. R. 122; *Purshotam Das v. Purshotam Das*, 21 B. 28 (90, 81); *Kinji v. Narsi*, 89 B. 682 (714); *Per Westrop C. J. in Umed v. Nagindas*, 7 B. H. C. R.

(O. C.) 122 (134); *Narad XII 30-38*; *Yajna-vaalkya* 1 65.6; *Vashissth* 2 Dig. 487; *Katya-yan Jb* 491; *Mit II II, 27*.

(5) On this point there are local variations. In some places these steps are taken successively into seven circles in other places, the pair perambulates seven times round the marriage pole, while in others the parties compile seven steps upon a stone.

(6) *Mir Asmat Ali v. Mahmudul-Nissa*, 20 A. 96

(7) *Ramsurn v. Rakhal Dass*, 1 W. R. 412; *Aunjona-Dasi, v. Prahlad Chandra*, 6 B. L. R. 243 F. B. overruling *contra* *Ramsaran v. Rakhal ib* p. 244 C.; *Aunjona v. Prohladh Chunder*, 14 W. R. 182

(8) *Venkatacharyulu v. Rangacharyulu*, 14 M 816.

(9) *Purshotam Das v. Purshotam Das*, 21 B. 27 (87).

(10) *Kalisunker v. Koylash Chunder*, 15 O. 888.

Right to marry. **13.** Every man has a right to marry, and such right is not affected by infancy or infirmity.

Synopsis.

- (1) *Right to marry* (426). (2) *Competency to marry* (427-429).

426. Analogous Law.—Hindu Law which treats marriage as a *Samskar* and as such a religious rite, naturally regards the male as marrying and the female as merely married to. From her standpoint the *Dharmkars* treat her as being the subject of a gift by her father to the bridegroom called "the *Kanyadan*". ⁽¹⁾

427. Who may marry.—A Hindu marriage being a sacramental ceremony, every twice-born Hindu desirous of entering the householder's estate is entitled to contract a marriage irrespective of his age, constitution and poverty.

No deformity or disease, ⁽²⁾ not even congenital impotency, ⁽³⁾ can stand in the way of marriage nor leprosy or other loathsome and contagious disease.

But since Hindu Law regards marriage in the nature of a gift by the father of his daughter to the husband, the latter may be an idiot and even a lunatic, so long as his lunacy did not, at the time of his marriage, prevent him from accepting his bride during the marriage ceremony and of understanding what was going on. ⁽⁴⁾

There is no age limit. A boy of any age and a man up to any age are both equally competent to marry.

428. The right of Bairagis ⁽⁵⁾ and Gosains to marriages is now recognized ⁽⁶⁾ and there seems no reason why a *Nihang* Gosavi should not enter the order of *Grihashth* by contracting a marriage. In doing so he merely breaks the vow of perpetual celibacy made to himself, but Hindu Law does not tie any one down to lifelong celibacy, and any custom having this effect would be ruled out as obnoxious to the rule restraining marriage. ⁽⁷⁾ But though a Gosavi can marry, it does not thence follow that he can thereby alter the devolution of property which he held on condition of continued celibacy. The property so held would devolve in accordance with the rules of the order and the nature of the grant. ⁽⁸⁾

429. The illegitimate children of a Hindu have equally the right of marriage and may marry in the caste if the caste people recognized them as still in caste. ⁽⁹⁾ So may the dancing girls or Dasis attached to temples. ⁽¹⁰⁾

(1) Lit. "gift of the daughter."

(2) *Monji Lal v. Chandrabati*, 88 C. 700 (706) P. C. See per Woodroff, J. at p. 705 affirmed O. A. at p. 706 Under English Law the marriage of a lunatic is absolutely void even if it takes place during a lucid interval. *Turner v. Meyers*, 1 Hag. Con. 414; *Marriage of Lunatics Act 1811* (51 Geo. 3 C. 37)

(3) *Purushotam v. Das Mani* 21 B. 617.

(4) *Monji Lal v. Chandrabati* 38 C. 700 P. C.

(5) *Dial Das v. Dhanwan* (1914) P. R. 36: 21 I. C. 982.

(6) *Gosain Rambharti v. Mahant Suraj-bharti* 5 B. 682 (684); *Gitabai v. Shivbakas* 5

Bom. L. R. 318; *Sattiadama v. Saranabagi* 18 M. 266 (270); *Shree Mahant Kishora v. The Coimbatore etc Co.* 26 M. 79 (82); *Chhajju Gir v. Diwan* 29 A. 109

(7) *Balgir v. Dhondgir*, 5 Bom. L. R. 114; *Gitabai v. Shivbakas*, Ib. 318.

(8) *Ib Contra* assumed per Piggott, J. in *Sesperi v. Dwarka* 10 A. L. J. 181 and per Rafiq, J. in *Ramkishore v. Jagannath*, 11 A. L. J. 783 (740) is, it is submitted, erroneous

(9) *Inderun v. Ramasamy*, 13 M. I. A. 141 (159); *Ram Kumari (In re)* 13 C. 264 (268, 269).

(10) *Kamakshi v. Nagarathnam*, 5 M. 161.

14. No prescribed ceremony is necessary to constitute marriage,⁽¹⁾ provided that if any ceremony is customary and regarded by the caste as essential, then it must be performed.⁽²⁾

Explanation I.—The ceremony of Saptapathi is necessary⁽³⁾ to complete a marriage performed according to the orthodox rites, and that of Vivah Hom⁽⁴⁾ is also usually performed, but their non-performance does not invalidate a marriage, if otherwise completed.

Explanation II.—A marriage celebrated with due ceremony is not invalid by reason of the fact that a party thereto was then an outcaste.⁽⁵⁾

Explanation III.—Co-habitation is not necessary to complete marriage.⁽⁶⁾

Synopsis.

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|--|---|
| (1) <i>Shastric ceremonies</i> (430-431). | (10) <i>Punjab marriage customs</i> (452-459). |
| (2) <i>Saptapadi</i> (432-433). | (11) <i>The Central Provinces marriage customs</i> (460-462). |
| (3) <i>Present day ceremonies</i> (434-435). | (12) <i>Second marriage when necessary</i> (464). |
| (4) <i>Consummation not essential</i> (436). | (13) <i>Intercaste marriages</i> (465-467). |
| (5) <i>Who can give in marriage</i> (437-440). | (14) <i>Marriage of Hindus and non-Hindus</i> (469). |
| (6) <i>Customary marriages</i> (441-444). | (15) <i>Factum Valet</i> (470). |
| (7) <i>Communal marriage rites</i> (445). | (16) <i>Remarriage of wives</i> (471-473). |
| (8) <i>Common marriage customs</i> (446-449). | (17) <i>Remarriage of widows</i> (474-476). |
| (9) <i>Relic of Niyog</i> (450-451). | (18) <i>Conditional marriages</i> (478). |

430. Analogous Law.—The marriage ceremony follows that of betrothal.

The shastric ceremonies which are now out of vogue⁽⁷⁾ are elaborate and comprise the following:—(1) The selection of the bride. (2) The wooers' visit to the girl's house the wooers being the younger brother or some near relation and friends of the selected boy. (3) Sacrifice when the girl's father consents to the match. (4) The ceremony of bathing the girl. (5) Bridegroom elect visits the house of his intended wife. (6) Presentation of clothes and jewels to the girl. (7) Arghya at the marriage. (8) Homa sacrifice. (9) Panigrahan (or taking of the hand). (10) The treading on the stone. (11) Walking round the nuptial fire. (12) Sacrifice of fried grain. (13) The Saptapadi or the taking of seven steps which concludes the marriage compact. (14) Carrying away of the bride to a new house (not the bridegroom's). (15) Looking at the Pole star. Mandlik enumerates 27 such ceremonies⁽⁸⁾ but he

(1) *Authikesavali v. Ramaswami* 32 M. 512 (519) *Moosa Haji v. Paji Abdal* 30 B. 197.

(2) *Strange H.* L. 42.

(3) *Brindaban v. Chundra Kurmoker*, 12 C. 140 (148) *Venkatacharyulu v. Rangacharyulu* 14 M. 316 (318) *Manu VIII—227*, 2 Dig. 487, 488

(4) *Muthusawmi v. Masilamani*, 20 M.L.J. 94; 5 I. C. 42.

(5) *Inderun v. Ramasawmy*, 18 M. I. A. 141; *Kumari (In re)* 18 O. 264; *E. v. Madan Gopal*, 31 A. 589 (591)

(6) *Anandachari. In re* 9 M. 466 (470); *Dadaji v. Ruckhmabai* 10 B. 301 (311)

(7) *Mandlik Hindu Law* p. 401; *Muthusawmi v. Masilamani* 38 M. 349 (348)

(8) *Mandlik Hindu Law*, p. 401, F. N.

rightly observes that all these are greatly interlarded with custom, and that they are neither indispensably necessary nor invariably possible. "There are places where hardly a qualified Brahmin priest is obtainable, and parties have to improvise a ceremonial for themselves. This is done by distributing *Pan Supari*, worshipping the household deities and the ceremonial *Pothi* (book) containing the ritual".⁽¹⁾ The whole gamut of these ceremonies is never undergone even in places where the Brahmins abound.

431. The "nuptial fire" favoured of the Smritis is never lighted⁽²⁾ nor the Homa sacrifice invariably performed. Of all the ceremonies the one which is most insisted on and which has outlived the rest is the *Saptapadi* or advancing seven steps consisting in the bridal pair facing and approaching each other step by step till they join hands on completion of the seventh step which is then regarded as the final and irrevocable step.⁽³⁾ In some places the *Bridhishradh* is performed.⁽⁴⁾

432. Of all the religious ceremonies prescribed for a Hindu marriage the ceremony of *Saptapadi* or the "Seven Steps" is treated by the *Smritikars* as conclusive. Thus

Manu says:—The relation of wife is created by the texts pronounced when the girl is taken by the hand. Be it known that those texts end, according to the learned, with the texts prescribed for walking seven steps.⁽⁵⁾

Yashleth says:—In connection with the formation of the relation of husband and wife agreement is first prescribed. Then taking by the hand is prescribed. It is said that mere agreement is defective, and that of the two, taking by the hand is indispensable.⁽⁶⁾

Yama says:—Not by the pouring of water nor by the words of gift is the relation of husband and wife formed, but it is formed by the rite of taking the bride by the hand and when they walk together the seventh step.⁽⁷⁾

433. The ritual so far as it extends to *Saptapadi*, may be divided into three parts: (1) the *Vagdan* or the promise to give; (2) the actual gift of the bride or *kanyadan*; and (3) the marriage rite which commences with taking the wife by the hand (*panigrahanam*) and ends with the seventh step *Saptapadi* taken around the consecrated fire.⁽⁸⁾ In the United Provinces this ceremony involves circumambulation of the bridal pair with their clothes knotted seven times round the marriage pole fixed in the centre of the shed or of the shed itself,⁽⁹⁾ while in the Punjab it means circumambulation round the *Granth Sahib*.

But this is not the invariable form of taking the seven steps. In another place it is described thus: "The bride is conducted by the bridegroom, and directed by him to step successively into seven circles a text being recited at each step." This is called *Saptapadi*.⁽¹⁰⁾

But whatever may be the variation in the mode of taking the seven steps all agree that with the completion of the seventh step marriage becomes irrevocably complete. This does not, however, imply that it is a *sine qua non* to a Hindu marriage, and that it may not be otherwise complete. As a matter of fact Hindu marriage ceremonies have of late become so varied and various that it is impossible to generalize about them. All that the law therefore requires is

(1) *Ib.*, p 403.

(2) Sir T. Strange H. L., pp 7-8.

(3) *Manu Ch VIII* § 27.

(4) *Brindaban v. Chandra Kurmoker*, 12 C. 140 (142).

(5) *Lit "Seven steps" Skt & Lat-Saptam: Seven & pad: pedes-foot.*

(6) *VIII* 229.

(7) Cited in *Venkatacharyulu v. Ranga-charyulu*, 14 M. 316 (319)

(8) Cited in 2 Dig. p 488.

(9) *Ib.*, p. 319.

(10) U. P. Census Report 1912 § 288 p 222.

(11) Cole. Essays 7, Asiatic Researches, p. 308.

that whatever the ceremonies may be, they should be performed and not omitted, if their performance is essential to the completion of the marriage.

434. Present day ceremonies.—It is now universally acknowledged that the Shastric ceremonies have been almost entirely superseded by those which custom and convenience have substituted in their place. So Shankar Nair, J., observed in a case: "Hindu lawyers prescribed various ceremonies to constitute a valid marriage. But those ceremonies in their entirety are seldom, if ever, performed. According to them the Vivah Hom (1) and *Saptapadi* (2) are essential. But it is notorious that marriages are performed in many castes without them, and it is now settled that if by caste usage any other form is considered as constituting a marriage, then the adoption of that form under those conditions prescribed by the caste with the intention of thereby completing the marriage union is sufficient. No other conclusion is possible if due regard is had to conditions in India." (3)

435. It is consequently clear that the essential and binding part of the marriage ceremony must necessarily vary in different localities. (8)

"In the Punjab it consists of the *phere*, or circumambulation of the sacrificial fire, which is held to imply the consummation of the vows in the presence of Agni and the other sacrificial gods. In the United Provinces the young couple walk round, not a fire but the marriage shed or pole. In the east of these provinces, and also in Bengal Bihar and Orissa, the binding portion of the ceremony is generally the *sindirdan*, or painting of the bride's forehead with vermilion. That this is probably a survival of a blood covenant is shown by the fact that amongst certain castes, such as the Hari, the bride and the bridegroom smear each other with their blood, which they obtain by pricking their fingers with a thorn. In Bombay the higher castes follow the practice of circumambulation. The lower castes, sprinkle rice over the bride and bridegroom, while some of Dravidian origin pour milk or water over the joined hands of the young couple. In Orissa their right hands are tied together with kusa grass, or their left hands, when the bride is a widow. In Madras there are various ceremonies, such as making them eat from the same dish, or knotting their garments together, or pouring water over them so that it runs from the man to the woman. But the most common is the tying of the tali, or necklace, by the bridegroom round the bride's neck. The Brahmin bridegroom places the bride's foot seven times on a mill-stone, a symbol of constancy." (4)

These general observations admittedly do not exhaust the innumerable local, tribal and sectional variations to which marriage ceremonies are liable from all of which the only conclusion possible is that stated in the section.

436. Consummation not necessary.—Consummation is not necessary even under English Law to complete a marriage, which is complete as soon as the declaration and contracting words (5) are spoken; still less is it necessary under Hindu Law (6) where marriage are usually contracted before the parties thereto have attained puberty. But though consummation is not necessary under law it may become so by custom. In that case the custom must of course, be strictly proved.

According to Vashishth "if a damsel at the death of her husband had been merely wedded (by the recitation of texts) she may be married again." (7) But

(1) Lit. "Marriage Sacrifice"

(2) Lit. "Seven Steps."

(3) *Muthusawmi v. Manilamani*, 33 M. 342; 5 I C 42 (46).

(4) Census of India, 1911, Vol 1, 814, pp. 257, 258.

(5) Marriage Act 1898 S. 6 (61 and 62 vice o. 58).

(6) *Administrator-General v. Anandachari*, 9 M. 466; *Arur Singh v. Mangal* (1877) P. R.

85 I issued that consummation was in ancient times essential to complete a marriage. Ghose, H.L. (8rd Ed) 789; This view is supported by the fact that a virgin widow could re marry (Vashishth XVII.74) and a wife only passed into the *gotra* of her husband on performance of the consummation *Homa* ceremony. *Hiranya Keshin Grih. Sutra*, 30 S. B. E. pp. 191, 198, 20.

(7) Vashishth XVII.74.

this precept has no value beyond the fact that it reduces the prejudice against the remarriage of such a widow.

437. Persons entitled to give in marriage.—It has already been stated that the Indian Majority Act (1) does not "affect the capacity of any person to act in the matter of marriage, dower, divorce and adoption" (2) and as under Hindu Law the age of majority is attained on completion of the 16th year persons born below that age cannot be married except through their guardians whose right rests upon the following text of Yajnavalkya :—

"The father, paternal grandfather, brother, kinsmen, remote relations (Sakulyas) and mother are the persons to give away a damsel—the latter respectively on failure of the preceding."

438. It has been held that this order merely prescribed for the giving away of the child, and does not confer an individual right of betrothal in the order of succession declared. Though the father has the absolute right of arranging for the marriages of his children no other paternal kinsman can in his absence arrogate to himself the same unqualified authority without the concurrence of the mother. (3) But in a conflict between the father and mother the father has doubtless a superior right. This right was put to a somewhat severe test in a case in which the father was convicted of theft and imprisoned for two years after which he deserted his first wife and married another. Three years later the wife negotiated for the marriage of her daughter to her own cousin, whereupon the father sued her for an injunction which the Court granted being satisfied that the father had arranged for another more eligible match to the greater advantage of the minor and that his suit being in the interest of his child and his right to give his daughter in marriage being superior to that of the mother it could not be defeated by the latter. (4) But, of course, if in such a case the marriage had already been performed then it would not have been cancelled merely because the mother had married without the father's authority. (5) A father may expressly or impliedly delegate his authority to another. Such was held to be the intention of the father who having lost his wife made over his daughter two years old to another person to adopt, who brought her up and at the proper age married her to the plaintiff. The natural father then secured possession of her and married her to one Jadoo whom the plaintiff sued for the custody of his wife, and the court decreed the suit holding that the father having by his conduct delegated his parental authority to another, could not re-assert it to the detriment of the plaintiff to whom the girl had been previously married by her putative father. (6)

439. Apart however, from the father and mother, the paternal relations have the preferential right of arranging for the marriage of minors (7) in the following order :—

The father, paternal grandfather, brother, kinsmen, the Sakulyas—that is other paternal relations up to the tenth degree, and the mother. The right is then said to vest in the maternal grandfather, maternal uncle, and other maternal relations in the order of proximity.

(1) Act IX of 1875.

(2) *Ib.*, S. 2 (a).

(3) *Namasevayam v. Annamalai* 4 M. H. O. B. 389; *Rangonaiiki v. Ramanuja* 35 M. 728; *Ramkore v. Jamnadas*, 97 B. 18.

(4) *Nanabhai v. Janardhan* 12 B. 110 (190, 121); *Ram Bunser v. Soobh Koonwar* 7

W. R. 321; *Golamee v. Juggessur*, 3 W. R. 193.

(5) *Khushal Chand v. Baimani*, 11 B. 247; *Ghazi v. Sukru*, 19 A. 515.

(6) *Golamee v. Juggessur* 3 W. R. 198.

(7) *Kasturi v. Pannalal*, 38 A. 520.

But the question of priority loses its importance as soon as the marriage is performed. In the absence of force or fraud, the marriage will then be upheld on ground of *factum valet*, if the consent thereto was given by a legal guardian such as the mother without consulting the father. (1)

440. A step-mother has no right to give in marriage, (2) and indeed, excepting the parents with whose authority the Courts are loath to interfere, the authority exercised by more distant relations is subject to the supervision of the Court, which as the supreme guardian of the state, is entitled to intervene whenever it will be in the interest of the minor to do so, and in doing so it may consider the minor's own wishes if she is sufficiently old to study her own welfare. (3)

441. Custom may influence the form of marriages or it may legalize the alliance not in consonance with the normal law. In the one case it reduces modifies or altogether dispenses with the performance of the prescribed or any ceremonies. In the other case it sanctions inter-marriages between different castes or sub-castes or permits the remarriage of women already married or of widows. In its solicitude for upholding marriage contracts law suffers every community to follow its own notion of a valid marriage, and if it is only sure of the *factum* of marriage it even presumes that it has been performed with the requisite sanction of custom. In this respect it views custom with unwonted indulgence. Such marriages may be grouped under the following heads :—

- (i) Those in which custom moulds the form (§§ 450-463).
- (ii) Inter-caste marriages (§ 464).
- (iii) Marriages between Hindus and non-Hindus (§ 467).
- (iv) Remarriage of wives (§§ 469-471).
- (v) Remarriage of widows (§ 472-474).
- (vi) Conditional marriages (§ 476).

442. It has already been seen that of the eight forms of marriages enumerated by the *Smṛitikars*, the *Brahma* is the most favoured. It is still current; so is the *Asur* form. But since these two forms only differ on a single point, *viz.*, whether the bride is gifted or sold (4) it is clear that they take no note of the fact that widow remarriages have since been again legalized and the bonds of caste have again been loosened. Moreover, there remain the ceremonies.

Besides the *Brahma* and *Asur* forms, another old form—the *Gandharva*—is said (5) to still survive. “The voluntary union of a maiden and her lover, one must know to be the *Gandharva* rite which springs from desire and has sexual intercourse for its purpose.” (6) The essence of this form lies in the absence of all ceremonies.

443. But there are marriages which are held to be perfectly valid, though they require no religious ceremonies. Such is the *Karewa* marriage in the Punjab which is marriage with the brother or some other male relative of the deceased husband and is contracted without any ceremony at all, but is nevertheless held to be valid and to confer upon the parties all the rights of a valid

(1) *Ghasi v. Sukru*, 19 A. 515.

(2) *Ram Bunses v. Soobh Koonwar*, 7 W. R.

321.

(3) *Shridhar v. Hiratal*, 12 B. 480 (485, 486).

(4) *Chunilal v. Surajram*, 38 B 498 (487).

(5) *Brindavana v. Radhamani*, 12 M. 72
contra; *Bhaoni v. Maharaj Singha*, 8 A. 788.

(6) *Manu*, III-82, (3 Cole. Dig. p. 606).

marriage. (1) The *Karao Dhureecha* marriage prevalent amongst the Jats (2) and Lodhis (3) of the United Provinces appears to be quite similar. So a form of Gandharv in a Tipperah caste is completed "by the worship of the goddess Tripoora and taking santi-water (or the water of absolution)." (4) The wife so married admittedly possesses an inferior status. So does the "Dagger wife", that is to say the wife who is merely married to a dagger of her husband who being usually a person possessing a much higher social status does not stop to marry in person. (5) The Anand marriage customary amongst the Sikhs is completed by the *Kharat* or an offering to the deity coupled with the recitation of a text called Anand. (6) Still greater laxity marks the marriages of Jat Sikhs amongst whom not only inter-caste marriages but marriages without any ceremony at all are quite common and customary, and as such recognized as valid by the courts. (7) So a mere mutual consent is all that is required to constitute a Buddhist marriage, and such consent may be expressed or implied by conduct or reputation. (8) Even a permanent concubine acquires the status of a wife. (9) The fact that the Privy Council recognized such an alliance as valid marriage shows how elastic is the term "marriage" when applied to persons only subject to their customary law and such examples are not unfamiliar to the Indian Courts dealing with cases of even such high caste people as the Gour Rajputs of Cawnpur. (10)

444. The Punjab and Malabar marriage customs reduce marriage to a mere figure of speech. The Punjab customs not only permit of inter-caste marriages but they permit of marriages such as the *Chadar Andazi* and the *Karewa* which are mere sexual alliances which custom recognizes as lawful marriages. (11) So is the *Samhandham* of Malabar in which all that is necessary is the consent of the girl and her guardian followed by co-habitation. There are several varieties of Samhandhams, amongst which the *Podamuri* form is said to take the pride of place, being one in which the bridegroom makes the ceremonious present of a cloth to a bride. (12) It is said that these marriages have been reprobated by the courts. (13) But this seems to be a mistake, for the reports of cases prove otherwise. (14) Such mock marriages are equally in vogue amongst the Newars of Nepal. (15)

(1) *Authikesavali v. Ramanujam*, 32 M. 512 (514, 515, 518).

(2) *Rattigan Punjab Customary Law* (7th Ed.) 7b, p. 141 and cases there cited. *Tup per's Customary Law*, Vol. 2-95.

(3) *Pooran Mul v. Toolsi*, 3 Agra 350; *Bahadur Singh*, 4 N. W. P. H. C. R. 128.

(4) *Kesree v. Samardhan*, 5 N W P H C R 94.

(5) *Chakrodhuj v. Beer Chunder*, 1 W R 194; *Rajkumar Nohodip v. Birchandra*, 25 W R 404 (414).

(6) *Ramasami v. Sundarlingasami*, 17 M. 422 (430).

(7) *Deo d. Joggomohun v. Sanmcoomar*, 2 Mor. Dig 41 S C 8 I. D (O S) 797 (799).

(8) *Chandasingh v. Mela* (1897) P. R. 78; *Harta v. Kanhya*, (1908) P. R. 72; *Askaur Savansinh*, (1910) P. R. 79; *Hardial v. Kali Ram*, (1911) P. R. 85.

(9) *Mi Me v. Mi shwa Ma*, 89 C 492 P. C.; *Id.*, p. 505 P. C.

(10) *Lachman Kuar v. Mardansingh*, 8 A. 148.

(11) *Askaur v. Sawansingh*, (1910) P. R. 79; 7 I. C. 1009.

(12) *Report of the Malabar Marriage Commission 1894*, pp. 21-24, 98.

(13) *Census of India 1911 Vol I S 294*, p. 242 foot note (1); see *Moore Malabar Law and Custom*, p. 75.

(14) *Census of India, 1911, Vol. I, § 294*, p. 248.

(15) For Bengal, Bihar, Orissa and Sikkim, See *Census of India, 1911 Vol 5, Part 1, Ch. VII, Part 1, §§ 634-689*, pp. 814-948. For Bombay *Id* Vol. IX Part 1, Ch. VIII. deals with caste and tribes but no marriage customs. The Madras part *Id* Vol XII similarly deals with the religion and caste (ch. IV and XI) but not with their marriage customs.

The U. P. and Oudh part *Id* Vol. XV devotes a considerable space to the description of marriage customs. Ch. VII, §§ 212-239, pp. 207-229. The Punjab part *Id* Vol. XIV is a most illuminating record of castes, religion and marriages of the Hindus—As to the last see *Id* Vol. XIV, Pt. 1. Ch. VII Ss. 334-384, pp. 261-294.

For C. P. See *Id* Vol. X, Pt. 1, Ch. VII, §§ 160-196, pp. 131-151.

445. Communal Marriage Rites.—The Courts only decide such cases as come before them. But the ethnographic records of India contain a detailed account of the matrimonial customs of the various communities which constitute their present day law on the subject. It is impossible to pass them all in review here ; but a slight indication may be given to the buried treasure found in these works which are useful alike to the lawyer who has to determine the validity of a marriage as to the student of ethnography who has to compare the movements of the human mind.

The Report of the census of India devotes a considerable portion of its descriptive volumes to the marriage customs of the various communities and localities. A perusal of these shows that in spite of the Shastric prohibition of the sale of brides, amongst the lower classes, who mostly live by manual work and to whom a daughter is as useful as a son, the parents customarily exact a solatium for the loss of her labour from the husband. Amongst the higher castes where the males are the wage-earners and women relegated to the performance of household and even menial duties, their loss is more easily endured and where the law of supply and demand is not a disturbing factor the parents willingly part with their daughters for nothing and amongst the well-to-do they pay a handsome price for purchasing an eligible husband. And as to the marriage rites the bulk of the people follow the time-honoured, old usage regardless of the Shastric sanction or anathemas.

446. But a few leading incidents are common to all customs, whether European or Indian, Hindu, or non-Hindu. The husband
Common marriage customs. selected is invariably a few years older than the bride, and the marriage rites are performed in the parental home of the latter. Amongst the Hindus marriage is universal, and it is so amongst all other races who affect Hinduism. All Hindus strive to marry off their daughters before the age of puberty and strange devices are often resorted to in order to comply with the letter of the Shastric law. Failing to secure an eligible husband the girl is made to go through a mock marriage with an arrow a flower or a tree, ⁽¹⁾ the real marriage being performed later with the husband. ⁽²⁾ Wherever widow re-marriage is sanctioned by the caste it is invariably treated with disfavour and accompanied by the ceremony of applying vermilion to the woman's forehead and putting bracelets on her wrists. ⁽³⁾ But the usual ceremony accompanying a virgin marriage is not much more elaborate: the *Sindurdan* or the smearing of vermilion on the bride's forehead or on the parting of the hair being generally regarded as the essential feature of the marriage ceremony. ⁽⁴⁾ It is probably a survival of the blood covenant between husband and wife and has a wide vogue even amongst people and races whose connection with the Indo-Aryan civilization is not readily apparent.

447. Polygamy is everywhere common and it was in its worst form rampant in Bengal where, however, Kulinism is now a decadent institution. Instances were at one time not uncommon of orthodox Brahmins living by their marriages. Lest they should forget their numerous wives who were often a hundred or more in number, they used to maintain a register of their marital engagements and paid

(1) Bengal Census Report, 1918, Pt. I, §§ 647, 648.

(2) Tribes and Castes of Bengal, Vol 1, p. 415.

(3) Bengal Census Report 1918, Pt. I § 641: widow marriage is very common in Orissa, *Ib.*, § 648.

(4) *Ib.*, § 640.

periodical visits to their fathers-in-law to receive their customary gifts upon which they maintained themselves in luxury. They noted down for their private information their numerous progeny which they saw rising around them, and to whom they likewise looked forward for filial recognition and support. Kulinism is now dying out but it is not yet extinct and the last census report records three cases in which the husbands owned 60, 8 and 4 wives, the husband of the last batch being an M. A. and B. L. (1)

448. The Brahmos are monogamists but their number is inconsiderable. The total number of marriages celebrated under the provisions of the Special Marriage Act (2) during the decade 1901-10 being only 335 out of which in 34 cases only were the brides widows. (3)

449. As regards the prohibited degrees, Hindu Law prohibits the inter-marriage of *Sapindas*. Now taking this term to include persons whose common ancestor is within six degrees of the male and four degrees on the female side, it excludes no less than 2, 121 possible relations, while the Christian table of kindred excludes 30 for any one person. The higher castes follow the *Sapinda* rule by limiting it in practice to 4 and 3 degrees in the male and female line respectively; while the lower castes everywhere follow the rule of thumb which they have made for themselves, viz., that there should be no inter-marriages between the "*Chachera, Mamera, Phuphera, and Mausera*" relations which prohibits a man marrying any one in the line of either his uncle or aunt on either the male or female side. This again is cut down in practice to mean that a man may not marry into any family into which any male relative has married so far as the connection is remembered. Ordinarily this carries the prohibited degree to three generations or say, a period of 60 years. (4)

450. In all parts of India where widow marriage is customary the first refusal is given to the husband's younger brother after whom other relations are given a choice. In this respect this custom follows a custom not only confined to the Hindus or to India (5) but to all primitive societies who regard the wife as property belonging to the family over whom one could assert the individual right of inheritance. (6) The *Niyog* custom is definitely based on the idea that the wife is property and that the husband using it authorizes another to perform on her an act, of which he could have authorized the performance in his life time and the sons are his, because they like the mother, are his property, being born of her.

451. Marriage by purchase and marriage by exchange are common throughout India, and in the United Provinces such marriages are even customary amongst Brahmins. (7) Marriage by capture was at one time common. It could not persist after the Penal Code and the only survival of the custom is now to be found in the fact that the husband goes mounted and armed

(1) *Ib.* § 654.

(2) Act III of 1872.

(3) Bengal Census Report, 1913, § 644.

(4) U. P. Census Report, 1912, Part 1, § 219, pp. 211, 212.

(5) The practice of Levirate was common amongst the Jews. See Deuteronomy XXV-5.

10, Lev. XXV 25: Bengal Report, 645; U. P. Report, § 222.

(6) See Art. "Levirate" in Hastings' Dictionary of the Bible; also "Levirate" in *Encyclopædia Britannica*.

(7) U. P. Census Report, 1912, § 231.

and captures his bride in a mock battle. This custom is not confined to the Hindus, nor, indeed, to India.

452. The Punjab is a province of customs and amongst them the marriage customs both tribal and territorial greatly differ. But the essential features of Hindu customs equally persist there.

Marriage is universal and regarded as a sacrament. Infant marriages are customary, the majority of girls being married between the ages of 10-15. Girls are as a rule sold as there is a shortage of women ⁽¹⁾ the price varying according to the maturity of the bride. A girl aged 8. can be had for nothing but afterwards the price payable is Rs. 100 for each year of the girl's age, *i.e.*, Rs. 900 for a girl of 9 years old and Rs. 1,000 if 10 years and so on. Everywhere the girl is looked upon as a valuable asset.

453. The orthodox marriage ceremonies are thus described :—(1) "The ceremonies begin with the usual worship of Ganesh and other gods after which the sacrificial fire is lit. (2) The father of the bride is then requested by the priest to give his daughter to the bridegroom. He accepts the proposal and with his daughter seated on his left knee and his right hand full of water, a little rice and kusha grass makes a sacred offer of the girl, with all the jewelry and equipment which have been previously gifted to her, to the bridegroom, who accepts her with due formality ; after which the girl's father demands a promise that the Kumari (virgin) given to him must be taken by him in constant companionship in the performance of his duties and the enjoyment of wealth and other pleasures. The promise is duly made. This is the *kanyadan*. (3) Then follows the *panigrahan*, which is known as *hathleva* and consists of the couple grasping each other's hand to mark the union, and certain Vedic hymns are recited. The gods who have been invited to the sacrifice are asked to bear testimony to the sacred tie. At this stage is performed the *ashmarohan*, the pair placing one foot each on a stone in token of the firmness of the ground on which they are going to tread in their married life. (4) The pair then, with clasped hands or with the ends of their garments knotted together, go seven times round the sacrificial fire. This ceremony is called *phere* and implies the consummation of the vows in presence of *agni* and the other sacrificial gods." ⁽²⁾

454. These ceremonies were originally performed by the Sikhs as well, who used to employ the Brahmins to officiate at their marriages. Later on it became usual to supplement this with the Sikh ceremony which is now the sole marriage ceremony performed by them in their marriages. A Sikh marriage may now be performed in the old style, or it may be performed in the new style called the Anand marriage. The leading binding ceremony in each is however the same, *viz.*, the circumlocution of the pair four times round the Granth Sahib accompanied by the reading of hymns by the Sikh priest. These hymns are called the *Lawans*. ⁽³⁾

455. Widow marriages though deplored are none the less more frequent in the Punjab than anywhere else. The ceremony most prevalent amongst the Hindus and Sikhs is that called the *Karao* or *Chadar andazi* in the Eastern Punjab and *Karewa* or *Chadar Pana* in the rest of the province. This marriage

(1) Punjab Census Report, 1912, pt. 1, Ch VII §§ 348, 349, p. 272.

(2) *Ib.*

(3) Translated in Macauliffe's "Sikh

Religion" Vol. 2, Oxford 1909 ; also in the Punjab Census Report, 1912, § 355, pp. 277, 278.

is completed with little or no ceremony at all.⁽¹⁾ Where a brideprice has to be paid the husband merely takes the wife home after payment and it is considered sufficient to mark the commencement of their matrimonial relation. But where a ceremony at all is performed, it consists of the widow usually dressed in red taking her seat by the side of her husband over whom a Brahmin, a Sadhu or an elder of the brotherhood spreads a white chadar or a sheet after which the husband either places a rupee in his bride's hand or presents her with bracelets, and nose and ear-rings or some other emblems of wedded life.⁽²⁾

456. Mock-marriages are equally customary in the Punjab but they usually take place when the widower wishes to marry a third wife, that number being considered inauspicious or when the horoscope of the girl foredooms her to early widowhood. The object the girl is married to is either a *Ber* or *Pipal* tree or to an animal or some inanimate object such as a sword, dagger, arrow or the like.⁽³⁾

457. As to marriage within the prohibited degrees the orthodox rule is honoured here more in the breach than in its observance. The Punjabi Hindus avoid only two *gotras*, viz., one's own and that of the mother's father; small groups avoiding only the collaterals, i.e., only the father's *gotra*,⁽⁴⁾ and marriages by exchange are common throughout the Province.

The Sikh marries in his own caste ordinarily avoiding only the collaterals of the father and the mother's father.⁽⁵⁾

458. The Saptapadi is performed in the Punjab by the pair walking seven times⁽⁶⁾ round the sacrificial fire with clasped hands or with the ends of their garments knotted together. The Sikh perform only four circuits⁽⁷⁾ round the granth Sahib.⁽⁸⁾ It will thus be seen that the seven *steps* of Manu have in places developed into seven circuits round the fire or round the pole or round the marriage mandap. The original seven steps are however still taken in many localities whether face to face or with joined hands or clothes tied together with a knot. Certain castes still retain the initial ceremony of making the pair walk seven steps, the bridegroom's father in the Punjab placing gold and silver under each step of the bride.⁽⁹⁾

459. Polyandry exists in the Kulu division, the Simla Hill states and to a smaller extent in the Nahan, Mandi, and Suket states. It is confined to the lower castes though Rajputs and other castes do not abjure it. The polyandry generally practised is of the fraternal type, known as Tibetan, all the brothers in a family having usually one joint wife, but distant relations and even persons belonging to different families agree to share a wife in partnership.⁽¹⁰⁾ The husband visiting the wife has to leave his shoes or cap at the door, which is notice to the other husbands that the wife is "engaged."

(1) *Haker v. Mahalesing* (1879) P. R. 38, *Mula v. Chando* (1880) P. R. 26; *Lachu v. Dalsingh* (1886) P. R. 33; *Chandsingh v. Mela* (1897) P. R. 78; *Dalipkaur v. Talla* (1918) P. R. 99; 18 I. C. 98.

(2) Punjab Census Report, 1912, § 369
(3) *Ib.* § § 871 878

(4) The Mohyal Brahmins marry into the family of one of the collaterals of the mother's father, *Ib.* § 374.

(5) *Ib.*, § 374.

(6) But Khattris perform only 4 and Aroras 8 rounds

(7) Called "Pheras" (rounds) or "Parkar-mas" (circumambulations).

(8) Punjab Census, 1912, Pt. 1, § 355.

(9) Punjab Census, 1912, Pt. 1, p. 278 F.N.

(10) *Ib.*, § 378.

Polygamy is, as usual, prevalent throughout the Punjab, and the number of wives is regulated by the wealth and *status* of the husband.

Divorce does not appear to be customary amongst the Hindus, Sikhs and Jains.

460. The leading features of the marriage customs in the Central Provinces resemble those of its neighbours, the Bihar and the United Provinces. The leading idea of the highest caste is to make a gift of their daughters to husbands of the lower to exploit them for money. The Kunbis will take Rs. 20 for a daughter before she reaches adolescence, after which she is given away for nothing. Exchanges are common ⁽¹⁾ while service is taken in lieu of cash where the husband is too poor to afford it.

461. The binding portion of the marriage ceremony in the Hindi speaking districts is the *Bhanwar* ceremony which consists of the bridal pair walking round the marriage shed called the *Mandwa*. In the Maratha country this ceremony is not usually performed and the marriage rite is completed when the sheet suspended between the bride and the bridegroom is taken away and the rice is thrown over them. Amongst the tribes the *Bhanwar* is usually performed, but the binding ceremony is the affixing of the vermilion mark on the forehead of the bride which concludes the marriage.⁽²⁾ Marriage by capture is symbolized by the Gond and the Mudia aborigenes.⁽³⁾

462. Widow re-marriage is customary not only amongst the Shudras but also amongst the Marathas who claim an equal status with the Rajputs.⁽⁴⁾ The ceremony which is usually performed at night includes one symbolic of the supersession of the rights of the ex-husband and the changing of clothes and bangles. If a bachelor marries a widow he usually has to go through the ceremony of a mock-marriage with a tree, an arrow, or a ring. A widow may not marry any one of her own father's *gotra* or within the degree that would be prohibited to her as an unmarried girl. A member of her deceased husband's family has a prior claim.

Divorce is customary and may be obtained by the husband for adultery of the wife and by the wife if she is deserted by her husband. But in practice where women are greatly in demand, they are free to re-marry as often as they desire for a new husband. Such re-marriages are customary even amongst the Jadams of Hoshangabad who claim to be a branch of the Rajput race.⁽⁵⁾

463. It will thus be observed how different are the local customs regulating the relation of the sexes. Beyond a certain common ideal which underlies all Hindu society the divergencies in practice are as remarkable as if the various groups had owed no allegiance to a single system or religious ritual. And yet we find the Shastras quoted for what is marriage, and all marriages submitted to a single test, as if all Hindus were amenable to the prescribed rituals, and totally free from the influence of their communal usages which have at the present day almost entirely overlaid the orthodox conventions.

(1) C. P. Census Report, 1912, § 175.

(2) *Ib.*, § 176.

(3) *Ib.*, § 177.

(4) *Ib.*, § 178.

(5) C.P. Census Report, 1913, § 179.

It cannot be too often repeated that the Hindu Law that the courts are enjoined to apply is not the Hindu Law of the epic age but the law as it stands modified by usage, and in the matter of marriage, usage is all in all.

Second marriage when necessary. 464. Amongst most people the ceremony of marriage begins and ends with the performance of a single ceremony.

This is the real marriage. But where it is performed before puberty, a *Gowna* or *Pathoni* miscalled a second marriage usually marks the advent of that event. But this is usually a quiet ceremony and one which is by no means essential to the completion of marriage. But it might be possible that by custom, before any conjugal rights could be asserted, a second ceremony of marriage was necessary, though the Hindu Law requires no such ceremony. In a case in which this custom was alleged the plaintiff's suit for possession of his wife was thrown out on the ground that the evidence disclosed that the wife was free to re-marry till the second marriage was performed, and the plaintiff's failure to perform it, disentitled him to the relief which he claimed. (1)

465. Inter-caste Marriages.—The history of the origin and growth of castes and their inter-relations has already been given in the General Introduction (§§ 206-217) from which it will be seen that in the Vedic times when the idea of caste was only taking root, inter-marriages between Aryan males and the Shudra females were not interdicted and were even connived at. But later on when the caste ascendancy grew and the four castes became more distinctly marked, inter-caste marriages still continued to be customary; though they began to be treated with growing disfavour (2) and so Manu ordains that the *Dwij* should preferably marry in his own caste, at least his first wife (3) though he may take other wives from the caste next to his own. But this rule does not appear to be inflexible and Manu anathematizes a Brahmin if he takes a Shudra woman as his first wife. (4) In a later age this practice was exalted into a moral law and inter-caste marriages increased in disfavour with the increase of caste independence. Sub-castes were formed the members of which followed the example of the greater castes. But this ferment was mainly confined to three separate castes. Though the Shudras were technically within the pale of Hindu society, in reality they continued to remain outside it. Consequently inter-caste marriages amongst them continued unchecked by the rising tide of popular opinion against them. And their legality is now well established. (5)

466. But even amongst the twice-born, both pure and mixed, such marriages have obtained a foothold in the Punjab where the inter-marriages of a Rajput man with a Khatri woman (6) and of a Ksha man with an Aishya woman (7) have been upheld and so the Calcutta High Court has upheld the marriage of a Vaidya husband with a Kayasth mother as supported by a local custom prevalent in Tipperah (8) and the Allahabad High Court had to concede both the legality and validity of inter-caste marriages between a Brahmin and a Kshatriya woman as supported by the local custom in

(1) *Boolchand v. Janokee*, 25 W.R. 386.
 (2) *Manu* III 4, 13.
 (3) *Id.*, III-12.
 (4) *Id.*, III-17.
 (5) *Inderun v. Ramasawmy*, 13 M.I.A. 141;
Abdur Gauda v. Ganji, 22 B. 277; *Mahan-*
man v. Gangava, 11 Bom. L. R. 822;

Contra Narain v. Rakhal, 1 C. 1.
 (6) *Haria v. Kanhaya* (1908) P. R. 72.
 (7) *Khairu v. Fakirchand* (1909) P. R. 57;
 2 I. C. 244
 (8) *Ramlal v. Akhoycharan*, 7 C. W. N. 619.

Nepal. (1) But both the courts of Bombay and Allahabad have held as invalid a marriage of a Brahmin woman with a Rajput man (2) much less with a Shudra man. (3)

Inter-marriages between mixed castes are permissible (4) and since illegitimate children are held to possess no caste, inter-marriages between them are equally unobjectionable. (5)

It has been held in Burma that there could be no valid marriage between a Hindu male and a Burman Buddhist female. (6)

467. At the present day all over India inter-marriages between sub-castes even when not customary are generally condoned on payment of a small fine. But nowhere are such marriages considered as void. (7) The present tendency is to eliminate all interdiction against sub-caste marriages (8) and to make the connubial limit extend as far as the commensal. In fact this tendency is generally observable in all castes. It will be thus seen that the ban on inter-marriages is caste the direct result of the growing caste exclusiveness. They are least common where caste-conservatism is most rigid. For instance in the Punjab where caste has never taken a strong hold on the people, inter-caste marriages are quite common. (9) But where, as in the United and the Central Provinces and Behar, caste is all in all, inter-caste marriages are highly reprobated. But nevertheless there is no Shastric authority against inter-sub-caste marriages, least of all for territorial interdiction which forbids a Brahmin of the North to marry into a Brahmin family of the South, and the Kayasths of Bengal to intermarry with the Kayasths of the adjacent Bihar.

468. The four rules deducible from the Shastras which still survive in the customs of the people are then these:—

- (1) All Shudras can intermarry. (10)
- (2) Persons belonging to the same primary caste may intermarry notwithstanding any practice against such marriages. (11)
- (3) Persons belonging to the mixed and new castes may intermarry if permitted, to do so by their own custom. (12)
- (4) Where inter-caste marriages are permitted by custom they only permit hypergamous marriages, *i.e.*, they permit only men of the higher caste marrying women of the next lower caste but not *vice versa*. (13)

(1) *Padam Kumari v. Suraj Kumari*, 28 A. 458 (461)

(2) *Lakshmi v. Kalian Singh*, 2 Bom. L. R. 128; *Sasipuri v. Dwarka*, 10 A. L. J. 181.

(3) *Bai Kashi v. Jamnadas*, 14 Bom L R. 547.

(4) *Daryai Singh v. Narpal Singh*, 13 O. C. 875

(5) *Sukkh v. Ramcharan*, (1892) A. W. N. 27.

(6) *Maung Man v. Dermo*, 8 L. B. R. 244

(7) *Census for India*, 1911, Vol. I, S. 472, p. 868.

(8) *Bengal Census Report*, 1901, p. 856.

(9) *Inderun v. Ramaswamy*, 18 M. I. A.

141; *Fakirgauri v. Gangi*, 22 B. 277; *Mahantawa v. Gangawa*, 88 B. 698 (697).

(10) *Inderun v. Ramaswamy*, 18 M. I. A.

141 (158, 159); *Ramamani v. Kulanthai*, 14 M. I. A. 346; *Ramaswamy v. Sundaralingasami*, 17 M. 422 (480, 481); *Muthusami v. Masilamani*, 33 M. 342; *Fakir Gauda v. Gangi*, 22 B. 277; *Mahantawa v. Gangawa*, 83 B. 693; *Upoma v. Bholaram*, 15 C. 708; *Contra Narain v. Rakhal*, 1 C. 1.

(11) See § 437.

(12) *Ramlal v. Akhry*, 7 C. W. N. 619; *Daraysingh v. Nepalsingh*, (1910) 18 O. C. 375; 9 I. C. 71.

(13) *Tukaram v. Babaji*, 1 Bom. L. R. 144 (158); *Ramasami v. Sundaralingasami*, 17 M. 422 (480); *Shepuri v. Dwarka*, 10 A. L. J. 181; 16 I. C. 222; *Lakshmi v. Kaliarsingh*, 2 Bom. L. R. 128; *Bai Kashi v. Jamnadas*, 14 Bom. L. R. 547; 16 I. C. 133.

469. As regards the intermarriage of Hindus with non-Hindus the question is one, again, of custom. A Hindu may marry a Christian woman re-converted to Hinduism. ⁽¹⁾ Even without such re-conversion there is a possibility of a legal marriage if the *lex loci* permits it. So a Hindu may validly marry a Christian lady in England as the law of England does not prohibit intermarriages between Christians and non-Christians ⁽²⁾ but not a Burman Buddhist in Burmah. ⁽³⁾ Sikhism is a proselytizing creed. A Mahomedan may be converted to Sikhism. Consequently where a Sikh of position was shown to have co-habited with a Mahomedan woman and there was evidence to show that he was anxious to make her his lawful wife the Court presumed lawful marriage presuming at the same time that the woman must have been converted to Sikhism inasmuch as there was neither a legal nor a customary bar to such conversion. ⁽⁴⁾ In case of conflict between persons belonging to different religions the Courts apply the rules of justice, equity and good conscience ⁽⁵⁾ presuming the legality of a marriage if in fact it was performed. ⁽⁶⁾

470. Factum valet.—The legal maxim—*quod fieri non debuit factum valet* ⁽⁷⁾ has a recognized place in the application of Hindu Law to cases of adoption ⁽⁸⁾ and marriage ⁽⁹⁾ to cure a mere irregularity in form or an immaterial defect, as where the adoption or marriage is irregularly performed or where the rule against the adoption or marriage of a particular person is simply directory and not obligatory. But the maxim is one of wider application and applies to condone formal defects and disobedience of rules which are merely directory and not imperative. ⁽¹⁰⁾

471. Hindu law regards woman as designed by nature to create a son. She was, therefore, to submit herself to *Niyog* if her own husband was unable to beget one. Polyandry was then customary if it was not then the established rule. ⁽¹¹⁾ The twice-born were the first to denounce polyandry ⁽¹²⁾ and Manu speaks of the practice as a tradition. ⁽¹³⁾ He, however, found it still extant in the lower strata of society. "On failure of issue by the husband, if he be of the servile class, the desired offspring may be procreated either by his brother or some other *Sapinda*, on the wife who has been duly authorized." ⁽¹⁴⁾ Human jealousy corrected this custom and *Niyog* fell into disfavour, but the function of woman was yet declared to be the same. Upon marriage her individuality was lost in that of her husband. "No sacrifice is allowed to women apart from their husbands, no religious rite, no fasting; as far only as a wife

(1) *Muthusami v. Masilamani*, 93 M. 342.

(2) *Chetty v. Chetty*, (1909) P. 67.

(3) *Maung Man v. Daramo*, 3 L. B. R. 244.

(4) *Dualip Kuar v. Fatti*, (1918) P.R. 99: 18 I. C. 930; *Sodlie v. Steersing* (1895) P. R. 50; *Shidditta v. Bela*, (1900) P. R. 60.

(5) *Badamea v. Fatima Bi*, 26 M. L. J. 260 (264).

(6) *Inderun v. Ramasami*, 18 M. I. A. 141 (158); *Lopez v. Lopez*, 12 C. 706 (782); *Lucas v. Lucas*, 32 C. 187 (191).

(7) "What should not be done, yet being done, shall be valid" is a qualification of the general maxim *quod ab initio non valet in tractu temporis non convalescit*. (That which

is bad in its commencement, does not improve by lapse of time.)

(8) *Raje Vyankatram v. Jayavantrao*, 4 B. H. C. R. (A. C.) 191; *Gurlinga v. Rama*, 1 Bom. L. R. 226 P. C.; *Sukhbasi v. Guman Singh*, 2 A. 366 F.B.; *Ganga Sahai v. Lekhray* 9 A. 250; *Beni Prasad v. Hardai*, 14 A. 67 F. B.; *Chinna v. Kumara*, 1 M. H. C. R. 54; See under Adoption.

(9) *Diwali (Bai) v. Moti* 22 B. 509; *Mulchand v. Bhudia*, *Ib.* 812 (S15).

(10) *Balusu v. Balusu*, 22 M. 398 (415) P. C.

(11) *Manu* X. 66.

(12) *Ib.*, X. 64-66.

(13) *Ib.*, X. 66-68.

(14) *Ib.*, V. 161.

honours her lord so far she is exalted in heaven." (1) Even should her lord predecease her, she should not remarry, though this was merely a moral precept. But a widow who from a wish to bear children, slights her deceased husband by marrying again, brings disgrace on herself here below and shall be excluded from the abode of her lord. (2) The growing puritanism of the age soon carried the position assigned to the wife to its logical end. As she was the better half of her husband she could not out live him. Widow marriage was inconsistent with this ideal of wifely duties. The higher castes to whom these precepts were addressed soon made them a part of their customary law, but there were yet those to whom the first impulse of nature was superior to social conventions.

472. They continued to remarry widows if they could not find virgins and so in time, widow remarriage became supported alike by ancient tradition and modern necessity. It will be observed that inter-caste marriages, divorce and remarriages of women are most customary amongst communities where caste is weak, and women scarce. Such is the case in the Punjab (3) where all such marriages have always existed side by side. Where, however, sacerdotal influences have been long at work amongst the ignorant proletariat, as in the United Provinces and Bihar, which have been the strongholds of orthodoxy such marriages are held in disfavour and are merely confined to the Shudras and a few mixed or other upper castes. It will be observed that in castes which permit of widow remarriages, the husband's brother, younger and sometimes elder, has the first refusal. This is a relic of fraternal polyandry, traces of which still remain both in the Aryan and the non-Aryan communities all over India. (4) Only a few such cases can come under notice of the Courts. But further information can be obtained from the Census Reports which record the result of a systematic inquiry made on the subject. The local customs on widow remarriages widely differ. In the Central Provinces and Berar they were regarded as a nuisance and the Zamindars had established a custom to distribute all widows amongst the aboriginal tribes. (5) But as the demand for them grew, they began to be sold and when the British Government succeeded to the Mahratha rule the Zamindars considered it a grievance that their one source of revenue was curtailed by the insertion of a clause in their patent that they shall no longer traffic in widows.

473. Amongst several custom ridden castes wives are permitted to remarry with or without the consent of their husbands. "Where women are greatly in demand, they are correspondingly free to decide with whom they will live, and in a caste of as high a status as the Jadams of Hoshangabad, an endogamous branch of Rajputs, it is said that a woman sometimes has as many as nine or ten husbands in the course of her life." (6) The Courts however decline to succour runaway wives, holding the consent of the first husband essential to the validity of a second marriage. In many cases the consent or acquiescence of the husband is considered essential to the dissolution of the first

(1) *Ib.* V. 155

(2) *Ib.* X. 59; according to some a second son may be so procreated. *Ib.* X. 61.

(3) "There is a great dearth of females in the Punjab" Census of India 1911, Vol. I § 262 p. 208 the average being 811 to per thousand males. In Bihar and Orissa females preponderate, their number being 1,014 to thousand males. The C. P. runs close with 1,019 per thousand; so does Madras with its

1,011 females. The U. P. has 902, Bengal 970, Bombay 942 per 1,000; *Ib.* 255, 260.

(4) In the Punjab and C. P. See Census of India 1911, Vol. I §§ 292, 298; in Southern India *Ib.* § 294.

(5) Census of India, 1911, Vol. I, § 299, p. 246.

(6) Census of India, 1911, Vol. I., 297, § 297, p. 245.

marriage, and till its dissolution the woman is not free to remarry. In short, in these castes remarriage recognizes the custom of divorce; the husband being awarded a solatium in the shape of his marriage expenses, while the new husband celebrates the occasion by a caste dinner, called the *Marti Jiti* ⁽¹⁾ feast, that is a feast which symbolizes the death of the wife to her former husband and her becoming alive to the new one. Sometimes a writing called *Chod Chittu* ⁽²⁾ is given to the wife to enable her to get remarried, while in some cases the husband, though not a willing party to his wife's remarriage, acquiesces in it on terms. Certain castes permit remarriage of wives upon desertion by their husbands. The Courts uphold all such transactions in which remarriage follows upon a divorce ⁽³⁾ or desertion. ⁽⁴⁾ Sometimes the wife remarries with the permission of the elders of the caste but in this case if the husband remains recusant, the elders have neither the power to decree a divorce nor permit a remarriage, and any custom which transfers this power from the husband to his castemen is unreasonable and immoral, legalizing adultery ⁽⁵⁾ which, the Courts would not enforce. ⁽⁶⁾ The remarriage of wives is quite customary amongst the Shudras, ⁽⁷⁾ but it is not unusual amongst even the twice-born castes, e.g., the Sompura Brahmins of Ahmedabad, the Lodhis of the United Provinces, ⁽⁸⁾ the Lingayat Banias ⁽⁹⁾ of the Southern Provinces and many castes, high and low of the Punjab, which is the greatest latitudinarian as regards the custom regulating the relation of the sexes.

474. It has been already seen that the remarriage of widows was at one time not only customary but even obligatory (§ § 27-28).

Remarriage of widows.

It has also been seen how in course of time this practice fell into desuetude till the pendulum of custom having swung to the opposite extreme of enjoining and even ordaining the self-immolation of the newly made widow with the body of her husband (§ 55). These Vedic and Shastric tenets, it seems, remained confined to the twice-born, and amongst them to a few. The British Government abolished the practice of *Sati* and once more legalized the remarriage of widows ⁽¹⁰⁾ in quarters in which it had fallen into desuetude.

475. But apart from the Act, widow remarriage was always customary amongst the Shudras. It was customary even amongst some of the higher castes of which the *pat* marriages of the Mahrathas and the *Natra* marriages of Guzerat are familiar examples, while the same custom has been traced up to the Gour Rajputs of the United Provinces ⁽¹¹⁾ and the Sompura Brahmins of Ahmedabad. ⁽¹²⁾ Of all widow marriages the marriage of the widow to the deceased husband's younger brother is that most favoured and one which needs least ceremony everywhere. It is the modern relic of an ancient custom which was at one time a feature of Hindu society (§ 28).

(1) Lit. "dead and alive."

(2) Lit. "Letter of Release"

(3) Steele's Law of castes, p. 168 *et seq* :
Reg v. Karson, 2 B. H. C. R. 117; *Rahi v. Govind*, 1 B 97 (114) *Sri Ram v. Inchi* 11 A. L. J. 711; 21 I.C. 318.

(4) *E. v. Umi*, 6 B 126; *Virasangappa v. Rudrappa*, 8 M. 440

(5) *Bai Ugri v. Patel Purshottam*, 17 B 400 (405, 406).

(6) *Reg v. Karson*, 2 B. H. C. R. 117; *Narayan v. Laving*, 2 B. 140; *Uji v. Hathi Lohu*, 7 B H. C. R. (A. C.) 438.

(7) *Khemkar v. Umai Shankar*, 10 B. H. C. R. 381.

(8) *Kesaree v. Samardhan*, 5 N. W. P. H. C. R. 94.

(9) *Virasangappa v. Rudrappa*, 8 M. 440 (451)

(10) Widow Remarriage Act (XV of 1856); Civil Marriages Act (III of 1872).

(11) *Lachman v. Mardan Singh*, 8 A. 134.

(12) *Khemkar v. Umai Shanker*, 10 B. H. C. R. 381.

476. Customary marriages of Hindu widows were wholly insufficient to check the growing evil resulting from the surplus of unmarried widows, which attracted the notice of the Legislature, which in 1856 passed an Act "to remove all legal obstacles to the marriage of Hindu widows." (1) This Act merely supplements the custom, by legalizing the remarriage of widows in cases when their remarriage would have been opposed to custom. The result of this Act coupled with custom is to establish the right of all Hindu widows to remarry; though the result of remarriage under the Act determines her interest in her late husband's property. In other words, while a widow remarrying by custom may retain her first husband's estate if so permitted by custom, one who marries under the Act must of necessity forfeit it because it is so provided therein. (2) The act was never intended to vary the existing custom in favour of remarriage or any of its legal incidents. It was merely intended to enable widows of those castes to remarry who by their custom were prevented from remarrying, and it is only to those and those alone that the Act extends and applies. If her estate is from its very nature limited and its enjoyment conditioned upon her remaining unremarried then her remarriage would necessarily determine her estate. (3)

477. Statutory right of divorce.—Though a marriage under Hindu Law is indissoluble and apostacy furnished no ground for its dissolution, still in the case of converts to Christianity divorce may be secured in accordance with the provisions of the Native Converts Marriage Dissolution Act of 1866, (4) if in consequence of a party's conversion to Christianity, the other party repudiates or deserts the other for the space of six continuous months. (5) In that case the former may sue the latter for conjugal society, (6) and on the respondent's refusal to co-habit for a period of one year allowed by the Court, the Court may dissolve the marriage (7) which may, moreover, be dissolved even without the *locus penitentiae* for a year, if the marriage was not consummated owing to the fact that either party was then *impubes*. (8) This Act has not the effect of widening the door for divorce, but merely prescribes and provides for a dissolution where (i) either party, is after marriage, converted to Christianity; and (ii) the desertion or repudiation is solely due to such conversion. If the repudiation or desertion was then due to cruelty or adultery and not to conversion, the Court cannot entertain a suit for dissolution under the Act. (9)

A dissolution under the Act does not affect the status of children. (10)

(1) Act XV of 1856. "In the whole of India no fewer than 11 per cent. of the females aged 15-40 are widowed. Amongst the Hindus the proportion is 12 and amongst Mahomedans 9 per cent." Census of India 1911, Vol. I, 846 p. 278. The widows of all ages number 17 per cent of the total female population as compared to 9 per cent in Western Europe. "When we consider this distribution by age, the difference becomes still more striking, for while in Western Europe only 7 per cent of the widows are less than 40 years old, in India 23 per cent are below that age, and 1.3 per cent (the actual number exceeds a third of a million) are under 15, an age at which in Europe no one is even married." *Ib.* 880 p. 266.

(2) *Har Saran v. Nandī* 11 A. 880; *Dharam Das v. Nand Lal* (1889) A. W. N.

78; *Ranjit v. Radha Rani*, 20 A 476; *Gajadhar v. Kaunsilla* 81 A 161; *Mula v. Partab*, 82 A 489; *Abdul Aziz Khan v. Nirina* 35 A 466; *Ashrafi v. Ishri*, 11 A. L. J. 693.

(3) *Matungini v. Ram Ration Roy*, 19 C. 289; *Rasul v. Ram Suram*, 22 C. 589 (595); *Gourcharan v. Sita*, 14 C. W. N. 846; *Muhammad v. Mankuar*, 21 C. W. N. 906; *Murugayi v. Viramakali*, 1 M 226; *Vitta v. Chatakondur* 41 M 1078 (F. B.) *Vishnu v. Govinda*, 22 B. 821; *Joharmal v. Nainsukh*, 9 N. L. R. 88; See post under "Inheritance".

(4) Act XXI of 1866.

(5) *Ib.*, S. 12.

(6) *Ib.*, Ss. 4, 5.

(7) *Ib.*, S. 16.

(8) *Ib.*, S. 18.

(9) *Ib.*, S. 25.

(10) *Ib.*, S. 27.

478. A marriage is absolute, irrevocable and unconditional by law. ⁽¹⁾ But it may be rendered conditional by custom. ⁽²⁾ Such **Conditional marriages.** a custom was proved in a case in which a husband had sued for restitution of conjugal rights which the wife resisted on the ground that she had not become his married wife for which a second ceremony on her attainment of puberty was required, and this contention was upheld. In another case, the marriage was in the nature of an exchange of children who were married when only a month old on condition that the son's father should provide a girl to be married to the wife's brother. The Court upheld this mutual bargain holding it justified by the possible paucity of women. ⁽³⁾

But while a marriage may be contracted so as to take effect only upon the fulfilment of a condition precedent, it cannot be cancelled for any breach of condition made for its cancellation. ⁽⁴⁾ Nor can it be conditioned by an agreement to live apart. ⁽⁵⁾

Marriage expenses. **15** The marriage expenses of all members of an undivided family are a legitimate charge on its property.

479. Analogous Law.—Marriage being a *Samskar* and an obligatory religious duty binding upon all Hindus, whether Dwijas or Shudras, male or female, it follows that the expenses of marriage constitute a family necessity for which its property may be validly alienated or charged. ⁽⁶⁾ This liability is common to every manager whether the father or any other co-parcener or whether the estate is in the hands of a qualified owner such as a Hindu female. But of course, this amount must not be out of all proportion to the requirements of the case. ⁽⁷⁾ Even the expenses of the second marriage of a male co-parcener are so chargeable. The right to such expenses does not rest on contract. The liability is created by Hindu Law and arises out of the moral relation of the members of the Hindu family.

No valid marriage within prohibited degree. **16.** Every marriage is subject to the following conditions, namely :—

(a) That the parties thereto must not be within the prohibited degree of relationship ; and

(b) that if the parties thereto are *Dwijas*, they must be of the same caste.

(1) *Katesram v. Gendhenee*, 28 W. R. 178
 (2) *Boolechand v. Janckee*, 25 W. R. 386;
Baiugri v. Patel Purshotam, 17 B 400 (106.)
 (3) *Baiugri v. Patel Purshotam*, 17 B 400
 (406).
 (4) *Chastram v. Nathi*, (1900) P. L. K. 198.
 (5) *Krishna v. Balammall*, 34 M 398
 (6) *Sundarabhai v. Shiv Narayana*, 32 B.
 81; *Kameswara v. Veerachariu*, 84 M. 422;
Arunachellam v. Arunachellam, 10 I. C (M)
 285; *Marina v. Doddiseti*, (1911) 2 M. W. N.
 280; *Seeni Ammal v. Angamuthu*, 1912 M. W.
 N. 99; *Gopalakrishna v. Venkatanarasa*, 87
 M. 273; *Pohumal v. Naroomal*, 6 S. L. R. 246;
 19 I. C. 885; *Yelamanchili v. Yelamanchili*, 19
 M. L. J. 666; 4 I. C. 1069; *Nandan v. Ajudhia*,
 32 A. 325; F. B. *Contra Namasivayam v.*
Annammal, 4 M. H. C. R. 389; *Seshammal v.*
Munisami, Mad unrep. Cited in *Sundari v.*
Subramania, 26 M. 505; *Vaikuntam v.*
Kallapiram, 23 M. 512; *Govindarasulu v.*
Devarabhotla, 27 M. 206.
 (7) *Raghunatha v. Damodra*, (1910) M.
 W. N. 195; 6 I. C. 720; *Nandan v. Ajudhia*,
 32 A. 325 (282) F. B.

Explanation I.—The prohibited degree of relationship for the purpose of marriage is regulated by custom.

Explanation II—A person shall be deemed to be within the prohibited degree of relationship whose marriage is opposed to common morality.

Illustrations.

(a) The Shastras prescribe that Dwijas' sons who are Sapindas, Gotrajs or who belong to the same Pravar should not intermarry. A. a Dwija wishes to marry B, who is related to A. The validity of their marriage depends upon the usage of the caste.

(b) A has married B, who is his own sister's daughter. The marriage is valid as it is sanctioned by custom.

(c) A Kshatriya marries B, who is the illegitimate daughter of a Kshatriya father. The caste people recognize it as a valid union. The marriage is valid.

Synopsis.

- | | |
|---|---|
| (1) <i>Prohibited degrees of marriage</i>
(480-483). | (5) <i>Samanapravaras</i> (491). |
| (2) <i>Meaning of Sapinda</i> (484-485). | (6) <i>English rules of prohibited degrees</i>
(497) |
| (3) <i>Who are Sapindas</i> (486-489). | (7) <i>Shastric rules, how far binding</i> |
| (4) <i>Gotrajas</i> (490). | (498-501) |

480. Analogous Law.—The following texts on the subject of prohibited degrees are to be found in the *Smritis*. They are all conflicting, many of them too wide, and none of general application.

Manu.—"She who is neither his father's nor mother's *Sagotra* or Sapinda is commended for the nuptial rite and holy union amongst the twice born classes." (1) "But Sapinda relationship ceases in the seventh degree from the mother and the father" (2)

Yishnu.—"No one should marry a woman belonging to the same *Gotra* or descended from the same Rishi ancestors or from the same Pravars.

Nor should he marry one descended from his maternal ancestors within the fifth, or from his paternal ancestors within the seventh degree" (3)

Yajnavalkya.—"Let a man who has finished his studentship, espouse an auspicious wife who is not defiled by connection with another man, is agreeable, non-Sapinda, younger in age and shorter in stature, free from disease, has a brother living, is born from a different *Gotra* and *Pravar* and is beyond the fifth and seventh degrees from the mother and the father respectively." (4)

Narad—"Persons of the same *Gotra* and Pravars are ineligible for marriage up to the fifth and seventh degree of relationship respectively on the mother's and father's side." (5)

Gautam.—"A marriage may be contracted between persons who have not the same Pravars and who are not related within seven degrees on the father's side or within five degrees on the mother's side." (6)

Yashisth—"A man may marry a damsel who is the fifth and seventh in degree on the mother's and the father's side respectively." (7)

(1) III-5

(2) Ib V-60

(3) XXIV-10, 11; 7 S. B. E., pp. 106, 107.

(4) I-52, 53

(5) XII 7.

(6) IV 2-5; To the same effect Harit.

(7) Cited in Mit. Note on Yad. 1-58 (Panini Ed.) p. 110.

Paithinas.—"He may marry a damsel related to him beyond three from the mother and five from the father." (1)

Yrihat-Manu.—"She who is not connected by *pinda* or water, is fit for marriage among the twice-born classes as also she who is distant by three *Gotras*." (2)

Mitakshara.—"Sapinda relationship arises between two people through their being connected by particles of one body."

"Asapinda":—She whose *pinda* or body is *samana* or common one, is called a *sapinda*; who is not a *sapinda*, is an *Asapinda*; such a one (he should marry). "Sapinda" relationship arises (between two people through their being) connected by particles of one body. Thus the son stands in *sapinda* relationship to his father, because the particles of his (father's body having entered his). In like manner stands the grandson (in *sapinda* relationship) to his paternal grandfather and the rest, because through his (father, particles of his (grandfather's) body have entered into his own. Just so on (the son, a *sapinda* relation) of his mother, because particles of his mother's body have entered into his own. Likewise (the grandson stands in *sapinda* relationship) to his maternal grandfather and the rest, through his mother. So also is the nephew a *sapinda* relation of his maternal aunts and uncles and the rest, because particles of the same body (the maternal grandfather) have entered into (his and theirs): likewise (does he stand in a *sapinda* relationship) with paternal uncles and aunts and the rest.

So also the wife and the husband (are *sapinda* relations to each other) because they together beget one body (the son). In like manner, brother's wives are also *sapinda* relations to each other, because they produce one body (the son) with those severally who have sprung from one body. Therefore one ought to know that wherever the word *sapinda* is used, (there exists between the persons to whom it is applied) a connection with one body either immediate or by descent."

In the explanation of the word *sapinda*, it has been said that *sapinda* relationship arises from the circumstance that particles of one body have entered into the bodies of persons thus related, either immediately or through transmission by descent. But inasmuch as this definition would be too wide, since such a relationship exists in some way or other, amongst all men in this world that has no beginning, the author says—"Fifth and seventh removed from the mother and father respectively."

Kaustubh lays stress on the subject of the prohibited degree being essentially one of custom. He says:—

"Thus it is established that even in the Kali age, marriage within the prohibited degrees is not sinful, if it takes place in families or countries where the alternative of the narrowing of the *Sapinda* relationship has prevailed through several generations, and if it is in accordance with such usage." (3)

Kaustubh allows marriages of damsels within even three degrees declaring that "even a female of the fourth or third degree on either side may be married in accordance with the usages of the country or family." (4)

So **Mandlik** observes:—"The question of a proper or an improper marriage is, therefore, always one of usage, to be determined according to the people's *achar* (practice) and not by mere texts of greater or less antiquity." (5)

481. Within the prohibited degree the *Shastras* interdict all marriages between *sapindas*. (6) But this restriction is too widely disqualified as it does exclude no less than over 2,000 relations as compared to 30 relations amongst Europeans. Communal and territorial customs have consequently greatly narrowed

(1) *Ib.* p. 110. Full text given by Balam Shasth *Ib.*, p. 118.

(2) Cited by Raghunandan

(3) *Samskar Kaustubh* cited in *Mandlik's H. L.* p. 418

(4) *Samskar Kaustubh* cited in *Mandlik's H. L.* p. 418.

(5) *Mandlik's H. L.* p. 414.

(6) *Yajñavalkya Smṛti*: Mit. Ch. III

the circle of prohibited degree. The position of women remains as it ever has been before, one of dependence. Letounneaw ⁽¹⁾ describes this subjection of woman as a mark of the earlier stages of civilization the development of which strengthens the woman's rights resulting in the recognition of the institution of divorce. It has already been seen how women were classed as chattels in the patriarchal age (§§ 28, 29). That notion accounts for the several matrimonial customs which are neither peculiarly Indian nor, indeed, are they solely confined to Hindus. The woman is still a chattel and her marriage, even in the most approved form of Brahma marriage, is but a gift of her by her father to her husband. Here marriage is not a contract but a sacrament with a special purpose, but there are sacraments in which the gift may comprise a cow, a horse or any article of utility or value. The wife passes into the *gotra* of her husband and is appropriated by his family as its own. Her primary purpose in life is to beget a son. ⁽²⁾ It is immaterial what means are employed so long as that object is achieved. Hence the practice of *Niyog* or the Levirate which was customary not only amongst the Jews but even among other primitive nations uninfluenced by the Aryan culture. There could be no divorce for divorce implies a freedom of contract in which the rights and obligations are reciprocal; but the rights in a Hindu marriage are all unilateral and the obligations such as they were, were at first merely moral. If the wife was vicious or bore female children the husband could discard her ⁽³⁾ though he is bound to maintain her. ⁽⁴⁾ The evil propensities of women must be curbed by keeping them well employed in the performance of household duties. ⁽⁵⁾ The system of polyandry which is a partnership in woman is another outcome of the same view. And to it is traceable the preferential right of marriage of the husband's brother and his other relations to strangers, upon the wife becoming a widow, in whom these relations were regarded as possessing the right of inheritance. ⁽⁶⁾ The absence of any reciprocal rights justified recourse to polygamy, which though originally qualified and limited, became in time absolute and in theory unlimited.

482. From these facts it will be seen that if the sapinda relationship be taken to determine the prohibited degree of relationship for the purpose of marriage then it would extend to eight degrees both on the father's and mother's side according to Manu, seven and five according to Yajnavalkya, six and four according to Vashisth and five and three according to Paithinasi, which is yet too wide if judged by the higher customary practice of the people. ⁽⁷⁾

(1) Evolution of marriage and family, pp. 247-248.

(2) Manu, III 37, Yad. LVIII. Mit Ch. III.

(3) Manu IX 77-82 Yad. V. 52-53.

(4) Yaj. 74

(5) Manu, IX 10, 11.

(6) All the Smritikars recognize the re-marriage of wives and widows upon desertion by, or death of, the husband. Manu IX.76: Gautam XVIII.15, 17: Vashisth, XVII 78,79: Prasar, IV-80: Narad, XII 97: *Ib.* XVIII.15, 17: Yajnavalkya, Chap I 86 however impliedly condemns widow remarriages while the Mitakshara gloss thereon counsels self-immolation or *Sati* citing a text of a Vyas whose identity and text are both unascertainable. But numerous other authorities—Sankha, Angiras and Harit are cited in support of the same practice See Mit. Achar

Kand (Panini Press, Allahabad 1918), pp. 167-175 for quotations from them and others in support of the practice

(7) This is now generally admitted—See Sarkar's H. L (3rd Ed.) p. 67; Mandlik's H. L p. 426 "outsiders can hardly form a correct notion of how present usage has so changed the old structure that but little remains of the old texts; and this change must in each case be carefully ascertained from practice." So Sarkar says: "There is so much divergence between the sages as well as between the commentators on the subject, that it would not be safe to enforce their views as binding rules of conduct" *Ib* p. 95 He then states "the golden rule of prohibited degrees to be the practice of the people"—*Ib.* p. 68.

* 483. But the sapinda prohibition is not the only one that stands in the way of the orthodox marriage, for the parties must not belong to the same *Gotra* or *Pravar*. These three rules are independent and the fact that a party is not a sapinda does not make him marriageable, for he may be a *Gotraj* and failing both, he may still be of the same *Pravar*. It is said that the two latter prohibitions apply only to the Brahmins, since both the Kshatriyas and the Vaishyas have neither a *Gotra* nor a *Pravar* but the Mitakshara lays down that the *Gotra* and *Pravar* of their family priest are theirs, and so they too are subject to the these limitations. ⁽¹⁾ But the Shudras are stated to be subject only to the sapinda prohibition, as they have neither *Gotra* nor *Pravar*. ⁽²⁾

Meaning of Sapinda.

484. The three terms "Sapinda," "Gotraj" and "Pravar" used by the Smritikars require explanation.

The word "Sapinda" in its etymological sense means one who is of the same "pinda".

The word "Pinda" is a word of uncertain import and may, among other things, mean either a body or a ball. The Mitakshara understands it in the first sense, Raghunandan the accredited writer of the Bengal School understands it in the other. According to the one it means relations who are related to one another by reason of the fact that they possess particles of the same body. According to Raghunandan the word indicates relations of a person with whom when deceased, he partakes of the obsequial offering of the rice ball. This view is forced and far fetched, as will be seen in the sequel while dealing with inheritance. ⁽³⁾

485. According to the Mitakshara meaning, all human beings would be sapindas of one another, as all possess some particles of the same body in common. This was realized by all the smritikars who had, consequently, to reduce that term to a term of art by ascribing to it a limited and restricted meaning. As such, "Sapinda" becomes a technical term, and must, wherever used, be understood not in its primary sense, but in its limited and restricted sense as meaning persons related through a common ancestor, 3, 5, or 7 degrees remote according to the different views of the *Smritikars*. Taking them up to seven degrees, as approved by the Mitakshara, the sapindas of a person would be his six male ascendants and descendants in the male line of each of the six male ascendants—altogether 48 primary relations. But these are not all. The lawfully wedded wives of these relations as well as of the person himself, are his sapindas, since the sacrament of marriage effects the physical unity of husband and wife.

486. The term "Sapinda" "Gotraj" and "Pravar" are explained in the Mitakshara. Referring to the prohibition against sapinda marriage the author of Mitakshara observes that that term must be understood as limited to the fifth and seventh degree removed from the mother and father respectively. Without any such limitation all people of the world would be sapindas of one another. "Thus the six ascendants beginning with the father, and six descendants beginning with the son, and one's self counted, in each as the seventh, in each case

(1) Mit. Note on Yaj. 1-52 (Panini Ed.) p. 106.

(2) Mit. (Panini Ed.) p. 106.

(3) See Daya Bhag. Ch. XI-S.VI 83: and discussion on the subject under "Inheritance."

are sapinda relations." (1) "So also beginning from the mother and counting her father and grand-father, etc., till the fifth ancestor, is reached is the meaning of the words fifth from the mother." (2) But in the case of children of hypergamous marriages (called *Anuloma* births), the sapinda relationship extends only up to the third degree. (3)

487. The following table gives the simplest example of this prohibitive relationship.

A.	
2 S	2 S
3 D	3 D
4 D	4 S
5 S	5 D
6 D	6 S

Here 6 D cannot marry 6 S because 6 D is within seven degrees on her father's side related to 6 S. But in this case if 6 S were a female, then 6 D could have validly married 6 S because 6 D would then have been more than five degrees remote from her mother related to 6 S through their common ancestor 1 A. But even in the days of the Mitakshara this prohibition was held by some to go too far. Paithinasi is quoted by the Mitakshara as laying down that a damsel may be espoused who is beyond the third on the mother's and fifth on the father's side. (4) In this view 4 D could have validly marry 4 S. On the other hand, Manu prohibits marriages up to the seventh degree on either side (5) which he lays down as the last degree of the sapinda relationship. (6)

These relationships were at one time explained only to refer to the question of marriage. So they do, but they have been held equally to control inheritance. (7)

488. In laying down the limit of sapinda relationship the *Smṛitikars* follow the canonist rule of computation at variance with the civilian rule followed in Sections 21 and 22 of the Succession Act. The former start counting with the *propositus* who counts as one degree, while the latter exclude the *propositus* in their calculation. Consequently, when in the foregoing texts the sapinda relationship is declared to end with the 5th, 6th or 7th degree, it means that it ends with the 4th, 5th and 6th degree according to the modern method of computation.

489. The sapinda relationship described in the ritual section of the Mitakshara has been held to apply equally to inheritance. But when dealing with that subject it will be seen that the term *Bandhu* is often used in a sense different to sapindas. For the present it may be noted that the two terms are synonymous and were so intended by Narad who in defining the limit speaks of the *Sapindas* as *Bandhus*. (8)

(1) Mit. (Panini Ed.) p. 110.
 (2) *Ib.* p. 110: To the same effect Yashisth, VIII-2; Gautam, IV-2.5, Vishnu XXIV-10; Narad, XII-7.
 (3) *Ib.*, pp. 110, 111.
 (4) *Ib.*, p. 110.

(5) III § 5.
 (6) V § 60.
 (7) *Ramchandra v. Vinayek* 42 O. 884 (P. O.) XII 7. This sense is lost in its translation in 88 S. B. E. 166. See text in original cited in Sarkar's H. L. (3rd Ed.) p. 74.

490. Secondly, some sacred texts (1) prohibit intermarriages of *Gotrajs*.

(2) *Gotraj*

What is then a *Gotraj*? In theory all the twice-born people, according to some, only the Brahmins, are descendants in the male line from certain *Rishis* or sages who are the accredited progenitors of the race. All descendants from this common Rishi bear a single family name, in the same way as all descendants in the male line from Smith and Brown bear those surnames. *Gotrajs* are thus persons entitled to the same surname. According to a text cited by Raghunandan there were originally 8 such progenitors, and their names are Agastya, Atri, Bharadwaj, Gautam, Jamdagni, Kashyap, Vashisth and Vishwamitra. (2) But many of their distinguished descendants have founded new families and new *Gotras* so that the number of such secondary *Gotras* runs into millions. Every twice-born owns one of these primeval procreators as the founder of his family, and as several thousands of families make the same claim, it follows that *Gotraj* relationship offers a formidable impediment to the establishment of connubial relations. This relationship is of course, a purely artificial one and its artificiality is acknowledged in the *Mitakshara* in which it is said that the Kshatriyas and Vaishyas have neither *Gotra* nor *Pravar* of their own (3) but that they should follow the *Gotra* and *Pravar* of their family priests. (4) Persons belonging to two different castes may possess the same *Gotra*. This is explained away on the ground that castes were a later development of Hindu society, and therefore the arrangement of the people into castes did not affect their *Gotra*. It is equally plausible that two families of different castes having the same family priests would naturally adopt the latter's *Gotra* as enjoined by the *Mitakshara*, and so *Gotraj* relationship would in course of time transcend the barriers of caste and the still narrower confines of the sapinda relationship.

(3) *Pravar*.

491. The question of *Pravar* still remains. Its meaning is explained by Baudhayana as follows:—

Yamdagni, Bharadwaj, Vishwamitra, Atri, Gautam, Vashisth, Kashyap, Agastya—these *Rishis* are the makers of the *Gotras*. Their descendants have founded *Gotras*. These are thousands and hundred millions. Among them forty nine are *Pravars* or excellent, from having attained to the wisdom of *Rishis* and they are founders of *Pravars*. As long as there is one *rishi* common to several *Pravars*, so long there is relationship of the same *Gotra* excepting the children of *Bhrigu* and *Angiras*. (5)

A *Pravar* then is an approved *Gotra* and as there are 49 such *Pravars* some of which have been founded by the same *Rishi*, those related through such common *Rishi* are themselves inter-related and so cannot inter-marry. (6)

492. The step-mother and at least some of her relations in the same degree

(4) *Step-mother*.

cannot be married for "The wives of the father are all mothers, their brothers are maternal uncles, their sisters are mother's sisters, their daughters are sisters, and the offspring of those daughters are children of a sister." Opinions differ as to

(1) Gautam and Vashisth do not mention *Gotra* at all. See texts cited ante.

(2) Balambhatt names 18 such *Rishis*—with several sub divisions of each. See *Mit.* (Acharikand) Panini Ed. pp. 107, 109.

(3) The implication being that they cannot claim the same descent from a saint as the Brahmins.

(4) Ch. III-V. 52: *Mit.* note thereon p. 106.

(5) प्रवर, Manu does not mention *pravar*

nor does his commentator Kulluk. Like Manu, Brihat Prasara also omits it. See texts cited ante.

(6) Cited in the *Parasara Madhava*, and *Parijat*, p. 137; also by Hardutt in *Ujval Balam Bhatt* gives a long disquisition on this subject of *Gotra* and *Pravar* for which see her gloss to the *Mitakshara* note to Yaj. v. 52 (Panini Ed.) pp. 107-109; see also Max Muller's *Hist. S. L.* pp. 195, 200.

whether the relations named are merely illustrative or exhaustive. The western lawyers favour the former, ⁽¹⁾ the eastern the latter interpretation.

493. Another subject upon which there is a conflict, is the effect of adoption upon the prohibited degrees. Since a son by adoption has

(8) Adoption.

consanguinous relationship with one family and relationship by adoption with the other, the question arises whether such son is debarred from marrying all the Sapindas of his natural as well as the adopted family. It is said that if the adoption took place after the boy had the *Upnayan* ceremony then the prohibition as to marriage in his natural family extends to all Sapindas and his adopted family only to three degrees. If however all the *Samskaras* except the *Upnayan* were performed in his natural family but only the *Upnayan* was performed in the adopter's family then the prohibition extends in both families to five degrees on the father's side and three degrees on the mother's side. But if all the *Samskaras* commencing from *jatkarm* to the *Upnayan* were performed in the adopter's family then the order of the first case is reversed, the prohibition extending in the adopter's family to all Sapindas and in the natural family only to three degrees. The *Nirnai Sindhu* would, however, extend the prohibition in all the three cases to all Sapindas of both the families while *Nagoji Bhatt* would make no prohibition against marriage in the natural family on the ground that adoption severs relationship with the natural family altogether.

If all these precepts had any value, the number of prohibited relations would exceed 6,000, and since there is the other mandatory prohibition against marriage out of caste, an adopted son with a step-mother must be thrice blessed if he can manage to secure a wife, let alone the ideal damsel of *Manu's* imagination.

As already observed, the courts regard this ⁽²⁾ and the other questions of prohibited degree as one, of custom, not of interpretation of the textual law.

494. It might have been thought these triple prohibitions had sufficiently narrowed down the field of selection. But they are not

Other prohibitions.

all. For there are other prohibitions against the marriage of the following non-consanguinous relations, *viz.* : (1) The step-mother's sister (2) her brother's daughter, and (3) his daughter's daughter (4) the paternal uncle's wife's sister, and (5) the wife's sister's daughter (8) and (6) the preceptor's daughter.

495. General result of the shastric rules.—The net result of the shastric rules as to the prohibited degree of relationship for marriage is to render ineligible no less than 2,100 relations as against the relations with whom marriage is prohibited amongst the Christian nations. It may be doubted whether these restrictions were ever tolerated in practice. From the context it would seem that they were rather in the nature of moral precepts addressed to the adept student, rather than to the people at large in the market place.

It has already been said that in no case does usage sanction such widespread exclusion, and the fourth degree appears to be the utmost verge of a valid prohibition given effect to in practice. And there are a good many marriages within that limit.

(1) *Mandlik H. L.* p. 852.

(2) *Vyithilinga v. Vijayathammal*, 6 M

(8) Such marriage is valid, *Ragavendra v. Jayaram* 20 M. 288.

496. These being then the textual rules that are both obsolete and impossible and no other general rules to take their place, the courts leave the question of the prohibited degree to be decided by custom, and no other alternative is possible or suggested even by the stoutest supporters of textual authority. ⁽¹⁾

English rules of prohibited degree. **497.** In this state of Hindu Law, it may be useful to advert to the English rules of prohibited degree which were set out in a statutory table in 1543 ⁽²⁾ as follows :—

(a) Relations a man may not marry :—

A man may not marry his grandmother, grandfather's wife, wife's grandmother, father's sister, mother's sister, father's brother's wife, mother's brother's wife, wife's father's sister, wife's mother's sister, mother, step-mother, wife's mother, daughter, wife's daughter, son's wife sister, wife's sister ⁽³⁾, brother's wife, son's daughter, daughter's daughter, son's son's wife, daughter's son's wife, wife's son's daughter, wife's daughter's daughter, brother's daughter, sister's daughter, brother's son's wife, sister's son's wife, wife's brother's daughter, wife's sister's daughter.

(b) Relations a woman may not marry :—

A woman may not marry her grandfather, grandmother's husband, husband's grandfather, father's brother, mother's brother, father's sister's husband, mother's sister's husband, husband's father's brother, husband's mother's brother, father, step father husband's father, son, husband's son, daughter's husband, brother, husband's brother, sister's husband, son's son's daughter's son, son's daughter's husband, daughter's daughter's husband, husband's son's son, husband's daughter's son, brother's son, sister's son, brother's daughter's husband, sister's daughter's husband, husband's brother's son, husband's sister's son. This table is annexed to the Book of Common Prayer and the only change which has been made is that in reference to marriage with the daughter of a deceased wife has not been legalized, nor has marriage with a deceased husband's brother.

498. Marriageable Sapinda relations.—It has already been stated that the true test of the prohibited degree is custom, and not the textual law. As such, a person may validly marry his own maternal uncle's daughter ⁽⁴⁾ or his own sister's daughter ⁽⁵⁾ or his wife's sister's daughter, ⁽⁶⁾ or his step-mother's sisters, and sister's daughter, his paternal uncle's wife's sister his paternal uncle's wife's sister's daughter, her brother's daughter and his children's daughter ⁽⁷⁾—any text to the contrary being explained away on the ground that they are merely hortatory and not imperative.

499. So again, marriages by exchange are not only customary but common and everywhere regarded as valid, though they are directly opposed to the scriptural text. ⁽⁸⁾ So Steele mentions cases in which inter-marriages with cousins and nieces, though prohibited, do occasionally take place. ⁽⁹⁾ In a Bombay case, the court however condemned the marriage of a man with

(1) See Sarkar's H. L., (8rd Ed.) 96 : Ghose H. L. (8rd Ed.) pp. 792, 793

(2) (1543) 82 Hen. VIII C. 38. This table is annexed to the Book of Common Prayer and the only change made since is by the Deceased wife's sister's Marriage Act 1907 S. 1 (7 Edw. 7 C. 47) which, after a prolonged struggle, legalized her marriage.

(3) Removed by the Deceased wife's sister's Marriage Act 1907 S. 1. (7 Edw. 7 C. 47.)

(4) Mandlik's H. L. pp. 418, 424 ; The

Nirnay Sindhu recognizes the custom *Ib* ; so does the Achar Madhav *Ib* p. 418.

(5) *Ib* p. 425.

(6) *Ib* followed in *Ragavendra v. Jayaram*, 20 M. 283 (286, 287).

(7) *Ragavendra v. Jayaram*, 20 M. 283 (286); *Ramchandra v. Gopal* 32 B. 619 (630).

(8) Narad cited by Kaustubh 1 196 p. 1. verse and translation in Mandlik's H. L. p. 414 F. N. 8.

(9) Steele's Law of caste, p. 165.

his sister's daughter as incestuous ⁽¹⁾ but in basing their decision on the Shastric texts ⁽²⁾ the learned judges took care to add that there was no allegation or proof of any custom tolerating such a marriage.

500. Precepts merely moral.—A large number of good qualities described as essential in a wife have always been held to be for the guidance of the match-makers. Their absence is not a blot on the marriage. Manu counsels avoidance of ten families "be they ever so great, or ever so rich in kine, goats, sheep, gold and grain."⁽³⁾ These are the families "which have omitted prescribed acts of religion, those which have produced no male children, those in which the Vedas have not been read; those, which have thick hairs on the body, and those which have been subject to hemorrhoids, pthisis, dyspepsia, epilepsy, leprosy and elephantiastis."⁽⁴⁾ He then gives a long description of the girl to be married: "Let him not marry a girl with reddish hair, nor with any deformed limb; nor one troubled with habitual sickness; nor one either with no hair or with too much; nor one immoderately talkative; nor one with inflamed eyes; ⁽⁵⁾ or one with the name of a constellation, or of a tree, or of a river or of a barbarous nation, or of a mountain, of a winged creature a snake or a slave; nor with any name raising an image of terror."⁽⁶⁾ "Her who has no brother, or whose father is not well known, let no man espouse through fear, lest in the former case her father should take her first son as his own to perform his obsequies; or, in the second case, lest an illicit marriage should be contracted."⁽⁷⁾ He then describes the physical qualities which a wife should possess: "Let him choose for his wife a girl whose form has no defect; who has an agreeable name; who walks gracefully like a phenicopter, or like a young elephant; whose hair and teeth are moderate respectively in quantity and in size; whose body has exquisite softness."⁽⁸⁾

501. According to the Mitakshara the bride selected should be younger and shorter in size. ⁽⁹⁾ Manu counsels a man aged 30 to marry a maiden of 12 and one aged 24, a girl aged 8. ⁽¹⁰⁾ Brihaspati thinks that if the age of man is 30 or 21 then the age of the girl should be 10 or 7 respectively ⁽¹¹⁾ while the Vishnu Puran declares that the age of the maiden should be a third of that of the man. ⁽¹²⁾ Both Yajnavalkya and Gautam discard these marriages and only enjoin the universal rule that the wife should be younger than the husband. ⁽¹³⁾ In Vedic times women wore the sacred thread with men. Harit refers to the custom and suggests that women should be provided with it on the eve of their marriage. ⁽¹⁴⁾ In later times even this custom fell into desuetude and Manu sought to reconcile Harit's condemnation of such uninitiated women as Shudras by declaring that their nuptial ceremony had the effect of their initiation. ⁽¹⁵⁾ In other respects both Yajnavalkya and Vijnaneshwar follow Manu by recommending the selection of a healthy and beautiful virgin for marriage.

They, however, insist on the husband possessing virile power ⁽¹⁶⁾ to which Narad adds that the husband should be muscular and vigorous. ⁽¹⁷⁾

(1) *Ramangavda v. Shivaji* (1876) B.P.J. 73.

(2) Mandlik shows that even the texts cited do not support the conclusion. See Mandlik's H. L. pp 488, 489.

(8) Manu III-6.

(4) *Ib.*, III-7.

(5) *Ib.*, III-8.

(6) *Ib.*, III-9.

(7) *Ib.*, III-11.

(8) *Ib.*, III-10.

(9) Mit. Achar Kand (Panini Ed.) 101.

(10) Manu IX-94

(11) Cited by Balam Bhatt in Mit, p. 101.

(12) Bk. III Ch. X-16.

(13) Yaj. v 52; Gautam IV-1.

(14) Harit XXI-28; Harit was a Sutra writer and older than Manu.

(15) Manu II-66

(16) Yaj. v. 55-Mit. p. 118.

(17) XII-9.

Any one giving away the girl without disclosing her defects is liable to the same punishment as the husband who deserts his blameless wife ⁽¹⁾ and is liable to deliver of her a third of his property. ⁽²⁾ The removal of the wife is punishable as a thief. ⁽³⁾ The wife must submit to the embraces of her husband's younger brother, sapinda or sagotra if she is sonless, till her conception. ⁽⁴⁾ Faithless wives may be deprived of authority but they cannot be deprived of starving maintenance. ⁽⁵⁾ Wives should be respected because they beget sons. ⁽⁶⁾

Invalid marriages. **17.** A marriage may be rendered invalid for any of the following reasons :—

- (1) because the parties were related within the prohibited degree,
- (2) because they were of different non-inter-marriageable castes,
- (3) because they did not observe the essential ceremonies,
- (4) because their marriage was brought about by force or fraud.

Synopsis.

- (1) *Prohibited degrees* (502). (3) *Non-observance of ceremonies* (505).
- (2) *Difference in caste* (503, 504).

502. The question of prohibited degree is a question of fact to be decided upon the evidence in each case. In the absence of such evidence the court will be guided in its decision by the recorded or reputed law, and if it finds such a marriage, all it can do is to treat it as a nullity. The authorities declare such marriage as wholly null and void, though the woman married is entitled to be maintained as a sister. ⁽⁷⁾ This was the view taken in a case in which a Brahmin had married his niece. ⁽⁸⁾

503. Inter-caste marriages stand on a somewhat different footing. Those contracted in the face of the Shastric prohibition, e.g., higher caste woman marrying a man belonging to the lower caste, have been declared to be void in places, such as Bombay and the United Provinces in cases in which the parties failed to plead or prove any legalizing custom (§§ 464-645). Such marriages create no legal obligation beyond the one to maintain the wife. Inter-sub-caste marriages are, however, not prohibited by the Shastras though they are not favoured by custom. They are well protected by the doctrine of *factum valet* and cannot be avoided.

504. The Shastras regard the Shudra caste as a single caste as comprising all who are not *Dvijas*. As such the numerous castes into which the Shudras have become divided have no scriptural sanction and inter-caste marriage among them are neither prohibited nor unusual. Even

(1) *Yaj.* v. 66.
 (2) *Ib.*, v. 76.
 (3) *Ib.*, v. 68.
 (4) *Ib.*, v. 68.
 (5) *Ib.*, vv. 70, 74.
 (6) *Ib.*, vv. 76, 82.

(7) *Manu* III 5; *Yajnavalkya* 1-52; *Mayukh* IV-S-5 pt. 29; *Macnaghten's H. L.* (2nd Ed).
 61; *Steele's L C* (2nd Ed.) pp 26, 80, 168, 166.
 (8) *Ramangavda v. Shivaji* (1876) 8 B.P.J. 73; Reprint, p. 67.

where a determined stand is made against them, they are likely to be upheld on the ground of *factum valet*.

505. When a marriage is proved to have been performed in fact it is presumed to be valid in law, since, as observed by the Privy Council, "It would be a most unlikely thing for a person of his caste to go through the ceremony of marriage, if it was known that the marriage was a marriage which was invalid in law."⁽¹⁾ In view of the law, ceremony is but the evidence of marriage and where its *factum* is proved, its form is to be presumed and it lies heavily on one to prove the contrary.

Marriage by force or fraud

18. A marriage brought about by force or fraud may be avoided by the party affected thereby.

Synopsis.

(1) *Avoidance of marriage* (506). (2) *Force or fraud* (507).

506. Analogous Law.—There is Shastric authority for this rule. Taking marriage as either the gift or sale of the bride to the bridegroom the section falls within the general principle enunciated by Manu that force⁽²⁾ and fraud⁽³⁾ vitiate all transactions with which Yajnavalkya⁽⁴⁾ and Narad⁽⁵⁾ agree. So referring to marriage, Manu says: "A person may abandon a maiden though taken or accepted in due form of ceremony if she be blemished, diseased, or deflowered and given fraudulently."⁽⁶⁾ But this is explained as relating only to a stage before the *Saptapadi*, i.e., its completion.⁽⁷⁾ This explanation explains away the text which itself did not go far. However, whatever may have been the view of the *Smritikars* the court regards the rule as well settled, and though slow to give effect to it, where the mischief cannot be retrieved, it will not hesitate to cancel a marriage if it is brought about by force or fraud of either party, or their guardians.

507. A marriage brought about by force or fraud is not void but voidable by the party wronged. But before it can be avoided the Court must be satisfied of the violation of some substantial right and material prejudice; otherwise, it will condone mere irregularities, omissions and errors of procedure which could not be permitted to affect such solemn obligations as those of a marriage: *quod fieri non debuit factum valet*.⁽⁸⁾ So the courts have refused to set aside marriages performed without the consent of the lawful guardian⁽⁹⁾ or where the certificated guardian marries without the consent of the District Judge.⁽¹⁰⁾ But the case would be different where a marriage of a minor is performed with no consent at all. Such was the case of the defendant who forcibly married his minor

(1) *Inderun v. Ramasawmy*, 13 M. I. A. 141 (158).

(2) VIII-168.

(3) VIII-165.

(4) Yaj. II-81 Mandlik, p. 204.

(5) IV-9, 10.

(6) IX-72.

(7) Vashisth XVII-78-14 S. B. E. 92; Baudhayan I-14 A-115-14 S. B. E. 814.

(8) "What should not be done, yet being done, shall be valid."

(9) *Rulayat (Bai) v. Jeychund* (1840-48) Bellasis 43; *Mulchand v. Bhudin*. 22 B. 812 (815); *Venkatacharyulu v. Rangacharyulu*, 14 M. 816; *Brindabun v. Chandra Kumar*, 12 C. 140; *Khushalchand v. Bai Mani*, 11 B. 247; *Diwali (Bai) v. Moti* 22 B. 509; *Gast v Sukru* 19 A. 515; *Misri Lalasa v. Harilasa*, 16 C. P. L. R. 46; *Dayal v. Narain*, (1884) P. R. 64.

(10) *Diwali (Bai) v. Moti*, 22 B. 509.

sister-in-law who had gone on a visit to see his wife. ⁽¹⁾ So where a woman was entrapped into a marriage without the consent of her guardian and the match appeared to the court unnecessary and unsuitable, it set it aside holding that its invalidity could not be cured by recourse to the doctrine of *factum valet*. ⁽²⁾ So in another case where a minor widow was alleged to have been married by the *chakar-andazi* ceremony but it appeared that the marriage was performed without the consent of her parents or any other lawful guardian and that the minor though consenting to it was legally incapable of offering herself in marriage the court held the marriage void, as consent which was necessary to the nexus of the marriage was wholly wanting. ⁽³⁾ Of course in such cases the want of a previous consent might have been made good by a subsequent acquiescence. The one question which exercises the court in cases of cancellation is whether the party suing for that relief will not be the greater sufferer by reason of the relief granted thereby. Where for instance, the parties or either of them is *impubes* and the marriage has not been consummated, cancellation would cause no serious injury but where marriage has been followed up by consummation and the wife sues for cancellation, the court may have to consider whether the cancellation would be to her advantage.

19. Where remarriage is lawful, the wife may remarry, if her husband after leaving her, has not been heard of for seven years, by those who would naturally have heard of him if he had been alive.

Presumption of the death of husband.

508 Analogous Law.—This section is based upon S. 108 of the Evidence Act ⁽⁴⁾ which supersedes the varying Hindu rules on the subject. Manu and Narad allow the wife to remarry after the continued absence of the husband for eight years, ⁽⁵⁾ Gautam after six years, ⁽⁶⁾ and Vashisth after five, ⁽⁷⁾ while Hindu Law generally prescribed twelve years as the period after which death might be presumed. ⁽⁸⁾ In all such cases S. 108 of the Evidence Act now introduces a fixed period of absence after which the court will presume death. ⁽⁹⁾ The rule is taken from Taylor's work on evidence. ⁽¹⁰⁾ It merely deals with a legal presumption as a matter of evidence and does not dispense with the proof of the *exact time* of death whenever such question is necessary, as it is, for instance, to start limitation. The rule cannot be controlled by the difference of age, sex and state of health which does not set up any counter legal presumption. ⁽¹¹⁾

(1) *Lal Chand v. Thakur Devi*, (1908) P. R. 49.

(2) *Anjona v. Prahlad*, 6 B. L. R. 248.

(3) *Dayal v. Narain Das*, (1884) P. R. 64.

Lalchand v. Thakur Devi, (1908) P. R. 49.

(8) *Lalchand v. Thakur Devi*, (1908) P. R. 49.

(4) 1 of 1872.

(5) Manu IX-76 : Narad XII-98 : Maonaghten's H. L. p. 9 ; Vyavastha Darpan (Siroar) pp. 10, 11 : *Ganganarayan v. Balram*, 2 Mor. D. 152 : *Ayabati v. Raj Krishna* 3 S. D. R. 28 ; *Janmajay v. Keshah Lal* 2 B. L. R. (A. C.) 184 following *Sarda Sundari v. Gobind*, 2 B. L. R. (A. C.) 187 note.

(6) *Gautam XVIII-15, 17* ; if a Brahmin 12 years, *Id.*

(7) Vashisth XVII-78, only four years if she has no issue.

(8) 1 Strange H. L. 117 ; *Ganesh v. Ragho*, (1879) B. P. J. 18 ; *Dhondo v. Ganesh* 11 B. 438 ; *Guru Das v. Matilal*, 6 B. L. R. (App.) 16.

(9) *Parmeshar v. Bisheshar*, 1 A. 58 F. B. ; *Dharup Nath v. Gobind* 8 A. 614 (619).

(10) *Dharup Nath v. Gobind*, 8 A. 614 (619, 620). Taylor's statement is based on the decision of Lord Ellenborough, C. J. in *Doe d. George v. Jesson*, 6 East 84 ; *Doe d. Lloyd v. Deakin* 4 B. & A. 438 ; and Stat. 19 Car. 2 C. 11 S. 1.

(11) *Underwood v. Wing*, 28 L. J. Ch. 982 O. A. 24 L. J. Ch. 298 affirmed in *Wing v. Angrave* 8 H. L. C. 188 ; *Re Green's Settlement* L. R. 1 Eq. 289.

509. Remarriage of deserted wife.—Narad sanctions the remarriage of a wife in the following cases of legal necessity :—

“ When her husband is lost or dead, when he has become a religious ascetic, when he is impotent, and when he has become expelled from caste ; these are the five causes of legal necessity in which a woman may be justified in marrying another husband.”⁽¹⁾

This section merely deals with one of these causes, *viz.*, disappearance of the husband for seven years. As the Hindu Widows' Remarriage Act only legalizes the marriage of all widows, and this section furnishes presumptive evidence of the husband's legal death, it follows that on expiration of this statutory period, the wife is entitled to consider herself a widow and get remarried under the Act. In other cases, the validity of her remarriage must depend upon the force of custom. Even in the cases provided for in the section, the husband must not only be absent for seven years, but he must not have been heard of for that period by those who would naturally have heard of him if he had been alive. This does not mean that these people should have heard from him. All that the section requires is that the missing man should have become untraceable and no one should know where he is or be able to say that he had heard of his existence. This is a question of fact, to be proved in the first instance, to create a *prima facie* presumption upon which the wife is entitled to act. If the husband afterwards reappears he cannot maintain restitution against his wife or claim her as his own—for the law severs the link on expiration of seven years.

Mutual rights and obligations upon marriage.

20. The following rights and obligations arise upon marriage :—

(a) *As to the husband*—

1. He is his wife's natural guardian during her minority.
2. He is entitled to her conjugal society.
3. He is bound to maintain her.
4. He cannot divorce her unless he is allowed to do so by custom.
5. Should she predecease him, he is entitled to inherit her property.
6. He has no right over her Stridhan, which he may, however, use in a time of great distress.

(b) *As to the wife*—

1. She is bound to live with her husband unless he is guilty of cruelty or misconduct.
2. She is entitled to retain her Stridhan as her separate property.
3. She is entitled to sue, and is liable to be sued, in respect of her Stridhan, as if she were a *feme sole*.

(1) Narad XII—97 ; To the same effect Parasar IV-80 ; Manu IX-76.

4. She cannot divorce her husband unless she is allowed to do so by custom.
5. Should her husband predecease her, she may be entitled to inherit his separate property : otherwise she has the right of maintenance and residence in the family dwelling house.
6. She has no right over her husband's property during his life-time beyond the right of maintenance and residence.

Synopsis.

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|---|--|
| (1) <i>Husband's status and rights upon marriage</i> (510-512). | (5) <i>Restitution of conjugal rights</i> (517-518). |
| (2) <i>Polygamy</i> (513). | (6) <i>Procedure</i> (519). |
| (3) <i>Divorce</i> (514) | (7) <i>Limitation</i> (520). |
| (4) <i>Wife's rights on marriage</i> (515-516). | |

510. Husband's status and rights upon marriage.—(On the conclusion of the essential ceremony of marriage, the wife absolutely passes into the *potestas* of her husband, and her marriage with him becomes absolute and for ever indissoluble. No deformity or disease ⁽¹⁾ not even congenital impotency ⁽²⁾ is a disqualification to a lawful marriage. Still less is it a ground for its dissolution. Even if the husband be a lunatic that fact is no ground for its dissolution, ⁽³⁾ though the contrary was conceded in a case, but in which the reasons given did not warrant the conclusion. In deciding that case it was said that there was no sufficient or reliable evidence to justify the conclusion that the unsoundness of mind was of such a character as would render the marriage invalid by reason of the fact that the husband was incapable of accepting the bride during the marriage ceremony and of understanding what was going on. ⁽⁴⁾ This is seldom possible in the customary child marriages and it is never regarded as a condition of their validity. ⁽⁵⁾

511. A Hindu marriage cannot be annulled because it was contracted without the consent of the lawful guardian. ⁽⁶⁾ It cannot be avoided by mutual consent of the contracting parties, ⁽⁷⁾ nor for the violation of the terms of any agreement upon which it was conditional, such as for instance, an agreement

(1) *Rameomary (In re)* 18 C. 264; *Dyal v. Narain Das* (1884) P. R. 64 (case of leprosy)

(2) *Manu* IX §§ 79, 89 208; *Mit* 11-X §§ 9-11; *Mayukh Ch* IV, S. XI § 11; *Vivad Chint.* (Tagore) 244; *Smriti Chandrika Ch.* V. § 32; *Jimut Vahan Ch.* v. § 18; *Narad XI* §§ 8-19.

(3) *Dahya Churn v. Radha Churn* 2 Mor. Dig. 99; *W. & B. H. L.* (3rd Ed.) 208.

(4) *Mouji Lal v. Chandrabati*, 38 C. 700 (708); *O.A. Id.* at pp. 706 707, (P.C.)

(5) But under English Law the marriage of a lunatic is absolutely void even if it takes place during a lucid interval—*Turner v.*

Meyers 1 Hag. Con 414; *Marriage of Lunatics Act*, 1811 (51 Geo. 3. C. 87).

(6) *Bai Rulyat v. Jeychund*, 1 Mor. N. S. 181; *Golames v. Juggessur*, 3 W. R. 193; *Madhoo v. Jadub*, 3 W. R. 194; *Kushalchand v. Bai Mani*, 11 B. 247; *Bai Diwali v. Moti*, 22 B. 509; *Mulchand v. Bhudisa*, 22 B. 812; *Bai Ramakore v. Jannadas*, 27 B. 18; *Venkatacharyulu v. Rangacharyulu*, 14 M. 316; *Ghazi v. Saloru*, 19 A 515; *Kasturi v. Chiranjilal*, 35 A. 265; *Maya Devi v. Ramchand*, (1916) P. R. 20 : 31 I. C. 186.

(7) *Chaitram v. Naiti*, (1900) P L. R. 193.

against polygamy, ⁽¹⁾ or that the husband should never remove the wife from her parents' house and that he would not leave it without his mother-in-law's permission. ⁽²⁾

512. The husband is the lawful guardian of his wife, ⁽³⁾ and is entitled to the enjoyment of her person and society. If she refuses he can maintain a suit for the restitution of conjugal rights. But against this suit she may defend herself on any of the following grounds, namely: that the husband was suffering from some loathsome disease such as syphilis or leprosy, ⁽⁴⁾ or that he was outraging her wifely feelings by keeping a mistress in the house, or was guilty of habitual cruelty towards her, or apart from cruelty, was guilty of a grave matrimonial offence ⁽⁵⁾ or had become converted to an alien faith, ⁽⁶⁾ and thereby or otherwise forfeited his caste, ⁽⁷⁾ though on the latter point the courts have struck a discordant note. ⁽⁸⁾ Even where the court decrees possession it may make its decree conditional imposing upon the husband conditions to secure his wife's safety, health and welfare ⁽⁹⁾ though such a condition cannot be that the husband must provide his wife with a separate house and separate maintenance. ⁽¹⁰⁾ He has no right over his wife's *Stridhan*, over which his wife has complete mastery, though the husband is allowed to draw upon it in a moment of pressing necessity. ⁽¹¹⁾

513. A Hindu is unrestricted as to the wives he may marry. The fact that he has already a wife or wives living is no disqualification to his polygamy. ⁽¹²⁾ Even if he has given an agreement to the father of one of his previous wives not to marry during his wife's life-time, such agreement is invalid, being opposed to the policy of Hindu Law ⁽¹³⁾ and polygamy being legal, it might be attacked even as a restraint on marriage under the general law. ⁽¹⁴⁾

514. Divorce.—From its very idea of a sacrament a Hindu marriage is held to be indissoluble. The effect of the marriage upon the wife is to transfer her both bodily and spiritually from her parental family to that of her husband. She adopts the Gotra of her husband and becomes united to him in flesh and blood. ⁽¹⁵⁾ "During the husband's life-time, he is to be regarded by the wife as a god, and the wife is declared to be half the body of her husband, equally

(1) *Sitaram v. Aheeree*, 20 W. R. 49 (50); contra *Gama v. Lahanoo*, 4 N. L. R. 83 following *Allen v. Jackson*, 1 Ch. D. 899 overlooks the fact that Hindu Law allows polygamy which English Law prohibits and consequently any agreement against polygamy may be attacked even as a restraint on marriage under the general law. S 26, Contract Act (IX of 1872.)

(2) *Sitaram v. Aheeree*, 20 W. R. 49; *Tekait v. Basanta*, 28 C. 751; Contra *Kawasji v. Sirindai*, 22 B. 279.

(3) *Bai Premkuvar v. Bhika*, 5 B. H. C. R. (A.C.) 209.

(4) *Lalla Gobind v. Dowlat*, 14 W. R. 451; *Jogundro Nundini v. Hurry Dass*, 5 C. 500; *Dular Koori v. Dwarka Nath*, 82 C. 284; *Dular Koor v. Dwarka Nath*, 84 C. 971.

(5) *Manu IX-79*; *Dular Koori v. Dwarka Nath*, 84 C. 971 (1980-985) following *Mackenzie v. Mackenzie*, (1895) A. C. 884; *Russell v.*

Russell, (1897) A. C. 897; *Yamna Bai v. Narayan*, 1 B. 164

(6) *Muchoo v. Arzoon*, 5 W. R. 285.

(7) *Paigi v. Sheonarain*, 8 A. 78; *Bai Jina v. Kharwa*, 81 B. 866; *Surjomoni v. Kalkinta* 28 C. 87.

(8) *Binda v. Kaunsilia* 18 A. 126; *Sobadur v. Rajwant*, 27 A. 96; *Jamna v. Mulraj*, (1907) P. R. 49.

(9) *Tekait v. Basanta*, 28 C. 751; *Jamna v. Mulraj*, (1907) P. R. 49; *Moonshee Busloor Raheem v. Shamsoo Missa*, 11 M. I. A. 607.

(10) *Chimanlal v. Normada*, 4 Bom. L. R. 820.

(11) *Mit. Ch. II XI-82, 88*; *Daya Bhag. Ch. IV-1-19-25*; *Tukaram v. Gunaji*, 8 B. H. C. R. (A.C.) 129; *Mohima Chander v. Durga Monee*, 28 W. R. 184.

(12) *E. v. Lazar*, 80 M. 550.

(13) *Sitaram v. Aheeree*, 20 W. R. 49 (50).

(14) S. 26 Contract Act (IX of 1872).

(15) *Apastamb*, 2 S. B. E. 187; *Tekait v. Basanta*, 28 C. 751 (758).

sharing the fruit of pure and impure acts and no sacrifice or religious rite is allowed to her apart from the husband's. Hence it is, that after the husband's death, the widow is regarded as the surviving half of his body; the union is a sacred tie and subsists even after the death of the husband."⁽¹⁾ This view leads to several results. Being the union of the two souls, the death of the husband does not set the wife free to remarry; and during his life-time there can be no divorce for whatever reason ⁽²⁾ unless it is permitted by custom. ⁽³⁾ Neither adultery ⁽⁴⁾ nor even prostitution ⁽⁵⁾ degradation by conversion to Mahomedanism ⁽⁶⁾ or other religion or forfeiture of caste ⁽⁷⁾ dissolves a Hindu marriage.

This is the normal law. Its inflexible rigour has however been to a certain extent modified by legislation ⁽⁸⁾ and custom, ⁽⁹⁾

515. Wife's rights on marriage.—Upon her marriage the wife not only leaves her parental home but severs her connection with it as completely as if she had never been born therein. She abandons the Goitra of her parents and passes into and assumes that of her husband into whose family she is received as a daughter ⁽¹⁰⁾, but in which she has no individuality apart from her husband. She is however entitled to separate ownership of her wedding gifts ⁽¹¹⁾ Apart from custom she cannot divorce her husband or be divorced by him for any cause or misconduct. The tie is inseverable and cannot be broken owing to her adultery ⁽¹²⁾ prostitution and consequent degradation from the caste, ⁽¹³⁾ or ex-communication therefrom; ⁽¹⁴⁾ and even conversion to an alien faith has not that effect. ⁽¹⁵⁾ But the husband may desert such a faithless wife, ⁽¹⁶⁾ refusing to provide her with even a starvation allowance unless she is penitent, ⁽¹⁷⁾ though the Smritikars admit her right to a bare sustenance. ⁽¹⁸⁾ But this is merely a moral injunction and does not create any legal obligation.

(1) Per Ghose, J in *Tekait v. Basanta*, 28 C. 751 (758)

(2) *Kudomee v. Joteeram*, 8 C 305 (306); *Ram Kumari (in re)* 18 C 264 (269); *Tekait v. Basanta*, 751 (758); *Binda v. Kaunsilic*, 18 A 126 (158); *Narain v. Tirlok*, 29 A. 4 (6); *Sinnammal v. Administrator General*, 8 M. 169 (178); *Administrator General v. Anandachari*, 9 M. 466 (470); *Vasudeva v. Secretary of State*, 11 M. 157 (161); *Thapita v. Thapita*, 17 M. 285 (242); *Subbaraya v. Ramasami*, 23 M. 171 (176); *Surampalli v. Surampalli*, 31 M. 383 (340).

(3) *E. v. Umi*, 6 B. 126, (128); *Bai Vigli v. Nansa Nagar*, 10 B. 152 (154); *Kudomee v. Joteerama*, 8 C 304 (306); *Jukni v. Q. E.*, 19 C. 627 (628, 629); *Sankaralingam v. Subhan*, 17 M. 479

(4) *Subharaya v. Ramasami*, 23 M. 171 (176, 178) followed in *Narain Das v. Tirlok*, 29 A. 48.

(5) *Subharaya v. Ramasami*, 23 M. 171 (178); *contra Komineymoney In re* 21 C. 697.

(6) *Sundari v. Pitambari*, 32 C. 871.

(7) *Government of Bombay v. Ganga*, 4 B. 380

(8) *Bisheshur v. Mata*, 2 N. W. P. H. C. R. 300.

(9) Act XXI of 1866.

(10) § 471.

(11) *Lallubhai v. Cassiba*, 5 B. 110 (118) (P. C.)

(12) See *Stridhan* post.

(13) *Subbaraya v. Ramasami*, 23 M. 171 (176, 178); *Narain Das v. Tirlok*, 29 A. 4; *Sundari v. Nemje*, 6 C. L. J. 372; *Hiralal v. Tripura*, 40 C. 650 F. B.

(14) *Hiralal v. Tripura*, 40 C. 650 F. B., *Narumayya v. Tiruvangadathan*, 24 M. L. J. 223; *Contra Bhutnath v. Secretary of State*, 10 C. W. N. 1085.

(15) *Q. v. Marimuthu*, 4 M. 249.

(16) *Manu IX. 46*; *Vashisth XXVIII 2-3*; *Bishashur v. Mata Gholam*, 2 N. W. P. H. C. R. 300; *Government v. Ganga*, 4 B. 380 (382); *Gobardhan v. Jasadamoni*, 18 C. 252; *Ramakumari (In re)* 164; *Sundari v. Pitambari*, 32 C. 871; *Administrator General v. Anandachari*, 9 M. 466; *Miltard (In re)* 10 M. 218; *Thapita v. Thapita*, 17 M. 285; *Budansha v. Falma Bi*, 26 M. L. J. 260; (*Contra in Sinnammal v. Administrator General* 8 M. 169) dissented from.

(17) 2 Dig. S. 80.

(18) *Mit. XI. 49*; *Valu v. Gangu*, 7 B. 84; *Vishnu v. Manjamma*, 9 B. 108; *Subbayya v. Bhavani*, 24 I. C. (M) 390; *Contra* if widow, *Honamma v. Timannbhai*, 7 B. 84.

516. The wife may claim separate maintenance for any just cause against her husband, if, for instance, he was guilty of cruelty to her ⁽¹⁾ or lived in adultery, ⁽²⁾ with a low caste mistress and thereby affronted her modesty, ⁽³⁾ or was suffering from insanity, incurable or loathsome disease, ⁽⁴⁾ or became a convert to an alien faith, such as Mahomedanism or Christianity. ⁽⁵⁾ The wife may defend herself for any libel upon her by her husband. ⁽⁶⁾ If improperly deserted, she may maintain a suit for the restitution of conjugal rights against her husband. ⁽⁷⁾

517. Restitution of conjugal rights.—The husband being by his *jus connubii* entitled to the society and service of his wife, is entitled to the custody of her person. He is not bound by any agreement to the contrary ⁽⁸⁾ unless so bound by his tribal custom. ⁽⁹⁾ The Courts however, do not entertain suits for possession of the recalcitrant wife or of the husband and the only relief available to an aggrieved spouse is that implied in a decree for the restitution of conjugal rights. ⁽¹⁰⁾ Even this cannot be decreed to him unless the wife has attained puberty. ⁽¹¹⁾ The wife may resist such a suit by the same defences which entitle her to live apart from her husband.

Shortly stated, these grounds are:—

1. Cruelty, physical or moral, rendering co-habitation unsafe to the wife's health or personal safety. ⁽¹²⁾ But an isolated act of unkindness or cruelty is insufficient. ⁽¹³⁾ So the fact that the husband slapped his wife ⁽¹⁴⁾ or made an unfounded imputation upon her chastity ⁽¹⁵⁾ or snatched her jewels or married another wife ⁽¹⁶⁾ is no defence. So, even if the cruelty be great, it might have been condoned, though this cannot be presumed from the wife's mere continuing to live with her husband after her ill-treatment. The question what amounts to legal cruelty depends upon no novel view of Hindu Law since the same principles which guide the English Court in decreeing judicial separation equally hold good here. ⁽¹⁷⁾ Apart from physical injury the Courts recognize the force of legal cruelty apprehended from the fact that the husband was

(1) *Bhawani v. Subhag*, 12 A. L. J. 995; *Yamuna v. Narayan*, 1 B. 164 (178); *Sidlingapa v. Sidava*, 2 B. 684; *Matangini v. Jogendra*, 19 C. 84; *Sitabai v. Ramachandra*, 12 Bom. L. R. 378.

(2) *Gantapalli v. Gantapalli*, 20 M. 470.

(3) *Administrator General v. Ananthachari*, 9 M. 466 (470); *Dular v. Dwarkanath*, 32 C. 284 (289); *Dular v. Dwarkanath*, 34 C. 971.

(4) *Bai Premkuar v. Bhika*, 5 B. H. C. R. (A. C.) 209.

(5) *Muchoo v. Arsoon*, 5 W. R. 285; *Administrator General v. Ananthachari*, 6 M. 466 (470); *Paigi v. Sheonarain*, 8 A. 78;

(6) *S. 499 I. P. C.*; *Contra Deokoonwar v. Umba Ram*, 1 B. 370 is no longer law.

(7) *Bindu v. Kausilia*, 13 A. 126;

Yamuna Bai v. Narayan, 1 B. 164 (166, 167); *Dadaji v. Rukma*, 10 B. 301 (310, 311);

Kaseeram v. Gendhenee, 23 W. R. 178;

Jogendra v. Harry Doss, 5 C. 500 (505); *Surjyamon*

v. Kali Kanta, 28 C. 37. (42-44).

(8) *Tekait v. Basunia*, 28 C. 751; *Paigi v. Sheonarain*, 8 A. 78 (79, 80).

(9) *Lenga v. Penguri*, 20 C. W. N. 406;

30 1 C. 796.

(10) *Chotun v. Ameer Chund*, 6 W. R. 105 (107); *Koobur v. San Khansama*, 8 W. R. 467; *Metaram v. Thanooram*, 9 W. R. 552; *Gatha Ram v. Moobta*, 23 W. R. 179. See as to execution O. 21 R. 32 C. P. C.

(11) *Santosh v. Gera*, 23 W. R. 22; *Dadaji v. Rukmabai*, 10 B. 301 (311); *Arumuga v. Viraragahava*, 24 M. 255.

(12) *Dular v. Dwarka Nath*, 34 C. 971; *Yamunabai v. Narayan*, 1 B. 164 (178); *Matangini v. Jogendra*, 19 C. 84; *Binda v. Kausilia*, 13 A. 126 (184); *Sitabai v. Ramchandra Rao*, 12 Bom. L. R. 378.

(13) *Sita Nath v. Haimabutti*, 24 W. R. 377.

(14) *Jogendra Sundari v. Hurry Doss*, 5 C. 500 (507); but a blow followed by minor acts may be enough—*Waddell v. Waddell*, 2 S. W. & Tr. 584.

(15) *Yamunabai v. Narayan*, 1 B. 164 (178).

(16) *Jeebo v. Sundbo*, 17 W. R. 522.

(17) *Buzloor v. Shumoonissa*, 11 M. I. A. 551 (615); *Yamunabai v. Narayan*, 1 B. 164 (174).

suffering from insanity⁽¹⁾ or any loathsome disease such as, leprosy or syphilis⁽²⁾ or abominable practices such as sodomy or bestiality⁽³⁾ but not impotence.⁽⁴⁾

2. Immorality: such as that the husband was living in adultery with a low caste woman.⁽⁵⁾ But the mere keeping of a mistress is insufficient as the practice of concubinage is common in this country⁽⁶⁾ and concubines have a legal right to maintenance.⁽⁷⁾

518. The wife's claim to maintenance may be enforced by a suit under the common law, or it may be enforced by a petition under S. 488 of the Code of Criminal Procedure. The provisions of the two may to a certain extent overlap but S. 488 provides a summary remedy limited as to the amount awardable, but it does not bar the wife's right of suit, though in decreeing maintenance the Civil Court will no doubt take into account the amount already payable to the wife under that section⁽⁸⁾.

[For further information on the subject see the chapter relating to maintenance.]

519. Procedure.—On marriage, the husband becomes entitled to the custody and care of his wife and he may assert his right by either getting himself appointed as the certificated guardian of his wife⁽⁹⁾ or by maintaining a suit for the restitution of conjugal rights. He cannot sue for possession, for though the husband is entitled to the possession of his wife, he cannot maintain a suit therefor as the courts do not regard the wife as a chattel, but as a human being upon whom no further coercion is justifiable than what the law considers it necessary to exert in execution of a decree for the restitution of conjugal rights, that is, by ordering the wife to return to her husband⁽¹⁰⁾ and if she refuses then the court may detain her in the civil jail for six weeks,⁽¹¹⁾ attach her property, or both.⁽¹²⁾ The Court is not bound to decree restitution merely because the husband claims it. It has power to refuse that relief on a proper case being made out,⁽¹³⁾ and it may qualify its decree by imposing terms on the husband,⁽¹⁴⁾ as that the husband should provide the wife with a suitable residence away from that in which the husband has kept his mistress,⁽¹⁵⁾ or that the decree was subject to the husband being restored to caste.⁽¹⁶⁾ In a case where the wife had gone wrong, and had in consequence been put out of caste, the plaintiff undertook to get her re-admitted into the caste but the court considered her re-admission necessary before any decree could be passed for restitution.⁽¹⁷⁾

(1) *Binda v. Kaunsullia*, 18 A. 126 155; *Hall v. Hall*, 3 S. W. and Tr. 347.

(2) *Pemkuwar v. Bhika*, 5 B. H. C. R. (A.C.) 209; *Yamuna Bai v. Narayan*, 1 B. 264 (173).

(3) *Bromley v. Bromley*, 2 Add. 158 N.

(4) *Purshotam Das v. Mani*, 21 B. 610; *Contra Devala* cited 2 Dig. 470: but ancient authorities which recognized Niyog do not regard impotency as a disqualification to the exercise of marital rights.

(5) *Paigi v. Sheonarain*, 8 A. 78 (81); *Dular Koer v. Dwarkanath*, 32 C. 284 (289); *Dular Koer v. Dwarka Nath*, 34 C. 971.

(6) *Gantapalli v. Gantapalli*, 20 M. 470 (474 N).

(7) *Ningareddi v. Lakshmanwa*, 26 B. 163; *Kamanarasu v. Buchamma*, 23 M. 232 (291).

(8) *Cf. Kuppa v. Singaravelu*, 8 M. 825.

(9) *Guardian and Wards Act*, Act (VII) of 1890) S. 21.

(10) O 21, R. 32, C. P. C.

(11) *Ib* 8 58 (b)

(12) O 21, R. 32 (1), C. P. C.

(13) *Surjyamonni v. Kali Kanta*, 28 C. 37 (46, 47). But this must amount to a material offence upon which the English Courts would refuse relief. *Ib.* p. 43: in case of non-attainment of puberty *Suntosh v. Geru*, 23 W. R. 22.

(14) *Bazloor v. Shumsoonissa*, 11 M. I. A. 551 (615). *Paigi v. Sheonarain*, 8 A. 78 *Jogendranandani v. Haryadas* 5 C. 500.

(15) *Jogendra Nundini v. Hurry Dass*, 5 C. 500 (508).

(16) *Paigi v. Sheonarain*, 8 A. 78

(17) *Surjyamonni v. Kalikanta*, 28 C. 34 (47).

In such a suit if the validity of the marriage is disputed, it is not enough to find that the marriage took place leaving it to be presumed that the rites and ceremonies necessary to constitute a legal marriage in the particular case were performed. The Court must find specifically what those rites and ceremonies are, and whether they were performed. (1)

520. Limitation.—A suit for restitution must be instituted within six years from the time when the right to sue accrues. (2) Such right would arise when there was a demand for and a refusal of co-habitation, but this is not necessary for the plaintiff's cause of action, (3) which for the purpose of jurisdiction is deemed to arise at the husband's house. (4)

521. The minority of the husband is no ground for refusing restitution (5) since minority does not disqualify the husband from being the lawful guardian of his minor wife in preference to her parents (6) though the court will not decree restitution unless the wife has attained puberty. (7) If the wife is removed from his custody, the husband may apply to the Court under S. 25 of the Guardian and Wards Act for its resumption, and the court will order it if it will be for the welfare of the ward. The husband may obtain an order of the nature of *habeas corpus* if his wife resides anywhere within the original jurisdiction of the presidency towns of Calcutta, Bombay and Madras. (8) The husband can maintain a suit for damages against any one restraining his wife. Every person, who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action for damages unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has by some insult or ill-treatment compelled her to leave him. (9)

522. As a party wronged, the husband may recover damages against a person committing adultery with his wife. (10)

The measure of damages depends on the deprivation suffered by the husband of his wife's society and affection, the loss to him of his wife's services and assistance in domestic affairs, and the social injury which he is likely to incur from the insult and dishonour which the adulterer has inflicted upon him against which the court has to weigh the conduct of the husband towards his wife and the adulterer with a view to judging whether or not he has contributed to the mischief of which he complains. The ability of the adulterer to pay damages is not generally to be taken into account. (11)

21. (1) In a case relating to conjugal rights there must be, except as otherwise expressly provided, proof of the performance of marriage and its validity.

Proof and presumption of marriage

(1) *Ib.* p. 50.

(2) Art. 130. Sch. I to the Limitation Act (IX of 1908); *Krishna v. Badammal*, 24 M. 898; *Chotun v. Ameerchand*, 6 W. R. 105.

(3) *Binda v. Kaunsillia*, 13 A. 126 (189); *Pakirgauda v. Gangi* 28 B. 897 (810); *Surjyamonni v. Kali Kanta*, 28 C. 46.

(4) *Lilitagar v. Suraj Bai*, 18 B. 816.

(5) Guardian and Wards Act VIII of 1890, s. 21.

(6) *Ib.* ss. 19, 41 (d); *Kaseeram v. Gendhene*, 23 W. R. 178; *Dhurnidhur (In re)*, 17 C. 298; *Surjomonni v. Kalikania*, 28 C. 87 (45).

(7) *Arumuga v. Viraraghava*, 24 M. 255.

(8) Cr. P. C. S. 491.

(9) Addison on Torts 802, cited per Melville, J. in *Yamunabai v. Narayan*, 1 B. 164 (174, 175).

(10) *Soodasun v. Lokenath*, Mont. 619

(11) Per Phear, J. in *Kelly v. Kelly*, 8 B.L.R. (O. C.) 67 (69)

(2) In other cases marriage may be presumed from continuous co-habitation, conduct and repute.

(3) Such presumption of marriage cannot be rebutted by mere proof of its improbability.

(4) When the fact of marriage is proved, it will be presumed that it was performed:—

(a) in the approved form

(b) with due ceremonies and was otherwise a valid marriage and that

(c) it continued during the life-time of either party.

Synopsis.

- | | |
|---|---|
| (1) <i>Presumption in favour of marriage</i> (524-525). | (4) <i>Presumption of marriage in Brahma form</i> (532). |
| (2) <i>Proof of marriage</i> (526). | (5) <i>Presumption as to due performance of ceremonies</i> (533). |
| (3) <i>Presumption of valid marriage</i> (527-531). | (6) <i>Presumption of continuance of marriage</i> (534). |

523. Analogous Law.—This is an important section, and all its clauses are amply supported by authorities. (1)

524. Principle.—This section embodies an important principle. There is a presumption in favour of morality, and consequently, if it is found that a man and a woman have co-habited and passed as a married couple, law presumes marriage, if marriage between them was at all possible. For this purpose it will presume compliance with every detail necessary to legalize a marriage. The law is jealous for the honour and reputation of the home and the family,

(1) *Clause (1)*—S. 50 Ev. Act; *Surjyamon v. Kali Kanta*, 28 C. 37; *Smith*, 4 W.R. (Cr.) 3; 4 W.R. Cr. 10; *Arshad Ali*, 13 C.L.R. 125; *Pitambur*, 5 C. 566 F.B.; *Danesh v. Tafir*, 7 C.W.N. 143; *Basanta Kumar*, 26 C. 49; *Bhagu*, 17 Bom. L.R. 75; *Kaliu*, 5 A. 238; *Dal Singh*, 20A. 166; *Nasir Khan*, 36 A. 1; *Santok Singh*, (1898) A.W.N. 186; *Syed Munir*, 14 N. L. R. 28 and cases cited in Gour's Penal Law (2nd Ed.) § 5181, 5130.

Clause (2)—S. 50 Ev. Act-ill (a); *Ma Wun Di v. Ma Kin*, 35 C. 232 (240) P. C. (caution necessary); *Monji Lal v. Chandratati*, 38 C. 700 (706, 707) P.C.; *Ghasanfer Ali v. Kaniz Fatima*, 32 A. 345 (350) P. C.; *Nath v. Bhag Singh*, (1910) P.W.R. 54; 6 I C 661; *Ratan v. Nathu Singh*, 16 C. P. L. R. 85; *Sastry v. Sembecutty*, L. R. 6 A. C. 864; *Sivarama v. Veerappa*, 28 I. C. (M.) 828; *Lopez v. Lopez*, 12 C. 706 (732); *Lucas v. Lucas*, 32 C. 187 (191); *Begun Behari v. Atul Krishna*, 17 O. W. N. 494.

Clause (3)—*Piers v. Piers*, 2 H. L. C. 331; *Morris v. Davies*, 5 Cl. and Fin. 163 (265) 47 R. R. 50; *Lopez v. Lopez*, 12 C. 706 (752);

Luchmi Koer v. Roghu Nath, 27 C. 971 (978); P.C. *Imambundi v. Matasuddi*, 15 C.L.J. 621, 13 I. C. 678; O. A. 35 M. L. J. 422=45 I. A. 83 (P. C.); *Moji Lal v. Chandrabati*, 38 C. 701 (706, 707) P. C.; *Bopin B hari v. Atul Krishna*, 15 I. C. 828.

Clause (4a).—*Thakur Deyhee v. Rai Baluk Ram*, 11 M. I. A. 189 (175); *Gangaram v. Ballia*, (1876) B. P. J. 26 (29); *Keser Bai v. Valab*, 4, B. 188 (197); *Goyaban v. Shabajirao*, 17 B. 114 (117); *Chunilal v. Surajram*, 33-B. 433 (437); *Jaganmath v. Norayan*, 35354 B. (559); *Jadeonath v. Basunt Coomar*, 19 W.R. 264 (266); *Jaganmath v. Ranjit*, 25 C. 354 (366); *Thayammal v. Annamalai*, 19 M. 85; *Authikasevalu v. Ramannujam*, 32 M. 512, 515, (516); in *Jai Kisondas v. Harkisondas*, 2 B. 9 (14), it is said to be matter of enquiry but this is no longer tenable.

Clause (4b)—*Inderun v. Ramasawmy*, 13 M. I. A. 141 (158); *Brindabun v. Chundra Kurmohar*, 12 C. 140.

Clause (4c)—*Bhima v. Dhulapa*, 7 Bom. L. R. 95.

and it presumes in favour of marriage and against concubinage when a man and a woman have co-habited continuously. The presumption of marriage is a presumption of a very special kind much stronger than most presumptions. "The presumption of law is not lightly to be repelled. It is not to be lightly broken in upon or shaken by a mere balance of probability. The evidence for the purpose of shaking it must be strong, distinct, satisfactory and conclusive." (8)

525. A presumption in favour of marriage arises from mere co-habitation, conduct or repute. (4) Marriage being so presumed it warrants another presumption in favour of the legitimacy of all children born in wedlock and within 280 days of the death of the husband or dissolution of the marriage. This is proof by presumption; but legitimacy may be proved *aliunde* as where a child was born after 357 days of the husband's death and at least 365 days from the last coitus the court considered the prolonged period of gestation as unique though not impossible and decided against its legitimacy on that improbability supported as it was by other evidence. (1)

The other presumptions specified in clause (3) are consequential, and justified by the fact that a person going through the form of marriage is most unlikely to omit its ceremony. (2)

526. Proof of marriage and its validity.—In cases between the husband and wife, created by or in respect of rights arising out of the marriage relation, such as divorce, the restitution of conjugal rights and offences and wrongs committed in violation of the marriage vow, if the marriage is denied, it is incumbent on the party relying upon any right consequent thereon, to prove both the *factum* of marriage as also its validity by proof of the nature of the ceremonies performed and their legal or customary sufficiency. (3) This strictness of proof is justified by the nature of the rights involved and their dependence upon the legality of marriage; while in criminal cases the sanctity which law attaches to the person of its subject requires that no one shall be condemned for violating any person's marital rights unless there was clear proof that he possessed those rights. The higher standard of proof required in such cases justifies the necessity for positive evidence, which as to the *factum* may be furnished by the witnesses who were present at the marriage or by the production of the register, or certified copy or of such other record as the law of a country or custom of a class may provide, (4) while its validity may be established by the examination of the caste panches or of those whose evidence is otherwise relevant. The Court will make no presumption when law requires proof of fact by positive evidence. In cases affecting the liberty of third parties law requires not only positive but also independent evidence and the evidence of the husband or of the wife that they were married is insufficient. (5)

527. Except in cases previously mentioned, law presumes and presumes **Cl. (2) Legal pre-** strongly in favour of marriage from the fact of continuous co-habitation, conduct and repute. In cases affecting the legitimacy of children this presumption is very strong indeed, though where there are no children and the validity of the

(1) Per Lord Lyndhurst in *Morris v. Davies*, 5 Cl. and F. 163 cited by Sir Barnes Peacock in *Sastry v. Sembecuttly*, 6 A. C. 864 (372).

(2) *Sastry v. Sembecuttly*, L. R. 6 A. C. 864.

(3) *Tikam Singh v. Dhan Kunwar*, I. L. R.

24. A. 448.

(4) *Inderun v. Ramasawmy*, 13 M. L. A. 141 (158).

(5) S. 50, Evidence Act

(6) *Pitambur*, 5 C. 566 F. B.; *Kallu*, 5 A. 288.

(7) See Gour's Penal Law (2nd Ed.) §§.

marriage is alleged, the presumption is yet strong, though not as strong as in the other case. ⁽⁶⁾ The Court will make every possible presumption against bastardy presuming not only the marriage but due compliance with all the forms and ceremonies of marriage and the removal of all impediments, if any, existing in the way of marriage.

528. This rule was put to a somewhat severe test in a case in which the court had to presume marriage on the following facts. One Sirdar Thakur Singh, a Hindu Sikh Jat, owned a large estate in the Jullundhar District. He died in 1907 leaving him surviving his two widows, his mother and a Lady Lal Kuar (alias Mt. Fatti) who claimed to be his married wife. She was the daughter of one of his Mahomedan tenants, and had been married to one Dulla but had lived with the Sirdar for four or five years up to his death. In 1904 he had secured for her a divorce from her husband on payment of Rs. 750. In a suit between his widow Dalip Kuar and Fatti, the former contended that there was and could be no valid marriage between her husband and Fatti who was a Mahomedan. The trial judge held with the plaintiff, but on appeal, the Divisional Judge reversed the decree presuming that Fatti had been married because the Sirdar called her by the name "Lal Kuar" and had obtained her divorce from her former husband. As for the religious impediment, the Court held that Sikhism was a proselytizing creed and the conversion of a Mahomedan to Sikhism being possible, there was no insuperable obstacle in the way of their marriage. These facts were concurred in by the Chief Court who presumed marriage from the lady's co-habitation with the deceased Sirdar, his procuring divorce for her and from the fact that she was known by a new name, all of which symbolized a changed status. ⁽¹⁾ The same court had previously in other cases upheld inter-caste marriages between a Jat and a Brahmin woman, ⁽²⁾ opposed to all shastras, and even suggested the possibility of a marriage between a Hindu casteman and a Mahomedan woman, if tolerated by the caste people. ⁽³⁾

529. But in a Burmah case decided by the Privy Council a similar presumption was contended for, but their Lordships, while conceding the principle, counselled caution in its application to Oriental people amongst whom open co-habitation without marriage was not so exceptional as in the Western countries. The case was however, an exceptional one. The alleged husband of the plaintiff, who sued for a share of his estate as his widow, was a Burman and had his house and wife at Moulmein in Burmah. He paid business visits to Siam where he co-habited with several women, admittedly concubines, including the plaintiff whom both the courts in India found to be the same. The Privy Council was, however, pressed to apply the presumption, but they found themselves unable to disturb the finding of fact, upholding it on the ground that the presumption, though natural, was in this case weakened by total absence of habit and repute inasmuch as the deceased had lived in a place where there were not many people to act the part of neighbours, or the public, and at all events there was no tangible evidence of the recognition of the plaintiff in her quality of wife, by people external to the house and independent of it: "What evidence she has, is that of the people who either speak to the abandoned marriage ceremony or distinguish her position in the house as one of more consequence, and her stay in it as of longer duration, than those of the other women. In truth, when all is said, there is little

(1) *Re M'Longhin's Estate*, (1878) 1 L.R.

421.

(2) *Dalip Kuar v. Fatti*, (1918) P. R. 99 ;
18 I. C. 980.

(3) *Ship Ditta v. Bela*, (1900) P. R. 50.

(1) *Sodhi Kartar v. Sher Singh*, (1895)
P. R. 50.

more pointing to marriage than the use of the word 'wife' by some of the witnesses ; and the most cursory, as well as the most careful examination of the evidence shows that it is applied to persons whose status is not matrimonial." (1)

530. But, as already remarked, this was an exceptional case and one in which their Lordships were moved to depart from their usual practice of letting alone concurrent findings of fact of the courts in India based upon the evidence that the plaintiff lived like the rest of the three other concubines of the deceased, that the witnesses called by the plaintiff to prove the contract and ceremony of her marriage did not support her, that though the Buddhist law permitted polygamy, it was rare and that the plaintiff never lived or associated with the married wife of the deceased who had no reason to contract a marriage with plaintiff when he could have followed, as regards her, the custom he did in fact follow as regards the remaining three of his mistresses. A similar argument was addressed to the same Board in an appeal from Ceylon (2) in which the parties were Tamil settlers in that island. The plaintiff claimed a share in her husband's estate against his surviving brother, who denied her marriage. The trial judge held it proved that she had co-habited with the deceased and given birth to a child which survived the deceased a few months. On appeal the Supreme Court dismissed her suit practically holding that the plaintiff had failed to discharge the burden. On appeal to the Privy Council it was contended that the burden had been misplaced in the court below who should have presumed marriage from the facts found by the trial judge, which the defendant had not rebutted by proof of any specific facts disproving the marriage. In upholding this contention, Sir Barnes Peacock in delivering the judgment of the Privy Council, held that continuous co-habitation raised a strong presumption of marriage which not only might, but ought to be drawn and which could not be rebutted by the mere proof of improbability: "The evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive." Mere proof that no one knew what ceremonies constituted marriage amongst the Tamil settlers in the locality or that the marriage was interrupted and all its ceremonies remained unperformed is not enough. (3) It was contended for the respondent that in a district where concubinage was not considered as immoral, the same presumption would not arise, but their Lordships wholly dissented from that view, observing that because a number of persons live in a state of concubinage it is not to be presumed that a man and woman who were living together as reputed husband and wife were not lawfully married. (4)

531. The same view was reiterated in another case in which the plaintiff claimed to be the wife of a dissolute Bairagi Mahant married seven months before his death which the trial Judge held proved but with which finding the High Court did not agree. It appeared that the Mahant was a libertine and had contracted diseases induced by his excesses of which he died when he was under thirty years of age, and the plaintiff had only lived with the deceased for seven months before his death. There was further the direct evidence of the *factum* of marriage of several respectable witnesses. Their Lordships considered these facts sufficient to raise a strong presumption in favour of the plaintiff's marriage which the defendant could not rebut by mere proof of its improbability on the grounds of the disparity of age and status, the health and disease of the deceased Mahant, the absence of religious motive for the

(1) *Ma Wun Di v Ma Kie*, 35 C 292 (240, 241) P. C.

(2) *Sastri v. Sambecuttu*, L.R. 6 A.C. 3361

(3) *Sastri v. Sambecuttu*, L. R. 6 A. C. 364 (370, 372).

(4) *Ib.*, p. 371.

marriage, and the unlikelihood of a man in his position going without attendants to marry plaintiff in a place distant from his home. The deceased had left a will in which he had made no provision for the plaintiff whom he referred to therein not as his wife but as if she were unmarried. This last fact was held to weigh against the plaintiff and to shift the presumption arising in her favour. Her claim was consequently decreed. (1)

532. The presumption that a Hindu marriage is in a Brahma form is (4) (a) **Presumption of Brahma Marriage.** made upon similar considerations, the presumption being founded upon what ought to be and is ordinarily done. It has already been seen that of the eight recognized forms of marriages the two forms now extant are the *Brahma* and the *Asur* marriages, which are open to all Hindus the Shudra being equally free to contract a Brahma marriage (2) and a twice born-being equally free to contract an *Asur* one. (3) In fact the form of marriage nowadays is not so much determined by the caste of the contracting parties as by the natural law of supply and demand.

533. The presumption of marriage necessarily implies a presumption of the due performance of all its essential ceremonies. This presumption is justified by the fact that no one intending to marry would go through the form without its ceremonies if he knew that their non-observance would invalidate the marriage. (4) It is a strong legal presumption and one which cannot be rebutted by any evidence which merely raises a counter-presumption, that is, evidence which is merely inferential and does not directly attack the marriage on any of its essential ceremonies. To be of any value such evidence must be clear, cogent and conclusive. (5) In the Breadalbane Peerage case the House of Lords went so far as to hold that the presumption was one which not only might, but ought to be drawn from co-habitation with habit and repute although the co-habitation commenced with a ceremony which was not only invalid by reason of the real husband of the woman being alive at the time, but was known by both parties to be so. (6) Such presumption of marriage was made even between a Pariah and Burmese woman. (7)

534. Since it is not usual for married persons to divorce each other, there is naturally a presumption in favour of the continuance of a marriage. Such presumption is all the greater in the case of a Hindu whose marriage is normally indissoluble. In monogamist countries the fact that a person was remarried would necessarily carry with it the presumption of dissolution of the previous marriage by death or divorce. But there is no room for any such presumption in the case of Hindus.

(1) *Luchmi Koer v. Roghu Nath*, 27 C. 971 (1977-79) F. C.

(2) *Sivarama v. Bagavan*, (1859) M. S. D. 44; *Aiskisondas v. Harkisondas*, 2 B. 9 (18, 14).

(3) *Nundlal v. Tapeedas*, 1 Borr. 14 *Keshov v. Naor*, 2 Bcrr. 194; *Vijayarangam v. Lakshuman*, 8 B. H. C. R. (O.C.) 244; *Visvanathan v. Saminathan*, 13 M. 88.

(4) *Inderun v. Ramasawmy*, 13 M. I. A. 141 (158).

(5) *Hewries Peerage claim* L. R. 2 H. L. (Sc.) 258 (268.)

(6) *Piers v. Piers*, 2 H. L. C 881; *Morris v. Davies*, 25 Cl and F. 865 (888).

(7) *Breadalbane's case* L. R. 2 H. L. (Sc.) 269 cited in *Sastry v. Semitecutty*, 6 A. C. 864 (872). (The report of the case cited however, does not contain the passage quoted by their Lordships who must have taken it from the journal of The House of Lords.)

CHAPTER IV.

AFFILIATION AND LEGITIMACY.

535. Topical Introduction.—The two following facts are a common feature of all primitive societies. *First*, the existence of a patriarchy; and *secondly*, ownership by the patriarch of his wives and children and disposing of them as would a present day-farmer his live stock. The joint family system which was only an incident of the patriarchal system postulated one undivided head, who was the father, who held sway and exercised complete dominion over all members of his household. The evolution of the modern conception of marriage and sonship is the outcome of ages of culture. The patriarch of primitive society sold and hired out his wives and children exactly in the same way as the keeper of a livery stable today sells or hires out his horses. Slavery was recognized and the father freely requisitioned the services of other men to beget children upon his wives whom he sold into slavery as a matter of routine business. But since male children are not only more useful but also necessary for the protection of the family and of the tribe against hostile aggression, it follows that they would be more prized than mere girls who being helpless could be seized by force or theft. The necessity for males being established, the necessity for begetting or buying sons followed as a matter of course. The civil law conferred special privileges on the father of three or more sons, and it popularized the institution of adoption (§ 552). The primary motive for adoption was thus entirely secular. The religious halo which came to surround this social necessity is a later development, and due to priestly laudation of a purely defensive act of which the mainspring was the instinct of self preservation. The son in archaic society took the same place as a recruit in a modern regiment. And that term did not convey what it has come to mean since.

536. The Sanskrit writers enumerate twelve kinds of sons, as they describe eight kinds of marriages (§§ 59 and 63). Some enumerate as many as 17 kinds. The Dattak Mimansa mentions 15 kinds, ⁽¹⁾ and Baudhayan 13. ⁽²⁾ Their description will show how loose was the primitive conception of family and sonship. These facts apparent to every student of social archæology have only become gradually established. As recently as 1834 the Privy Council were unable to trace the history of the law of adoption to the natural gregarious instinct of animal creation. "The law of adoption" their Lordships observed: "owes its origin to the timorous superstition of the inhabitants of India. That people vainly imagining that by leaving male children in this world they secured themselves against the torments of the next, seem to have been so anxious to obtain natural or adopted sons that they have established but imperfect securities against fabricated adoption." ⁽³⁾ But the real explanation of the origin of subsidiary sons is to be found in the primitive conception of family relations, and the exigencies of the time.

537. A society in which the sole security lay in the strength of its members welded into a defensive and offensive alliance for mutual support and self-protection could not think of the fears of a future purgatory any more than a herd of deer or a flock of geese. The spiritual element was a fiction introduced

(1) II. 57.

(2) 14 S. B. E. 228.

(3) *Sootrugun v Sabitrya*, 2 Knapp. 287.

later to emphasize a precept when the necessity for it became less obvious. This is even evident in the pages of Manu, who said: "The rule is that women who are devoid of valour and destitute of scriptural learning are useless." (1) Those who added to the physical strength of the social unit counted, the rest were relegated to a position of dependence and lifelong servitude. The blind, the deaf, dumb or lame and those suffering from bodily infirmity which detracted from the tribal strength were not fit for inheritance. They contributed nothing to its strength, and they could not, therefore, share in its rights. The patriarchal family was a self-centred state of which the father was its king. He levied an income-tax from the dependant relatives owned by him. They had no property of their own. All that they had earned belonged to the patriarch. "A wife, a son, and a slave are devoid of property; whatever they acquire becomes his whose they are." (2) Being their father's chattel, even his death did not determine their obligation to discharge his debt even if he had left no assets. (3) But otherwise the *patria potestas* being removed the sons commenced to enjoy a certain measure of independence. This then is the common genesis of the law of sonship and adoption.

538. It has already been seen that the primitive notions of the relationship of sons and wife were considerably loose. The Hindu law-givers describe several kinds of sons, most of them of 12 kinds, of whom the first six are placed in the category of heirs, the remaining six being merely classed as kinsmen who are not entitled to inherit to their father. But neither in the description nor in the order, do the sages agree.

Manu describe the twelve sons as follows:—

Class 1 (Heirs):—

- (1) Son begotten by a man on his own wedded wife (Auras son).
- (2) Son of the appointed wife, that is a son begotten on his wife by others with the permission of her husband.
- (3) Son of his appointed daughter.
- (4) Son by adoption.
- (5) Secretly born son of an adulterous wife.
- (6) Son discarded by his natural parents and brought up by another.

Class 2 (Kinsmen):—

- (7) Son of an unmarried woman.
- (8) Son of a pregnant bride.
- (9) Son bought.
- (10) Son by a twice married woman.
- (11) Son self-given, i.e., (an orphan or one abandoned by his parents and accepted by another as his son.)
- (12) Son by a Shudra wife.

539. These sons gradually dropped out of account (1) as society became more settled and the notion of family relationship more defined. The Mitakshara

(1) IX-18.
 (2) Manu VIII-416.
 (3) Yaj II-50.
 (4) Manu, IX-159: Baudhayan, II-2, 3, 31-33, 14 S. B. E., p. 298; Gautam Ch. XXVII-82-84; 2 S. B. E. 803, 804; Yaj. II, 132, 134 classifies them in a different order. Vishnu (XV-1-80) and Vashisth, (XVII-12-3) agree with each other but differ from Manu with whom Yama cited in Dattak Chandrika

V-3) and Narad (XIII-45-47) generally agree. Brihaspati (2 Dig 349) regards only two sons, viz., Auras (one's son) and that of the appointed daughter as entitled to inherit, the rest being merely kinsmen and so relegated to the second class adding "The sons made in various ways by the ancient *Rishis*, the powerless modern people have not the power to make in the Kaliyug (or present age)" cited in Datt. Mim-1.64 (Sutherland) p. 16.

mentions all these sons ⁽¹⁾ but agrees with Brihaspati in regarding all but the *Auras* son and that begotten on an appointed daughter as disentitled to inherit. ⁽²⁾ It adopts Yajnavalkya's order of merit as follows:—(1) *Auras* son, (2) Son of an appointed daughter, (3) Son of the wife begotten by a husband's kinsman, (4) Son of the wife secretly produced in the house by illicit intercourse, (5) Son of an unmarried woman considered as son of his maternal grandfather, (6) Son of a twice-married woman, which means a wife re-married or one who had previous intercourse with another man though she be not actually married a second time. ⁽³⁾ The wife whose husband is impotent and has therefore been enjoyed by another falls into the same class. (7) Adopted son, (8) Son bought, (9) Son made (*Kritrim*), *i.e.*, "one adopted by the person himself, who is desirous of male issue; being enticed by the show of money and land, and being an orphan without father or mother; for, if they be living, he is subject to their control." ⁽⁴⁾ (10) Son self-given, *i.e.*, "one who being bereft of his father and mother, or abandoned by them without cause, presents himself, saying "Let me become thy son." ⁽⁵⁾ (11) Son accepted "is a son, who being in the womb, is accepted when a pregnant bride is espoused. He becomes son of the bridegroom." ⁽⁶⁾ (12) Son deserted (*Apavidit*) "is one, who having been discarded by his father and mother is taken for adoption. He is son of the taker." ⁽⁷⁾ According to the Mitakshara all these sons are entitled to succeed in the order of their seniority. ⁽⁸⁾ But if they all co-exist then the Mitakshara makes no distinction between the legitimate and the appointed daughter's sons giving each an equal share. ⁽⁹⁾ These it regards as the primary or superior sons, the rest being spoken of as the secondary, subsidiary or inferior sons who receive a quarter share. ⁽¹⁰⁾ It then enters into a disquisition into other matters relative to the rights of all these sons, but they have long since disappeared from that category, and the only sons now recognized are the *Auras* and the adopted sons, though the law books will be found loaded with minute details of the other ten vanished sons.

It has been stated that the wide conception of sonship owes its origin not to the notion of spiritual advancement but the stern necessity of the age.

Children defined. **22.** (1) Children may be natural or adopted. Of these the former may be legitimate or illegitimate.

(2) A legitimate child is one begotten by a person on his lawfully married wife.

(3) An illegitimate child is one begotten by him on one who is not lawfully married to him.

A lawfully begotten son is called *Auras putra*.

(4) An adopted son is one legally adopted by or to a man as his son.

(1) Ch. 1-Sect XI, §§ 1-9 16-19. 22.

(2) *Ib.*, § 3

(3) Vishnu, XV-8, 9 : Cole. Mittak. Ch. 1-Sec. XI-8

(4) Mit. Ch. 1-Sec. XI-17.

(5) *Ib.* § 18.

(6) *Ib.*, § 19.

(7) *Ib.*, § 20.

(8) *Ib.*, § 22.

(9) *Ib.*, § 23.

(10) Mit. Ch. I-S. XI § 24.

A son taken in adoption is called *Dattak putra* or adopted son.

Synopsis.

Different kinds of children (540).

540. Analogous Law.—The only children now possessing any legal *status* as such are the natural and adopted children. Natural children may be legitimate or illegitimate and may belong to either sex, though except in the case of dancing women, a child taken in adoption must be a male. But legally there is no legal impediment to the adoption of a daughter so that the father may theoretically possess children of either sex who are either natural or adopted. Of the 12 kinds of sons of various degrees mentioned by the ancient law-givers (§§ 538-539) only two now survive, *viz.*, the legitimate son and the son by adoption. Of these the legitimate son calls for no notice. His legitimacy is a question of proof or of presumption to be made in accordance with the next rule. The adopted son is a subsidiary son and one still recognized. The law relating to him will be found set out in the next chapter.

541. This chapter deals only with the *status* of natural children, and of these, the subject may be considered in the following order.

(i) Presumption of legitimacy, (ii) proof of legitimacy, (iii) proof of illegitimacy, (iv) status of a legitimate son, (v) status of a legitimate daughter, (vi) status of an illegitimate son, (vii) status of an illegitimate daughter.

Presumption of legitimacy of **23.** The legitimacy of a child born of a married wife of a person is conclusively presumed in the following cases, namely —

(a) where it was born during the continuance of the marriage.

(b) or within 280 days after its dissolution, the mother remaining unmarried, unless it is proved that the parties to the marriage had no access to each other at any time when it could have been begotten.

Illustrations.

(a) A had validly married B in the morning. B was delivered of a child in the evening. The child is the legitimate child of A and B, and evidence cannot be given to disprove it.

(b) A had validly married B. After his marriage A became an ascetic. He visited B casually now and then. B was delivered of a child. It is the legitimate child of A and B, and evidence cannot be given to prove that by reason of his vow, A could not have begotten it.

(c) A validly married B. A was then aged 10 and B aged 14. A few months after the marriage, B was delivered of a child. The child is the illegitimate child of B since A could not have begotten it.

(d) A aged 30 married B aged 15. B subsequently gave birth to a child. It is the legitimate child of A and B, and evidence cannot be given to disprove it.

(e) A had validly married B. A child was born to them in wedlock. Evidence is led to prove that B was congenitally impotent. The evidence is admissible as proving sexual non-access.

Synopsis.

- (1) *Presumption of legitimacy* (2) *Proof of non-access* (545).
(542-547). (3) *Other presumptions* (548).

542. Analogous Law.—The rule here enacted is adapted from S. 112 of the Evidence Act which enacts a rule in consonance with both the English and Hindu Laws ⁽¹⁾ but at variance with that of the Mahomedan law. ⁽²⁾ The former treat a child as legitimate whenever conceived if it was born in wedlock but the latter treats it as legitimate only if the parties were married at the date of conception. The Evidence Act now formulates a general rule and this section merely reproduces it here, being equally applicable to Hindu Law.

543. The word “access” used in the proviso is held to mean “generating access,” ⁽³⁾ i.e., such access as made conception possible. It has accordingly been held that the presumption may equally be rebutted by proof of impotency in the husband. ⁽⁴⁾ Non-accessibility in this sense was pleaded in a case in which however the husband’s incapacity due to illness was alleged, but not proved. ⁽⁵⁾ The period of 280 days fixed in clause (b) is regarded by the obstericians as about the maximum period of normal gestation, though instances are on record of the period being as much as 311 days and in some rare cases it may extend to even 322 days. ⁽⁶⁾ The Evidence Act takes the usual period for presumption and leaves other cases to proof.

544. Presumption of Legitimacy.—The presumption of legitimacy under this section is conclusive if it is proved or admitted that the child was born in wedlock. ⁽⁷⁾ But since marriage may itself be the subject of a presumption ⁽⁸⁾ it follows that in order to raise the presumption of legitimacy all that is necessary is to prove birth of the child of the wife within any time however short or long after marriage up to 280 days of the death of the husband or divorce of the wife by him. This presumption is conclusive in the sense that it is not open to the parties to rebut it in any way otherwise than as stated in the proviso. Consequently, such presumption cannot be rebutted by proof that the child was begotten by some one else, or that other people had likewise access to the wife ⁽⁹⁾ or in fact by any other circumstances of general improbability.

545. The only fact allowed to be proved in rebuttal is non-access to the wife. This includes, as previously remarked, not only non-access in fact but also non-access in a sexual sense such as precludes the possibility of conception. Evidence may then be led to prove that the husband was impotent, ⁽¹⁰⁾ too young or too old, or otherwise incapacitated to beget a child. The fact that the parties lived apart or that the husband had remarried, and deserted and

(1) Per Lord Langdale in *Jeswant Sing v. Jet Singh* (1844) 6 W. R. 46 (47) P. C.; Per Sir Barnes Peacock in *Pedda Anani v. Zemindar of Marungapur* (1874) 14 B. L. R. 115 (122) P. C. S. 112 of the Evidence Act was drawn from the statement of the common law in the Bombay (*Peerage*) case 1 Sim. St. 158.

(2) Per Lord Langdale in *Hargrave v. and Hargrave* 9 Beav. 552 (556).

(3) *Ashrufoddowla v. Hyder Hossain* 11 M. I. A. 94.

(4) *Danbury (Peerage) case* 1 Sim. and St.

158; *Cope v. Cope* 1 M. and Rob. 276; *Bury v. Hilpot* 2 My. and K. 345.

(5) *Narendra v. Ram Gubind*, 29 C. 111 (125) P. C.

(6) 2 Taylor Med. Jur. (4th Ed.) p. 265.

(7) S. ante: *Ghazaffar Ali v. Kaniz Fatema*, 11 C. L. J. 649, P. C. *Manji Lal v. Chandrabati*, 38 C. 700 P. C.

(8) *Umra v. Mhd. Hayat*, (1907) P. R. 79.

(9) *Macris v. Davies*, 3 C. & P. 215; *Cope v. Cope*, 5 C. & P. 604; *Wright v. Moldgate*, 3 C. & K. 158.

(10) *Rozario v. Ingles*, 18 B. 468.

discarded his wife would not exclude the presumption, unless there was proof of non-access to her ⁽¹⁾ evidence as to which must be cogent and almost irresistible. ⁽²⁾ Such evidence was furnished in the case where the wife had admittedly lived in open concubinage with another man and they both had acknowledged the children born of them. ⁽³⁾

546. The same presumption in favour of legitimacy continues for a period of 280 days after dissolution of the marriage by death or divorce. Considered as a rule of limitation the day of death or dissolution would probably be excluded.

547. But apart from presumption, legitimacy may be the subject of direct **Proof aliunde.** proof, though where one can rest his case on so conclusive a presumption it would be not only supererogatory but at times risky, to attempt it.

548. Other presumptions.— Besides the conclusive presumption in favour of legitimacy, others may arise from circumstances the strength of which must naturally vary in each case. So in a case of disputed legitimacy of the plaintiff on the ground that there could be no legal marriage between his mother who was alleged but not proved to be a dancing girl attached to a Pagoda and his father who was a Zemindar, it was found that both were, however, Shudras belonging to different castes between whom inter-marriage was uncommon and its legality doubted. The evidence on both sides was conflicting and that adduced by the plaintiff as to how his mother (co-plaintiff and his next friend in the case) was married to the Zemindar false. But their Lordships held that the evidence failing the presumption remained: "The legal presumption in favour of a child born in his father's house of a mother lodged, and apparently treated, as a wife, treated as a legitimate child by his father, and whose legitimacy is disputed after the father's death, is one sale and proper to be made; and the opposing case should be put to strict proof."⁽⁴⁾ The plaintiff's claim was consequently decreed.

In the case of disputed legitimacy it is the child and not its mother that possesses the "legal character" referred to in S. 42 of the Specific Relief Act to obtain a declaration as therein provided. ⁽⁵⁾

24. Every child, whether legitimate or illegitimate, possesses the right of maintenance against its father or his estate. Provided that in a family subject to the Bengal School, such right, in the case of an illegitimate child, ceases upon its attaining majority.

549. Analogous Law.— The children's right of maintenance against their father is supported by the *jus naturale* and is recognized in all systems of law. It underlies S. 488 of the Code of Criminal Procedure which prescribes a summary remedy for maintenance of wives and children limited to a monthly allowance not exceeding Rs. 50. The common law right here declared is independent of that section and may be enforced by suit. In the case of legitimate issue the right is lifelong but both the Mitakshara and the Daya-bhag qualify it in the case of illegitimate issue, the former by continued

(1) *C. F. R. v. Mansfield*, 11 Q. B. 441.

(2) *Bosville v. Attorney-General*, 12 P. D. 346 (365-366)

177.

(3) *Bahadur Singh v. Vuru*, (1906) P. R. 23.

(4) *Ramamani v. Kulanthas* 14 M. I. A.

(5) *Latifan v. Moorti*, 23 C. W. N. 171.

service and obedience to the head of the family, the latter by his age and capacity to earn his own livelihood. (1) According to Yajnavalkya the illegitimate child of a regenerate father is entitled to maintenance not as a matter of consideration, as a provision against starvation and vagrancy, but as a matter of right and in recognition of his *status* as a member of his father's family and by reason of his exclusion from inheritance. As in the case of females of the family or of disqualified heirs, an illegitimate son is entitled to maintenance as long as he lives, and he possesses such right independent of his earnings, though they cannot be ignored in fixing his maintenance. But though the claim while it lasts may be charged upon the inheritance it still remains a purely personal claim and is not a heritable right. (2) It is not settled that the right of maintenance is independent of the mode of illegitimacy, so that the child whether born of a permanent mistress or a concubine is equally entitled to it. (3) The right of the child cannot be affected by reason of the fact that it was the issue of an adulterous intercourse. (4)

550. The amount of maintenance depends upon circumstances. It must bear some relation to the position and property of the father but an illegitimate son cannot claim a share therein in the guise of maintenance. (5) In one case the court decreed it at Rs. 25 per mensem but the value of the estate did not enter into its calculation, and it was treated merely as a compassionate allowance. (6) In another case the person entitled to maintenance was in possession of the inheritance the income from which yielded only Rs. 150 per annum which was found insufficient to maintain the claimant. The heir asserted his right to possession of the estate which the court decreed but burdened it with the payment of that amount though it represented the entire profit received therefrom. (7)

551. It has been held in a case that the common law right of maintenance is only available to an illegitimate son and not to an illegitimate daughter whose case is not supported by any text. (8)

For a further discussion see Chapter, on "Maintenance" *post*.

CHAPTER V

ON ADOPTION.

552. Topical Introduction.—It has already been seen that the adoption of children is not an institution peculiar to Hinduisim, but owes its origin to the social communism peculiar to the primitive races. All the European races have outlived that stage. In India it has become stereotyped as an integral

(1) *Ananthaya v. Vishnu*, 17 M. 160.

(2) *Roshan Singh v. Balwat Singh*, 22 A. 191 (1923) P. C.

(3) *Chhoturya v. Sahub Purhulad*, 7 M. I. A. 18 (50, 52) followed in *Roshan Singh v. Balwant Singh* 22 A. 191 (97) P. C. affirming *Balwant Singh v. Roshan Singh*, 18 A. 25.

(4) *Rahi v. Govinda*, 1 B. 97; *Subramanya v. Velu*, 20 M. L. J. 350; 5 I. C. 919;

Muttasamy v. Venkataswara, 12 M. I. A. 208; *Venkatachella v. Parvatham*, 8 M. H. C. R. 184; *Kuppa v. Singaravelu*, 8 M. 835 (827); *Viraramurthi v. Singaravelu*, 1 M. 806.

(5) *Gopalasami v. Arunachalam*, 27 M. 82.

(6) *Ib.* p. 37.

(7) *Oomrao v. Mankoonwer*, 2 N. W. P. H. C. R. 186.

(8) *Bhayalal v. Churaman*, 9 C. P. L. R. 38.

part of the Hindu personal law. In early times children irrespective of their sex were taken in adoption, and this is recommended by Nanda Pandit who commends the adoption of daughters as equally conducive to spiritual efficacy since both the gift of a daughter in marriage ⁽¹⁾ and the birth of a son to her are spiritually meritorious acts, ⁽²⁾ and children of both sexes are necessary to free one from the torments of hell. ⁽³⁾ This special pleading to bring into vogue an old custom which had long since fallen into desuetude does not appear to have appealed to the populace, and though the adoption of a daughter is not altogether unknown ⁽⁴⁾ it is now as dead as the Dodo amongst all classes of Hindus except the dancing girls amongst whom it is still common.

Leaving this out of account for the present, the adoption as now practised is the adoption of a son.

Adoption defined. **25.** (1) Adoption is a formal recognition of a person as the son of another.

(2) No adoption is valid unless it is made in conformity with law.

(3) Any Hindu, not having a son, grandson, or a great grandson alive at the time of adoption, may adopt a son to himself, and his wife or widow may with his consent do the same.

Synopsis.

- (1) *Texts on Adoption* (553). (3) *Who may adopt* (555).
(2) *What is an adopted son* (554). (4) *Adoption by minor* (556-557).

553. Analogous Law.—The law of adoption is supported by the following texts :—

Yajur Veda :—"A Brahmin on being born becomes a debtor in three obligations : to the Rishis (who are propounders of the sacred books) for studentship (to study the same) : to the gods, for sacrifices : to the ancestors, for progeny ; he is free from the debts who has son, who has performed sacrifices, and who has studied the vedas." ⁽⁵⁾

Manu :—"A son equal in caste and affectionately disposed whom his mother or father or both give accompanied by the pouring of water at a time of calamity is known as the Dattim (Dattak) son. He is considered as a son made or adopted, whom a man takes as his own son, the boy being equal in class, endowed with filial virtues, acquainted with the merit of performing obsequies to his adopter, and with the sin of omitting them." ⁽⁶⁾

Ib —(cited in Dattak Mimansa) "By a sonless person, should any description of a son be anxiously made for the sake of funeral oblations libations of water, and obsequial rites as well as for the celebrity of name".

Vashisth :—"If the father sees the face of the living son on birth, he transfers the debt to the son, and attains immortality. It has been revealed that endless are the heavenly regions for those having male issue, but there is no heavenly region for a sonless man."

Ib —"He who has no son may appoint his daughter in this manner to raise up a son for him saying, "the male child who shall be born from her in wedlock shall be mine for the purpose of performing my obsequies." ⁽⁷⁾

Attri :—"By a sonless person only, should always a substitute of a son be anxiously made for the sake of funeral oblations, libations of water and obsequial rites. If the father sees the face of a living son after birth, he transfers the debts to him, and attains immortality. As soon as a son is born the father becomes absolved from the debts to ancestors : on that day he acquires purity, since the son saves him from the infernal regions." ⁽⁸⁾

(1) *Dat. Mim.* VII-1, 16.

(2) *Ib.*, VII 16 18.

(3) *Ib.*, VII-8.

(4) *Nowab Ray v. Bhugbutte*, 6 B L R.

(5) *Nursing v. Bhuttun Lall*, W. R. (Gap.

No) 194.

(5) *Ashtak VI 8-10* *Hang. Vol. 1.* p. 179.

(6) *IX-168, 169*

(7) *IX-127.*

(8) *Cal. Ed Vol. 1*, p. 17, cited in *Mandlik's*

H. L., p 468 *F. N.* (2).

554. What is an adopted son.—An adopted son is a creature of the law. He is spoken of as a secondary, subsidiary or a substituted son. His affiliation is stated to be an imitation of nature. His necessity arose from secular motive. His continuance has been assured by an assumed spiritual benefit he is supposed to confer upon his adoptive father and his ancestors. But even persons, *e.g.*, the Jains, who do not believe in a hereafter, practise adoption. The fact that other sons whose spiritual efficacy was as great, if not greater, have become obsolete and the adopted son remains, suggests that its *raison d'être* must be “the ordinary human desire for perpetuation of family properties and names.” (1) This was stated by Manu himself in a passage already quoted.

But according to the sacred precepts the adoption of a son by a sonless man is a matter of religious necessity, but it does not mean that it is therefore necessarily a matter of legal obligation. All that it means is that adoption is commendable to one who has no present issue. (2)

555. Who may adopt.—In the matter of adoption the Indian Majority Act is inapplicable. Consequently there is no statutory bar as regards the age of adoption, and since the only direct provision of Hindu Law fixes the age of minority, in the sixteenth year (3) it follows that a person below that age cannot adopt. But since the affiliation of a stranger calls for the exercise of discretion the courts have laid down that no one who has not attained the age of discretion is competent to make an adoption.

556. The question then is what is an age of discretion. It would seem that in the absence of any specific rule of Hindu Law the statutory law of majority should guide the courts as courts administering the rules of justice, equity and good conscience. This the courts have generally enjoined but on the subject of adoption they have held the attainment of 15 or 16 years by a husband as a sufficient age “which according to the law prevalent in Bengal is to be regarded as the age of discretion.” (4) But this case was never intended to settle a general rule of Hindu majority and if it has that effect, then a Hindu adopter would fare much worse than a Hindu transferor or testator, inasmuch as a boy of 16 might at the age of impressionable youth, moved perhaps by a feeling of religious piety, or unduly alarmed by a passing ailment, commit an act for which he might heartily feel sorry when he foresees the consequence of it. Moreover the two ages of majority may, at times, lead to awkward results. Thus while a person below 18 may not execute an authority to adopt a son, since it is compulsorily registrable, (5) he is competent to confer such authority verbally or by a will, and what is more, make an adoption himself. In other words, he is a minor to delegate his authority to another, though not a minor to exercise it himself.

557. The Legislature has made some provision for protecting such minors as are placed under a certificated guardian (6) or the management of whose estate is assumed by the court of wards, (7) but the Legislature should certainly protect

(1) *Sri Balusu v. Sri Balusu*, 22 M 398 (414) P. C.; S. O 21 A 460 (477) P. C.

(2) *Ib contra Rajendra v. Saroda Soonduree*, 15 W. R. 548.

(3) *Manu* VIII-27

(4) *Rajendra v. Saroda Soonduree*, 15 W. R. 548 followed in *Jumona v. Bamasoondari*,

1 C. 289 (295, 296) (P. C.)

(5) Ss 17 (3) and 35 (3) (b) of the Registration Act (XVI of 1908)

(6) The Guardians and Wards Act (VIII of 1890)

(7) The Court of Wards Acts.

other minors as well. As it is, it is left for the court to decide whether the adopter in a given case had attained sufficient maturity of understanding to judge of the nature of his act and its consequences upon his natural heirs and after-born progeny.

26. No one can adopt a son unless at the time of adoption he had no living son, grandson, or great grandson.

Adopter must be issueless.

Synopsis.

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| (1) <i>Adopter to be issueless</i> (558). | (7) <i>Kritrim adoption</i> (566). |
| (2) <i>Historical retrospect</i> (559). | (8) <i>Usage prohibiting adoption</i> (567). |
| (3) <i>Simultaneous adoptions</i> (560). | (9) <i>Invalidity of adoption of one by two persons</i> (568). |
| (4) <i>Adoption by person having disqualified son</i> (561). | (10) <i>Notice immaterial</i> (569). |
| (5) <i>Adoption by Jains</i> (564). | (11) <i>Adoption of a daughter</i> (570). |
| (6) <i>Parsi adoption</i> (565). | (12) <i>Illatom adoption</i> (571). |

558. Analogous Law.—This condition is supported by a text of Manu which runs as follows :—

“ By a son, a man conquers worlds : by the son's son he enjoys immortality ; and afterwards by the son of a grandson, he reaches the solar abode ” (1)

As all these relations are qualified to perform the obsequies, (2) the main object of adoption is thus attained and there is no necessity for adoption.

559. But this qualification is of a later growth. In ancient times a

Historical Retrospect.

son being property necessary to strengthen the family, any person was entitled to acquire a son of which twelve modes of acquisition were recognized. The acquisition of all these sons was still customary up to a very recent age when the Mitakshara and the Dayabhag were written since they both recognize their status. The texts however discourage the affiliation of a substitute when the real son is in existence. But the texts have not the effect of illegalizing such acquisition, if made. But the growing public opinion, strengthened by changed environments discountenanced the appointment of substitute sons to the detriment of the legitimate issue. This is reflected by Nanda Pandit who struggles to read a positive prohibition in the old texts, but even he could not circumvent the Vedic legend of Vishwamitra's adoption of Devarat even though he had 100 sons of his own. (3) Importuned by his pupils to reconcile this precedent with his view that a man with a living son could not take another by adoption, and unable to explain it away, Nanda Pandit reluctantly conceded that a man with a living issue might adopt, provided he took permission of his legitimate issue. (4) This was acceded to by Devand Bhatt, the author of Dattak Chandrika, the other recognized authority on adoption. (5) And this view was accepted by

(1) IX-187 cited Datt, Mim-Sec 1 18.

(2) Vishnu Puran cited *Id* Sec 1-14

(3) The veda Aitreya Brahmana set out in Sarkar's H. L. 181.

(4) Sec. Datt Mim Sec 1.12 : “ But, however, if you pertinaciously insist on the superior cogency even of the indication of a revelation to a revelation recorded from memory then we accede that a man, though

possessed of male issue, may adopt another son with the sanction of such issue.”

(5) Datt. Chand 1 8-8 disposes of the other substituted sons by citing *rihaspati's* text “ sons of many descriptions who were made by ancient saints, cannot now be adopted by men, by reason of their deficiency of power ” *Id* (Suth) p. 109.

Colebrooke as correct and is echoed in his Digest. (1) Then again neither writer adverts to, or expressly prohibits the adoption of a second son in the presence of the first adopted son. The question was considered by the Privy Council who decided against its validity ; from which it, of course, follows *a fortiori* and was so regarded by their Lordships, that there could be no adoption when a legitimate son was alive. (2)

560. Two other questions remain. Can a man having two or more wives adopt as many sons as he has wives, and in any case, can, he make two or more adoptions simultaneously ? Gulab Shastri answers both these questions in the affirmative, adding, that it is not only legal but usual in Bengal. (3) He argues that the fiction of adoption should imitate nature. But the courts even in Bengal have answered both the questions in the negative holding two simultaneous or successive adoptions equally invalid and unsupported by the text or usage. (4) And the questions are really ones for usage and not logic to answer. In any case, it is against the policy of law to favour the creation of artificial relations, and it would treat that as prohibited what is not expressly permitted.

561. Since the primary purpose of adoption, as now understood, is to provide for the adopter's spiritual advancement by having some one legally qualified to perform his obsequies, and since such qualification must be judged by Hindu Law which disqualifies a son who is impotent, an idiot or insane, blind, deaf, dumb, lame, congenitally suffering from leprosy or from any infirmity or disease which disqualifies him for inheritance or one who has become a convert to an alien faith or has turned a hermit, sanyasi or Fakir, (5) and thereby snapped the natural tie by which he was bound to his father, the latter may make an adoption as such disqualified son is as good as civilly dead to him. This is also the view of Nanda Pandit who argues that since subsidiary sons were neither entitled to perform the obsequies nor share the inheritance, and participation in the obsequies and estate is the result of filial relation, a person who is impotent and the rest merely bears the semblance of being a son but is of no use for either purpose. (6) A son who has merely become a Bairagi who is not an ascetic does not forfeit his religious efficacy. (7) In order to have that effect the renunciation must be complete with no legal possibility of return to civil life. Such is the case of an ascetic, Sanyasi or Fakir who then form a brotherhood of their own and whose return even to their domestic life does not revive their lost right of inheritance. (8) There is of course, nothing in the Caste Disabilities Removal Act (9) to militate against this view, since the renunciation of worldly pursuits and worldly ties does

(1) Dig. p. 398 : cited in *Rungama v. Achama* 4 M. I. A 1 followed in *Akhoy v. Kalapahar* 12 C 406 (1 2) P C ;

(2) *Rungama v. Achama* 4. M I. A explained in *Akhoy v. Kalapahar* 12 C. 406 (412) P C.

(3) Adoption (2nd Ed) p. 183, 184.

(4) *Joy Chunder v. Bhyrub Chunder* (1849) S. D. A. 461 : *Sudanund v. Benomallee* 1 Marsh 317.

(5) *Mohru v. Moti* (1875) P. R. 52.

(6) Datt Mim 8. II-32 (Suth) p. 31 To the same effect 1 *Strange H. L.*, p 77; *Sarkar Adoption* (2nd Ed) 195, 196

(7) *Teeluk Chunder v. Shama Churn*, 1 W. R. 209; *Jagannath v. Bidyanudna*, 10 W. R. 172; *Khoderam v. Rookhinee*, 15 W R. 197.

(8) Dayabhog 5.14.

(9) XXI of 1850.

not amount to his "renouncing or having been excluded from the communion of any religion, or being deprived of caste." (1)

For the same reason a father whose son has disappeared for a time, sufficiently long to raise the presumption of death, is set free to make an adoption. Such presumption will arise if he has not been heard of for seven years by those who would naturally have heard of him if he had been alive. (2)

563. It has been said that in such a case the adoption is not valid unless it is proved that the son was dead at the date of the adoption, (3) but presumption is one mode of proof where the son has not been heard of for seven years prior to the date of adoption. Of course, where the question of the date of death is material it must be proved and cannot be left to presumption, since presumption merely extends to death and not to the date and time thereof.

564. It has already been seen that Jains though forming a sect of dissenters are classed as Hindus (§§ 296-297). As such they have the same right of adoption though their adoption is a purely secular institution (4) and is free from many of the restrictions of orthodox Hinduism. (5) For instance a Jain widow is entitled to adopt without the authority of her husband (6) and there is no objection to the adoption of a married man, (7) or sister (8) or daughter's son. (9)

565. Parsi adoption.—The Parsis who are Persian refugees in India have brought with them the ancient Aryan custom of adoption. Their adoption lacks the religious element of spiritual efficacy, though the adopted son has to perform the funeral ceremonies of his adoptive father to whom he inherits as a natural son. According to the evidence given in a case which was ultimately decided by the Privy Council (1) an adopted son may be either a "Dharm putr" or merely a "Palak Putra." In the case of the former, adoption is made in the presence of the priest who reads the "Tundurasti" or a benedictory prayer in the name of the person who claims to be the adopted son. A declaration of his adoption is usually made on the third day after the decease of the adoptive father though it is not indispensable and it is usual to take a writing in the absence of which the adopted son is treated merely as a palak putra.

566. Kritrim adoption.—A Maithil widow has no power of adoption to her husband with or without his consent. Any authority given by him will not, therefore, confer on her any power of adoption as it would be illegal.

She can however, adopt a boy to herself. But as already stated the son so adopted becomes her own son and not the son of her husband. He has no right to inherit her husband's estate and *a fortiori* has no right of collateral succession.

(1) *Contra Sarkar's Adoption* (2nd Ed.), p. 197.

(2) S. 108 Ev. A. (A 1 of 1872) as to the meaning of which see *In re Phene's Trusts* L. R. 5 Ch. 189 (144); *Parmeshar v. Bisheshar* 1 A. 53 F. B., *Mashar Ali v. Budh Singh*, 7 A. 297; *Dharup v. Gobind* 8 A. 614; *Dhondo v. Ganesh* 11 B. 438; *Rango v. Mud yappa* 32 B. 296 (808); *Contra Janumajay v. Keshublal* 2 B. L. A. (Ac) 134; *Guru Das v. Matilal* 6 B. L. R. (App) 16 following the Hindu Law are now superseded by the Evidence Act.

(3) *Trev. H. L.* (2nd Ed.) 105.

(4) *Asharfi Kunwar v. Rupchand*, 30 A. 197.

(5) *Lakhmichand v. Gatto*, 8 A. 819; *Harnabh v. Mandil*, 27 C. 379.

(6) *Asharfi Kunwar v. Rupchand*, 30 A. 197.

(7) *Hassan Ali v. Naga Mal*, 1 A. 283.

(8) *Lakhmichand v. Gatto*, 8 A. 819.

(9) *Homabae v. Punjeabhaee*, 5 W. R. 102 P. C.

Even where the father adopts him in the *Kritrim* and not in the *Dattak* form it merely creates a personal relationship between him and his adoptive father and the adopted son succeeds only to his estate. (1)

567. Adoption may be prohibited by custom, but in this case if the parties are admittedly Hindus, adoption will be presumed to be permissible till the contrary is established by custom. (2)
Usage may prohibit adoption. But if the family was one of non-Hindu origin and had adopted only some of the customs of Hinduism, then it would be on it to prove that the custom of adoption was also the one adopted by it. Such was held to be the case of a Cooch Bihar family which had only become partially Hinduised and as to whom the custom of adoption was pleaded but which the Privy Council held required to be proved like any other custom. (3)

568. Two persons, even brothers, cannot take the same boy in adoption either conjointly or consecutively. If they do, both the adoptions would be invalid. (4) Even as regards the adoption by two widows taking one boy in adoption to their husband, its legality depends upon local custom which justifies such adoption in Western India. (5) but not elsewhere.

569. The adopter's motive influencing his adoption is wholly immaterial and does not affect its validity, even if it be to defeat an alienation or disappoint an expectant heir. But of course, an adoption cannot be made a cloak for defrauding *bona fide* transferees who would be entitled to retain their property, or decreed restitution, if their title is attacked by the adopted son in collusion with the adopter.

570. It has already been seen (§ 552) that the *Smritis* favour the adoption of a daughter on the same ground of religious efficacy. Even Nanda Pandit (6) commends it on the grounds that it is conducive to a dual spiritual benefit derived from the gift of a daughter in marriage (7) and from a daughter's son (8) and the necessity of having children of both sexes to save one from the torments of hell. (9) Consequently in old cases such adoptions were upheld (10) and the Pandits, who were consulted by the Sadar Court, supported their view in favour of such adoptions by citing a considerable body of authorities. (11) And this custom was in keeping with that in vogue with the other branches of the Aryan race. (12) But though possessing ample sacred authority in support of the

(1) *Jiwan Mal v. Jamna Das*, (1911) P. L. R. 67; 10 I C. 822

(2) *Vandrayan v. Manilal*, 16 B. 470 (476); *Verabhai v. Bai Hiraba*, 27 E. 492 (498, 499) P. C.; *Bishmath v. Ramchurn*, (1850) S. D. A. B. 20 followed in *Fanindra v. Rajeswar*, 11 C. 468 (478) P. C.

(3) *Fanindra v. Rajeswar*, 11 C. 468 (478) P. C.

(4) *Raj Coomar v. Bissesur*, 10 C. 688 (696, 697).

(5) *Indar Kunwar v. Jaipal*, 15 C. 725 (746, 747) P. C.; *Narasimha v. Parthasarathy*, 37 M. 189 (220) P. C.

(6) "The daughter given resembling the legitimate daughter is a substitute for a son"

Datt. Mim. VII-81 *Suth.* p 98. Nanda Pandit supports his view by citing a considerable array of authorities favouring her adoption—See Sec. VII devoted to that topic (*Suth.*) pp. 91-100.

(7) *Datt. Mim.* VII-§ 1. 16.

(8) *Ib.* VII-§ 16, 17, 18.

(9) *Ib.* VI-§ 8.

(10) *Nowab Ray v. Bhuguttee*, 6 Beng. S. R. 4; 7 I D. (O.S.) 669; see authorities in support cited at pp 675-678.

(11) Printed at the end of *Nowab Ray v. Bhuguttee*, 6 Beng. S. R. 4; 7 I. D. (O.S.) 669 (675, 678).

(12) See General Introduction, §§

custom, it does not appear to have been ever popular with the Hindus and in course of time it fell into desuetude, till it now survives only in the case of women of an unfortunate class who are suffered to take daughters in adoption. But the present tendency of the law is to discourage such adoptions. In Bombay the Court refused to uphold such an adoption by a Brahmin, holding it to be opposed to Mayukh ⁽¹⁾ and the Madras Court has held it equally inapplicable to a family man, ⁽²⁾ while even as regards prostitutes and dancing girls, the courts differ as to the legality of their adoptions of daughters. Both in Calcutta and in some cases in Bombay, such adoptions are held illegal on the ground that an adoption by a woman can only be to her husband and as these adopters have no husbands, they cannot adopt to themselves. ⁽³⁾ But the Madras High Court upheld such adoptions as sanctioned by usage ⁽⁴⁾ though if their purpose be immoral they cannot be tolerated. ⁽⁵⁾ And this view has also prevailed in some cases in Bombay. ⁽⁶⁾

571. No other relationship except that of a son or of a daughter can be ordinarily created by adoption. One cannot for instance, adopt a person to be one's grandson, great grandson, brother or a nephew.

The only deviation from this rule is the adoption of a son-in-law which has become rooted in the districts of Bellary, Cuddapah, Kurnool, Nellore, and the North and South Arcot Districts of the Madras Presidency. ⁽⁷⁾ This is locally known as the custom of *illatom* and is quite independent of the adoption of a son. A person who has no son living at the time though he may have any number of daughters may adopt an *illatom* son-in-law ⁽⁸⁾ but it does not prevent the subsequent adoption of a *dattak* son. ⁽⁹⁾ The *illatom* son-in-law counts as a son and has the same rights as the *dattak* son sharing equally with him on partition. ⁽¹⁰⁾ Among the Reddis or the Kapu caste of Vellore he is allowed even to continue his connection with his natural family being a preferential heir to his natural father's divided brother ⁽¹¹⁾ while the members of his natural family continue their right of succession to him. ⁽¹²⁾ The *illatom* son-in-law may during his life-time deal with the property as he chooses and his sons have no right by birth in such property. ⁽¹³⁾ On his death it passes to his heirs in the same way as self-acquired property, the heirs of the adopter having no right to it. ⁽¹⁴⁾ Where he lives with the adopted son there may be commensality but in the absence of custom, there cannot be any co-parcenership between the two and there is no right of survivorship. ⁽¹⁵⁾ The relationship of *illatom* commences as soon as a person is admitted into the family, with a

(1) *Ganga Bai v. Ananta*, 18 B. 690.
 (2) *Guddati v. Ganapati*, 28 M. L. J. 493.
 (3) *Hancower v. Hancower*, 2 Mor. Dig 188; *Narendra v. Dinanalli*, 86 C. 824
Mathura v. Esu 4 B. 545; *Tara v. Nana* 14 B. 90 (92); *Hira v. Radha*, 37 B 116.
 (4) *Venku v. Mahalinga* 11 M. 398; *Muttukannu v. Paramasami* 12 M. 214; *Sivasangu v. Minal* ib. 277.
 (5) *Kamakshi v. Ramasami*, 19 M. 127.
 (6) *Manjamma v. Seshagiri Rao*, 26 B. 491 (496).
 (7) *Hanumantamma v. Rami*, 4 M. 272 (288).
 (8) *Id.*; *contra Nallury v. Kamapalli*, 26

I. C. (M) 54 the existence of a natural son is no bar to *illatom* adoption.

(9) *Chanamma v. Subbaya*, 9 M. 114 (115).

(10) *Hanumantamma v. Rami*, 4 M. 272 (288); *Chanamma v. Subbaya*, 9 M. 114 (116).

(11) *Shivada v. Shivada*, 6 M. 267.

(12) *Balarami v. Pera*, 6 M. 267; *Liamkrishna v. Subbakka*, 12 M 442.

(13) *Challa v. Challa*, 7 M. H. C. R. 25.

(14) *Challa v. Challa*, 7 M. H. C. R. 25; *Ramkrishna v. Subbakka*, 12 M. 442 (444).

(15) *Chanamma v. Subbaya*, 9 M. 114 (116).

view to marrying him to the daughter of the taker though the marriage takes place after the latter's death. (1) Since an *illatom* adoption, though recognized, is based on custom, it follows that the claim founded on that relationship cannot be made good unless the relationship itself is strictly proved. (2)

27. Save as provided by any law for the time being in force, every Hindu has the right to adopt a son provided—

Who may adopt.

- (a) he has attained the age of discretion ;
- (b) and has no son, legitimate or adopted, or grandson or great grandson in the male line then living ;
- (c) is possessed of sound mind ;
- (d) and is not suffering from any mental or physical disability which disqualifies him from inheritance.

Explanation 1.—The facts that the adopter is a bachelor or a widower, or that his wife is pregnant or opposes the adoption are immaterial to the validity of adoption.

Explanation 2.—A son mentioned in clause (d) does not include a son who suffers from any of the disabilities which disqualifies him from inheritance.

Illustrations.

(a) A is a Government ward subject to an Act which prohibits A from adopting without the consent of the Local Government. A adopts. The adoption is invalid unless consented to as provided in the Act.

(b) An eunuch registered under Act (XXVII of 1871) is declared by S. 29 thereof incapable of adopting a son. A cannot adopt.

(c) A suffers from virulent leprosy which disqualifies him to inherit. A cannot adopt.

(d) A has turned a Sanyasi and so renounced the world. A cannot adopt.

(e) A has a son who is deaf and dumb, or suffers from any of the disabilities mentioned in *ills. (c) and (d)*. A can adopt.

(f) A who has an adopted son B, adopts C. The adoption is invalid, for a Hindu cannot have two adopted sons at the same time.

Synopsis.

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|---|--|
| (1) <i>Capacity to adopt</i> (572). | <i>inherit</i> (579). |
| (2) <i>Simultaneous adoptions in valid</i> (573). | (9) <i>Adoption during pollution</i> (580). |
| (3) <i>Adoption during pregnancy of wife</i> (574). | (10) <i>Agreements against adoption</i> (581). |
| (4) <i>Degradation of adopter</i> (575). | (11) <i>Statutory prohibition of adoption</i> (583). |
| (5) <i>Adoption by lunatic</i> (576). | (12) <i>Assent of wife unnecessary</i> (585). |
| (6) <i>Adoption by bachelor or widower</i> (577). | (13) <i>Participation by one of the wives</i> (586). |
| (7) <i>Adoption by ascetic</i> (578). | (14) <i>Texts on adoption by woman</i> (587). |
| (8) <i>Adoption by person disqualified to</i> | (15) <i>Working rule stated</i> (589). |

(1) *Venkayalapatti v. Nagendra*, (1911) 2 M. W. N. 193 and 11 I. C. 25; *Vachora v. Vachora*, 13 M. L. T. 118; 18 I. C. 698.

(2) *Pattya v. Venkamma*, 17 M.L.T. 393; 29 I. C. 54.

572. Adoption is a solemn act and alters the course of devolution of property. In effect it is even more far reaching than a will. **No adoption without discretion.**

There can therefore be no valid adoption unless, the adopter had obtained sufficient maturity of understanding and was otherwise in possession of his senses. While therefore an idiot and a lunatic are not inherently incompetent to make an adoption, an adoption made by them may be set aside on the ground that they did not fully understand the nature of the act and of its effect upon their rights. So in setting aside the adoption and a will alleged to have been made by a dying man almost continually insensible, though occasionally roused to consciousness by loud tones or pungent applications to his nostrils, but almost immediately afterwards relapsing into a state of insensibility with his mind quite inert, and instantly fatigued upon the slightest exertion, their Lordships observed: "How is it possible that a man in such a condition could be capable of any act requiring judgment and reflection, especially one to which no antecedent circumstances appear to have led, and for which the enfeebled and scarcely conscious mind was unprepared. In such a state as that described, even if the mind were passively awake to the suggestions made to it, it would naturally cling to repose, and yield, for the sake of it, to any external suggestion . . . If the law were to countenance acts of this description, performed at such a time and under such circumstances, without the clearest and most cogent evidence to establish their validity, relations and the managers would be encouraged to advance their own private notions of what might be advisable to be done for the good of the family, and to ascribe acts to a dying man in which he would have been the merely passive instrument to prolong their own gain and authority." (1)

These words are equally applicable to persons of immature intellect and especially women who are often imposed upon to adopt by persons who are less anxious for the repose of the adopter's soul than for feathering their own nests.

573. The existence of any of the relations specified in cl. (b) of the section is a bar to an adoption, for every one of them is an heir and is capable of conferring the fullest spiritual benefit on the adopter. It does not make any difference in the rule if the person in existence is himself an adopted son. **Simultaneous adoptions invalid.** For much the same reason the simultaneous adoption of two or more sons is invalid as to all. This was laid down by the High Court of Calcutta in several cases, one of which has been affirmed by the Privy Council, who said, "The observation which appears to their Lordships to be the strongest against such an adoption as this being allowed by the Hindu Law, is that no authority and no text has been, or apparently can be produced showing that the Hindu Law allows it. . . . The entire absence of any authority in favour of such an adoption is an argument that the Hindu Law did not recognize it, and that it has really not been the practice amongst Hindus; for if such a practice had prevailed to any appreciable extent, some authorities would have been found on the subject." (2)

(1) *Tayammal v. Sashachallia*, 10 M. I. A. 429 (184 435); *Bulub v. Kishenpria*, 6 B. S. R. 219.

(2) *Monemotho Nath v. Onath Nath, Bourke* 189; *Sidessur v. Doorga*, *Ib.*, 260; *Gyanendra*

v. Kolapahar, 9 C. 50 affirmed O. A. *Akhoy Chunder v. Kalapahar*, 12 C. 406 (412) P. C.; *Doorga v. Surendra*, 12 C. 68; O. A. 19 C. 513 P. C.; *Mahesh v. Taruck*, 20 C. 487.

574. Though Hindu Law counts the birth of a child as from the date of its conception ⁽¹⁾ there is no prohibition against adoption by a person during the pregnancy of his wife. ⁽²⁾ The right to adoption cannot be suspended upon so remote and contingent a possibility—and such contingencies may often occur, as not only the adopter's but his son's, grandson's and great grandson's wives may become pregnant. As Sargeant, C. J., observed: "It may doubtless be contended, that when the wife is in a state of pregnancy there may be a son in the womb at the moment of adoption; but the possibility that the child *in utero* may be a female, would, if the power to adopt were to be deemed suspended by the mere fact of pregnancy, always imperil, and in some cases seriously so, the acquisition of those spiritual benefits which the rite of adoption is supposed to supply in default of a legitimate son."

575. But though the apostacy of the son frees the father for adoption, his own apostacy or degradation from caste does not disqualify him for adoption. In this he is protected by the Caste Disabilities Removal Act. ⁽³⁾ But though a convert to Mahomedanism or Christianity may nominally continue to possess his previous right of adoption, it will be a question, whether, by his abandonment of Hinduism, and acceptance of the doctrines of a new religion he has not abandoned the practice of adoption which only the religion he had abandoned allowed, but which his new religion does not. Moreover, since adoption is merely a means to the attainment of spiritual beatitude in accordance with the tenets of the Hindu religion, the renunciation of the religion would carry with it also a necessary inference that the convert had also abandoned a usage of that religion. ⁽⁴⁾ But this is a mere presumption. It does not preclude the possibility of adoption by a converted Mahomedan, and such customary rights are known to have persisted in the Punjab, ⁽⁵⁾ where adoptions by converted Mahomedans are both customary and common, and some of whom even closely follow the Hindu rule that a widow cannot adopt without the authority of her husband. ⁽⁶⁾

(2) or is a lunatic. **576.** So again lunacy is no bar to a person's right of adoption, provided the act is performed in a lucid interval.

This he may do even though he had been adjudged lunatic and a manager appointed for the custody of his person and the management of his estate. ⁽⁷⁾

(3) Bachelor or a widower. **577.** There is no express authority prohibiting the adoption by a bachelor ⁽⁸⁾ or a widower and both are therefore competent to adopt. ⁽⁹⁾

(1) Mit. 1.6.8.11; *Tagore v. Tagore*, 18 W. R. 859 P. C.

(2) *Doulat v. Ramlat*, 29 A. 310; *Nagadhushanam v. Seshamma*, 3 M. 180; *Hanmant v. Bhimacharya*, 12 B. 105.

(3) XXI of 1850.

(4) *Machhi Lai v. Hirbai*, 23 B. 264 (265)

(5) *Najibulla v. Nadir*, (1881) P. R. 120; *Umar Baksh v. Dhandu*, (1894) P. R. 89; *Nada v. Nur Muhammad*, (1894) P. R. 143; *Kur Ali v. Mawaz Khan*, (1900) P. R. 214; *Muhammad Niazuddin v. Mhd. Umar Khan*, (1907) P. R. 1; *Jivan v. Harnam Das*, (1907) P. W. R. 77.

(6) *Abdul Rahiman v. Bure Khan* (1911) P. R. 196; *Kallu v. Nur Muhi*, (1891) P.

R. 104.

(7) S. 67 Lunacy Act Act IV of 1912; *Amanchi v. Amanchi*, 19 M. L.T. 243 : 83 I. C. 578.

(8) *Gunnappa v. Sankappa*, (1889) B. Sel. R. 202; *Gopal v. Narayan* 12 B. 829; *Chandrasekharudu v. Bramhanna* 4 M. H. C. R. 270; *Monemtho Nath Dey v. Oononthnath*, 2 I. J. (N.S.) 24 (48).

(9) *Nagapa v. Subha*, 2 M. H. C. R. 367; *Chandrasekarudu v. Brahmanna* 4 M. H. C. R. 270; *Gopal v. Narayan* 12 B. 829; *contra* *Bhattacharje's H. L.* (8 Ed.) 848; *Sarkar Adoption* (2nd Ed.) 200 *dubitante*; *Somanath* in his *Datt. Mim.* cited per *Strange*, *Manual of H. L.*, p. 61.

578. But a person who has permanently renounced the world and turned a hermit has no need for adoption and he is held to be ineligible. (1) But such ineligibility must arise from custom or nature and purpose of the life affected. A mere change of status does not carry with it any disqualification to adopt as a matter of legal necessity. If any such did arise, it would be obnoxious to the provisions of the Caste Disabilities Removal Act. At any rate there is no law to prevent a *Grihast Gossain* from making an adoption. They are entitled to hold property and have now come to be regarded as a caste by themselves following a secular occupation. (2)

579. The question whether a person suffering from mental and physical infirmities, *e.g.*, congenital blindness, deafness, dumbness, impotency, lunacy, virulent leprosy, idiocy, lunacy, disqualifying him from inheritance, forfeits his right of adoption is neither covered by authority nor by judicial precedent. And a reasoning by analogy, always to be deprecated in the interpretation of law, does not lead to unequivocal results. In a case of disputed succession to a *Mahant* ultimately decided by the Privy Council, the plaintiff claimed to succeed to the *Muth* properties as the *chela* of the deceased Mahant. The defence was that the Mahant was a leper and so disqualified to make a valid appointment of his successor. The High Court threw out his suit holding that the plaintiff had failed to prove that he had been appointed by the Mahant, and that the Mahant could not have validly adopted him for he was suffering from leprosy. Mr. Mayne who supported this decree before the Privy Council conceded on the authority of decided cases (3) that only virulent leprosy would have disqualified the Mahant and that his leprosy was not of that type. As there was no evidence to prove that the deceased's leprosy was of this type, the Privy Council reversed the decision of the High Court by merely reversing their finding that the plaintiff had failed to prove his appointment. (4) But the fact that Mr. Mayne conceded and Sir R. Couch adopted this concession as the statement of sound law, in delivering the judgment of their Lordships, by observing that "in order to disqualify from making an adoption the leprosy must be of a virulent form" shows that this malady was treated by all concerned as a sufficient disqualification for adoption. If so, the other infirmities which occur in the same text would be equally a bar to adoption. In the case of Shudras, leprosy is no bar. (5) It is submitted that neither leprosy nor any other infirmity is a legal bar to adoption because a leper still remains a Hindu and has a right to have his obsequies performed and his soul transferred to heavenly regions which he would not be able to do without adoption. If at all, adoption is to him a greater necessity, otherwise, since his sufferings of this life are due to the sins he had committed in his past life, if he dies with his obsequial rites

(1) *Teku v Busti*, (1874) P. R. 15; in *Mhalsa Bai v Vithoba*, 7 B. H. C. R. (App.) XXVI (XXXI) the validity of an adoption was challenged on the ground that the adopter had undergone the ceremony of "Vibhut Vida" i.e. the father had assumed the role of a Lingayat ascetic but the court held this not proved and held that even if proved, it did not amount to Sanyas or complete abandonment of worldly matters.

(2) *Balaqir v. Dhondgir*, 5 Bom L. R. 114.

(3) *Ananta v. Ramabai*, 1 B. H. C. R. 554; *Janardhan v. Gopal*, 5 B. H. C. R.

(AC) 145; *Muthuvelayuda v. Parasakti* (1859-1862) Mad. S. D. A 238

(4) *Bhagoban v. Ram Prapanna*, 22 C. 848 (858) P. C. In *Uchobunessuree v. Gourree Dass*, 11 W. R. 535, the plaintiff had admitted that the disability due to leprosy could be expiated by penance (citing Shama Charan Sircar's *Vyavastha Darpan*, 2nd Ed., p. 1010) which the two courts below had found against the plaintiff. No further question was therefore gone into.

(5) *Sukumari v. Ananta*, 28 C. 168.

unperformed he would be exposed to even greater torments in the next life against which adoption is the only cure. ⁽¹⁾ Moreover, the author of Dattakimansa commenting on the text of Yajnavalkya ⁽²⁾ on the right of the issue of disqualified persons, expressly contemplates adoptions by them ⁽⁸⁾ though the Mitakshara understands that text to forbid the adoption of other sons. ⁽⁴⁾

But Babu Golap Shastri questions the correctness of this translation of the text and rightly, for a reference to the original shows that what the commentator meant was that the specific mention of the *Auras* and *Kshetraj* sons by Yajnavalkya was intended "to exclude other sons from inheritance" on the principle of *expressio unius exclusio alterius*. ⁽⁵⁾

580. The validity of an adoption cannot be attacked on the ground that **(6) Adoption during pollution.** it was made during the period of ceremonial impurity following the birth or death of a relative. ⁽⁶⁾

The question was raised and considered by the Madras High Court in which they said, "Pollution is only a bar to a religious act and renders religious ceremonies inefficacious, but a gift and acceptance are secular acts and may therefore be supplemented by *Datta Homa* after the period of pollution." ⁽⁷⁾ As, however, *Datta Homa* is not necessary in all cases it follows that an adoption may be completed even during a period of pollution. ⁽⁸⁾ And this seems to be essential since the services of a son, natural or adopted, are indispensable for the performance of the obsequial rites. Moreover, the *Shastras* provide for the vicarious performance of the ceremonies of adoption and the natural father has been held competent to delegate his authority to a relative, in case of his own sickness, to make the delivery ⁽⁹⁾ for otherwise the delay might imperil, and in some cases seriously so, the acquisition of those spiritual benefits which the rite of adoption is supposed to supply in default of a legitimate son. As observed in a Bombay case, "A man in bad health or on his death bed, as in the present case, might not live till the child was born and yet, if the rule be as contended for the appellant, the suspension must *ipso facto* take place in all cases during pregnancy: for we entirely agree with the Madras High Court that it would be impossible to make the validity of an adoption dependent on knowledge or ignorance of the fact of pregnancy." ⁽¹⁰⁾

581. An agreement not to make an adoption may be made by two undivided relatives, subject to the Mitakshara Law, such as **Agreements against adoption.** brothers, to preserve their right of survivorship to one another, or it may be that one or of both of them prohibit

(1) Sarkar's Adoption (2nd Ed.), p 202
(2) "But their sons, whether legitimate, or the offspring of a wife by a kinsman, are entitled to allotments, if free from similar defects" Yaj. 2 S 141.

(3) Datt Ch. Sect VI-§ 1.
(4) Mit. 2.10, 10.11. See Suth. Note to Datt. Ch. p 144.

(5) Sarkar Adoption (2nd Ed.) p 202
(6) The period of pollution (mourning) varies with the caste and closeness of relationship. The extreme period for Brahmins is 10 days, for Kshatriyas 12 days, for Vaishyas 16 days and for Shudras 30 days. But on the death of a man's parent or a woman's husband, the period of pollution lasts for a whole year.

(7) *Santappayya v. Rangappayya*. 12

M. 897 (898, 899) followed in *Asita v. Nirodi* 20 C.W.N. 901 (908); 35 I.C. 127. In *Ranganayakamma v. Ahwar Setti* 18 M. 214 (222) pollution was incidentally mentioned as an objection to adoption but its effect was not considered the adoption being set aside as brought about by coercion (see *Ib* p. 224). So in *Komalinga v. Sadasiva* 1. W. R. 25 P. C. pollution was pleaded as a bar but the P. C. found as a fact that the adoption had been made after the period of pollution which, they observed, extended to 16 days.

(8) *Thangathanni v. Ramu*, 5 M. 858.

(9) *Jannabai v. Raychand* 7 B. 221 (227, 228); *Vijjarangam v. Lakshuman* 8 B.H.C. R. 244 (257) and see *post*.

(10) *Hanmant v. Bhimacharya*, 12 B. 105,

their descendants to make an adoption. In the latter case, it is now settled that the father cannot fetter his son's right to adopt or legally stipulate that if he should adopt, the son so adopted should not inherit.⁽¹⁾ The Privy Council however refrained from considering its effect *inter partes*. But there can be no doubt that if adoption is favoured by law and indeed an act, at least morally obligatory upon the sonless father, then such an agreement in restraint of acquiring an issue, would ordinarily be void and in any case, it could not shake the status of the adopted son, whatever consequences a breach of such agreement might entail *inter partes*. But this does not of course, prevent a father who has, in Bengal, the unfettered power of disposal of his property, from devising his estate to his son on condition that he does not make an adoption before he attains the eighteenth year, up to which period he was to remain in charge of his testamentary guardians. Here the clause was upheld not because there was any prohibition against adoption but because the father had by inserting the clause merely postponed the Hindu age of minority for a period of two years. In other words, while the father could not alter the son's general right of adoption, he was well within his right to guide and control his discretion.⁽²⁾

582. The term "son" in the section means the natural son and includes an adopted son. It does not include the fraternal nephew though he is declared by Manu to be a son of all his father's brothers.⁽³⁾ Similarly the existence of a daughter's son is no bar to adoption though he is spoken of as equivalent to the son's son.

Nephew and daughter's son no bar to adoption.

583. The right of a ward of court to adopt is now the subject of express statutory enactments, which prohibit a Government ward from making an adoption without the previous or subsequent consent of the Local Government. The question in such a case is one of construction of the statutes concerned and the extent of their legality which should, however, be presumed.⁽⁴⁾

Statutory prohibition against adoption.

584. Eunuchs registered under the provisions of the Criminal Tribes Act⁽⁵⁾ are expressly precluded from adopting a son. They therefore forfeit by force of this statute any common law right they may have had to make an adoption.

585. It will be presently seen that the wife has no power to adopt without the consent of her husband, but is the husband on his part bound to consult his wife before introducing a stranger into the family? An adoption being regarded as an imitation of nature, the wife logically could not be ignored. This argument was addressed to Nanda Pandit who had no difficulty in answering it on the

Assent of wife unnecessary.

(1) *Suriya v. Raja of Pittapur*, 9 M 499 (508), (805) P. C.; *Hurrosoondery v. Cowar*, 1 Fulton, 898; 1 I D (O. S.) 877.

(2) *Hurrosoondery v. Cowar* 1 Fulton, 898 (898); 1 I. D. (O. S.) 877 (879).

(3) Manu—"If amongst uterine brothers one becomes father of a son, Manu ordained that all the rest became fathers of male issue by that son." IX-182; Datt. Mim II 29.

(4) For provisions prohibiting adoption by a Government ward see C. P. Court

of Wards Act S. 32 (XXIV of 1899); Beng. Act IX of 1879. S. 81 read with Act VII of 1912 S 5; Mad. Act 1 of 1902 S. 34; *Jamuna v. Borna Souderi*, 1 C. 289 (295) P. C.; Mad. Reg. V of 1804, S 25 U. P. Act IV of 1912, S 37; Punj. Act II of 1908, S 15; Orissa-Beng Act IX of 1879 S. 61 Bombay (Bom Act 1 of 1908); Ajmere (Reg 1 of 1889) seems to be a similar provision.

(5) III of 1911.

ground of the inferiority of women and the superiority of the husband (1) who can validly adopt a son not only without consulting her but in spite of her opposition (2) but she nevertheless, if she is the sole wife, comes to be regarded as mother of the adopted son and her parents, as his maternal grandparents. (3)

586. So while the wife does not count in the matter of adoption and it makes no difference in her *status* if she is the sole wife, her non-participation will however prejudice her right if she has a co-wife who had joined in the adoption. In that case the latter acquires the status of a mother and the former that of a step-mother so that on death of the adopted son, the former inherits to him to the exclusion of the latter. (4)

587. Adoption by woman.—The woman's right of adoption is based upon the following express texts:—

"Yashisth.—Man formed of uterine blood and virile seed proceeds from his mother and his father (as an effect) from its cause. Therefore the father and the mother have power to give, to sell, and to abandon their son".

"5. Let a woman neither give nor receive a son except with her husband's permission" (5)

Baudhayan : "Man, formed of virile seed and uterine blood proceeds from his mother and father as an effect from its cause.

"3. Therefore, the father and the mother have power to give, to abandon, or to sell their son."

"6. Let a woman neither give nor receive a son except with the permission of her husband." (6)

These texts are explained away by Nanda Pandit who argues that since the permission of her husband is essential, it is the husband and not the wife who adopts and on his death since "the assent of her husband is impossible" the wife could not adopt. Then as to adoption with the consent of his kinsmen he thinks it would defeat the very purpose of adoption. (7) The argument is throughout sophistical, but whatever might be the value of his argument, his views are unmistakeable against woman's adoption. Vachaspati Misra (8) of the Mithila School supports the same opinion but on the ground that a woman is incapable of performing the religious ceremony of adoption. According to him Vashisth and Baudhayan merely empowered the wife to become associated with her husband in the act of adoption.

Devand Bhatt author of the *Dattak Chandrika* does not appear to be so hostile to her claim. He even goes so far as to explain away the qualification as to the husband's assent by arguing that assent must be presumed from the absence of express prohibition. (9) With this both Mitra Misra (10) and Nilkanth (11) agree.

(1) Datt. Mim. 1-22 (Suth) p. 5; *Annappurni v. Collector*, 18 M. 277 (283) affirmed O.A. Sub. nom. *Annappurni v. Forbes*, 23 M. 1 P. C.

(2) *Narain v. Gopal*, 18 O. C. 341; 33 I. C. 31.

(3) Datt. Mim. Sec. VI 50; *Annappurni v. Collector*, 18 M. 277 (283).

(4) *Annappurni v. Forbes*, 23 M. 1 (9) P. C., following *Kacheeshwree v. Greesh Chunder*. (1864) W. R. (Sup. Vol) 71, dissenting from Macnaughten's view in his Prel. Remarks

to his H. L. pp. 12, 13.

(5) Ch. XV-§§ 1-2, 5, 14 S. B. E. 75.

(6) *Baudhayan Parisisht*, Q. 7, Ch. 5 §§ 2-3, 6; 14, S. B. E. 335.

(7) Datt. Mim. Sec. 1 §§ 15-19, Datt. Ch. seems to favour the woman's right (*See* 1 §§ 31, 32.)

(8) *Vivad Chintamani* (pp. 74, 75.)

(9) Datt. Ch. 1 § 32.

(10) *Vira Mitroday*, pp. 115-119.

(11) *Vyvhar Mayukh* (Mandlik) p. 57.

588. Other writers proceed on lines of their own so that there is ample authority afforded by the text for any view one chooses to support. (1) This conflict was noticed and passed in review by the Privy Council in a case in which they said: "All the schools accept as authoritative the text of Vashisth which says: 'Nor let a woman give or accept a son unless with the assent of her lord.' But the Mithila School apparently takes this to mean that the assent of the husband must be given at the time of adoption, and therefore, that a widow cannot receive a son in adoption according to the Dattak form at all. The Bengal school interprets the text as requiring an express permission given by the husband in his life-time, but capable of taking effect after his death, whilst the Mayukh and the Kaustubh, treatises which govern the Maratha School, explain the text away by saying that it applies only to an adoption made in the husband's life-time, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus upon a careful review of all these writers, it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband." (2)

589. "The duty, therefore, of a European Judge, who is under the obligation to administer Hindu Law, is not so much to

Working rule stated. inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law. (3)

Adoption by wife. **28.** A wife may adopt a son to her husband with his express consent.

Synopsis.

- (1) *Adoption by wife* (590). (3) *Joint authority invalid* (592).
(2) *Husband's authority* (591).

590. Adoption by a wife is supported by the text of Vashisth who allows it subject to the assent of her lord. (4) Cases of such adoptions are rare. Such an adoption contemplates the absence of the husband, in which case, the wife exercises the authority within the limits set by her husband, and is, in effect, his agent for that purpose. The consent requisite is express though it may be oral (5) but when given in a non-testamentary writing, it must be registered. (6) And since the provisions of the Registration Act are not controlled by Hindu Law, and are only subject to the Majority Act and the registrar has no option but to refuse registration of any such instrument if executed by a "minor, an idiot or a lunatic" (7) it follows that a person under 18 years of age cannot validly convey his authority in writing though he may do so by parol, a result which the law never could have contemplated, while extending its policy of *laissez faire* to Hindus in the matter of adoption in enacting the Indian law of majority.

(1) Sarkar's *Adoption* (2nd Ed.) pp. 224-227.

(2) *Collector of Madura v. Mootoo Ramalinga*, 12 M. I. A. 397 (485, 487).

(3) *Ib.*, p. 486.

(4) *Narayan v. Nana*, 7 B. H. C. R. (A C.)

153.

(5) *Soonder v. Gudodhur*, 7 M. I. A. 54

(6) S. 17 (3) Registration Act (XVI of 1908); *Somasundara v. Duraisami*, 27 M. 80.

(7) *Ib* S-85 (3) (b); *contra* 12 C. W. N. CXXX., VIII cannot be maintained.

591. But the law must remain in this unsatisfactory state till the Legislature intervenes to place it on a more logical footing. Where, of the two wives, the junior joins with her husband in adoption, she becomes the adoptive mother and is entitled to succeed to the adopted son in preference to the senior co-wife, who is assigned only the status of a step-mother. (1)

592. The authority given must be to the wife alone and not to her conjointly with another. Such authority, if given, vitiates it altogether. (2) But a person may while authorizing his wife to adopt provide that she should not adopt without consulting a person named (3) or even make the exercise of the power contingent upon the consent of other persons. (4)

The subject of authority to adopt will be found more fully discussed in the sequel.

Adoption by widow. **29.** (1) A widow may adopt a son to her deceased husband with his express authority :

Provided that, in places not subject to the Bengal and Benares schools, she may also adopt without such authority in accordance with the following rules :—

(2). (a) In the Dravid country she may make an adoption after consulting thereon all her husband's sapindas, and with the assent of all or the majority of them, thereto: provided that if only some of them assent to the adoption made, it will still be valid if it is proper and was made in the *bona fide* performance of a religious duty.

(b) Provided also, that where the family is joint, the consent of the father-in-law, and in his absence, of its managing member would be sufficient for an adoption made in their own life-time.

(3). (a) In the Maharashtra, where the widow succeeds to her husband who died a separated member from his family, she may adopt without his consent which is presumed.

(b) But if her husband died a member of an undivided family then she may only adopt with the consent, of his undivided co-parceners, in which case in lieu of such consent the consent of persons mentioned in clause (2) (b) will be sufficient, and the provisions of clause (2) (a) *mutatis mutandis* apply.

Explanation : 1.—The consent herein before mentioned must be free and not one induced by fraud or corruption.

Explanation : 2.—Where the majority of co-parceners or sapindas as the case may be, have assented to an adoption, it will be presumed that their assent was *bona fide*.

(1) *Surendra v. Sailaja*, 18 C. 385.

(2) *Beem Churn v. Heeralall*, 2 I. J. (N. S.) 225; *Amritolal v. Surmonoyee*, 27 C 996 (1002) P. C.; *Bal Gangadhar Tilak v. Shrinivasa*, 39 B. 441.

(3) *Annapurni v. Collector*, 18 M. 277 (288).

(4) *Amrito Lal v. Surmonoyee*, 27 C 996 (1002, 1003) P. C.

Exception 1.—A widow in Mithila can make no adoption to her husband with or without his consent.

Exception 2.—In the Punjab, the validity of an adoption by a widow depends upon her compliance with the tribal and territorial custom.

Synopsis.

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| (1) <i>Adoption by widow</i> (593). | (5) <i>Consent of husband necessary in</i> |
| (2) <i>Necessity for consent</i> (593-594). | <i>Bengal and in Benares</i> (599, |
| (3) <i>Whose consent necessary</i> (594-595). | 604). |
| (4) <i>Difference of opinion between the</i> | (6) <i>Prohibition to adopt</i> (601-603). |
| <i>various schools</i> (597-598). | (7) <i>Adoption by minor female</i> , (605-611). |

593. Analogous Law.—The foundation of the woman's right to adopt is the text of Vashisth's already cited. (§ 587) It makes her power subject to the assent of her lord. (1) But later usage has interpreted this text, giving rise to a diversity of views which have become more or less crystallized into fixed rules qualifying it. Thus in Bombay if the husband died separated from the family, his assent is presumed and the widow is empowered to make an adoption unrestricted by any of his relatives whose just expectations she might disappoint. (2) But if he died in jointness, then her power is limited and she cannot adopt without the consent of her father-in-law during his life time (3) after whose death she must obtain the consent of all her husband's undivided co-parceners, or of the managing member of their family. (4) In Madras the widow can never adopt free from the control of a masculine mind, whether her husband died separated or not. In either case, she must have been either possessed of the authority of the husband, or in its absence, she must act with the consent of her husband's *Sapindas*. She is bound to consult all, but for the validity of her adoption it is not necessary that all must concur in her act. If all or the majority do, then her act becomes final, but if only some of them concur and the rest dissent, then the validity of her act is put to another test: was it proper and made in pursuance of a religious duty? The question in this case becomes one of fact to be decided on the circumstances of the family and a fair consideration of its expediency.

594. But both the Bombay and the Madras schools agree that in an undivided family the consent of the father-in-law alone is sufficient. And so is that of the managing member of the family. If this is secured, the widow need not seek the assent of the other *Sapindas*. The managing member, must, however have given his independent assent uninfluenced by fraud, misrepresentation or valuable consideration, though he is entitled to stipulate that his own share should not be reduced by the adoption. But in either case the consent must be acted upon during the life time of the person consenting.

595. The Bengal (5) and Benares (6) schools understand Vashisth's text to imply the express authority of her husband and insist upon it, while in the

(1) *Mutsaddi Lal v Kundan Lal*, 28 A. 877 P. C.

(2) *Collector of Madura v. Mootoo Ramalinga*, 12 M. I. A. 897 (436), *Gopal v. Vishnu* 28 B. 250 (256); *Malgouda v. Babaji* 37 B. 107.

(3) *Ramji v. Ghaman* 6 B. 498; *Dinkar v. Ganesh* id 505; *Vithoba v. Bapu*, 15 B. 110.

(4) *Lakshmi Bai v. Vishnu*, 29 B. 410.

5) *Bachoo v. Mankorebai* 31 B. 373 P. C.

(6) *Janki v. Sudasheo*, 1 Beng. S. R. 197; *Solukhna v. Ramdolah*, 1 Beng. S. R. 435; 6 I. D. (O. S.) 318; *Tara Munee v. Derrnarayan*, 3 Beng. S. R. 516; 6 I. D. (O. S.) 1058

Mithila country the widow can, under no circumstances, adopt a son to her husband even with his express authority, though she may adopt a son to herself in the Kritrim form. (1) But such adoption is not an adoption to her husband, but to herself and consequently, the adopted son does not succeed to any estate but her own. (2) In the Punjab adoption is so entirely subject to tribal and territorial custom that it admits of no general statement.

596. The next few sections state the general rules and the discussion there under sets out their detailed import.

But all schools are agreed that whatever the nature of qualification upon her right, her power of adoption remains discretionary in her. She is not bound to adopt unless she chooses to do so. But if she does adopt, then the "assent of her lord" which may be given either orally or in writing, must be strictly pursued. If therefore, the assent did not limit her as to time, she may exercise the power at any time. (3) But the authority is of course personal to her. She cannot delegate, transmit or transfer it to another. (4)

597. All start by accepting the text of Vashisth as of unquestionable authority. But the text is bald and merely provides that the wife must adopt with the "assent of her lord." What is the meaning of "assent"? This is the sole question upon which there is divergence of views between the various schools. According to some, the consent of the husband is provided for because he is the natural guardian of the wife. Adoption affects the family and he consents for the family who should have something to say in his absence. This too is admitted and its admission involves a further admission that if the husband had separated from the family the latter could then have neither the motive nor the right to control the wife's adoption. This is the Bombay and Madras view.

598. According to the Western or Bombay school, in the case of a separated husband, his consent is necessarily implied, and in the absence of a prohibition, must be presumed (5) while according to the Eastern or Benares and Bengal schools it cannot be presumed but must be expressly given. (6) The Dravid (or Madras) school adopts an intermediate course between the stricter law of Bengal and the wider law of Bombay by making an adoption by the widow dependent either, as elsewhere, upon the consent of the husband or in its absence, upon the concurrence of her husband's *Sapindus*.

599. But while this has been literally understood in Bengal and Benares, other schools understand it merely to signify that the assent of a masculine mind is all that is required and would be sufficient to validate a woman's adoption and it may be furnished not only by the husband, but by any of his kinsmen who are interested in him and in his estate. Such assent is provided for to prevent a woman from making an improper adoption which is prejudicial to the family. Being condemned to a lifelong tutelage, a widow was not intended to act independently of those who are her guardians. Consequently when

(1) *Oomra Singh v. Mahtab Koonwar*, 3 Agra 103; *Haimun v. (Husheam)*, 5 W. R. 69 P. C.; *Pudum Singh (Chowdhry) v. Koer Oodey Singh*, 12 M. I. A 350, *Tulshi Ram v. Behari Lal*, 12 A. 328.

(2) *Sreenarain v. Bhya Jha*, 2 Beng. S. R. 23 (27).

(3) *Collector of Tirhoot v. Huopershad*, 7 W. R. 500; *Shibo Kooeres v. Joogun Singh*, 8 W. R. 155.

(4) *Bamundoss v. Turince*, 7 M. I. A. 169 (190); *Mulasadi Lal v. Kundan Lal*, 28 A. 377 P. C.; *Uma Sundari v. Saurobines*, 7 C. 288.

(5) But this is only the later view. *Lakshmi Bai v. Saraswati Bai*, 23 B 789 (795). Contra Per Westropp, J. (*dissentiente*) in *Bayabar v. Bala*, 7 B H C R (App) 1 who held express authority necessary.

(6) See cases cited in F. N. (4) and (5).

her husband was alive, his consent was sufficient. But on his death his guardianship ceasing, any consent given by him to a *post mortem* adoption became inoperative, except only in the case when he died separate from the family, in which case the widow being the heir, she took the estate independent of his kinsmen's control. And as adoption was beneficial to his soul he must be presumed to have consented to an act which was conducive to his spiritual advantage. (1) Therefore, in such a case, in the absence of an express prohibition, consent is presumed. On this subject then, the Eastern and Western schools, take diametrically opposite views. The one presumes prohibition and requires express consent; the other presumes consent, till any prohibition is proved. The Madras school presumes neither way, but stipulates for consent either of the husband or his *Sapindus*.

600. During his life-time, as her natural guardian and protector, the father-in-law is the proper person to give the requisite consent. (2) But if he too is dead, then her husband's joint co-parceners must accord their authority to an act which, however beneficial to her husband's soul, is highly prejudicial to their temporal interests. But should they be unanimous and what if some of them dissent? Should the majority favour the adoption? And is the managing member competent to authorize it? All these questions are natural but cannot be answered in a general way as "it is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen, as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously, nor from a corrupt motive." (3) In determining the sufficiency of the assent the court will look to its propriety. If it was given from corrupt motive by some, even though by the managing member, it will be insufficient; otherwise, probably, the consent of the managing member, should suffice. (4) Her own motive for adoption is however, irrelevant. She may, for instance adopt with intent to defeat her co-widow's share. (5)

601. Husband's prohibition to adopt.—It will be observed, that by the consensus of opinions of all schools the express permission of the husband entitled the widow everywhere to make an adoption. But his express prohibition is nowhere stated to be necessary to destroy her right. If, therefore, by his words and acts a prohibition might be reasonably inferred, then it amounts to such prohibition as will be sufficient in law to preclude an adoption by her. This was pointed out in the Ramnad case (6) in which their Lordships observed: "Inasmuch as the authorities in favour of the widow's power to adopt, with the assent of her husband's kinsmen, proceed, in a great measure, upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family" which afford no plea for a supersession of heirs on the

(1) *Collector of Madura v. Mootoo Ramalinga*, 12 M. I. A. 397 (485); *Datto v. Pandurang*, 32 B. 499.

(2) *Collector of Madura v. Mootoo Ramalinga*, 12 M. I. A. 375.

(3) *Vellanki v. Venkata*, 1 M. 174 (190)

P. C.

(4) *Ganesa v. Gopala*, 2 M. 270 P. C.

(5) *Ishimawa v. Sangawa*, 22 B. 206.

(6) *Collector of Madura v. Mootoo Ramalinga*, 12 M. I. A. 397 (448).

ground of religious obligation to adopt a son in order to complete, or fulfil, defective religious rites. (1)

602. The prohibition to adopt may be expressed or implied and may equally be inferred from other facts inconsistent with a sanction. So where the husband at the point of death positively refused to adopt a son, died without retracting his refusal, the court considered it necessarily to carry with it an implied prohibition to the wife to do what he himself had deliberately refused to do. (2) So where the wife had misbehaved and had been for 30 years living apart from her husband, who had deserted her and married three other wives in succession, adopted a son with the consent of her husband's brother, the court held that the presumed authority in a normal case was more than rebutted by those facts which justified a finding of prohibition to her to adopt whereupon the consent of his brother to the adoption became irrelevant. (3) So where a testator by his will provided for the contingency of his having a son in these words, *viz.*, "if by divine favour I have child of the male sex," these words were construed to mean only a natural son and were not sufficient to confer an authority to adopt. (4) The terms of a will or other disposition of property by the husband might imply a prohibition. (5)

603. It has already been stated that such prohibition is legally presumed both under the Bengal and Benares systems of law while under the other two systems, there is equally a presumed permission in favour of adoption. The burden of proving permission in the one case lies upon the widow while the burden of proving prohibition in the other case lies upon those who dispute her presumed authority.

604. The view that the widow subject to the Bengal (6) and Benares school (7) cannot adopt without the express authority of her husband is supported by the highest authorities. (8) In Bengal the question was settled as far back as 1811 when the Pandits consulted, opined that the widow was competent to adopt with the authority of her husband which may be provisional as, if he had a son then alive, the husband might direct that in the event of his death, the widow was at liberty to adopt. (9) Such authority might be verbal or in writing. (10) As regards Benares, a similar question put to the Pandits in 1816 elicited the reply that though the authority of the widow to adopt without the authority of her husband was admitted by *Vir mitroday* and *Samskar Koustubh*, their authority was overruled by that of the *Dattak Mimansa* which required his authority. (11) The authority of her "lord" could not, the Pandits added, mean or be

Adoption by Bengal and Benares widows

(1) *Ib.*, p. 443.

(2) *Bayabai v. Bata*, 7 B. H. C. R. (App) 1 (xix-xx).

(3) *Dyanoba v. Radhabai* (1894) B. P. J. 22.

(4) *Shiyah v. Colve*, 21 M. L. T. 315; 37 I. C. 404.

(5) *Malganda v. Babaji*, 37 B. 107.

(6) *Solukhna v. Pande*, (1811) 1 S. D. A. B. 433; 6 I. D. (O. S.) 818 (820); *Tara Munee v. Debnarayan*, (1824) 3 S. D. A. B. 517; 6 I. D. (O. S.) 1058.

(7) *Shumshere (Raja) v. Dilraj Konwur*, (1816) B. S. D. A. 216, 6 I. D. (O. S.) 523; *Haimunchull (Raja) v. Ghunshcam*, 5 W. R. 69 P. C. *Pudum Singh (Chowdhry) v. Koer Oodey Singh*, 12 M. I. A. 350; *Tulshi Ram v.*

Behari Lal 12 A. 328.

(8) *Solukhna v. Pande*, (1811) 1 S. D. A. B. 433; 6 I. D. (O. S.) 818 (820).

(9) *Tara Munee v. Debnarayan*, 3 Beng. S. R. 516; 1 I. D. (O. S.) 1058; in *Janki v. Rai*, (1807) Beng. S. R. 289; 6 I. D. (O. S.) 193, the necessity for authority was admitted though the one produced was found forged.

(10) In *Jai Ram v. Musam*, (1850) S. D. A. B. 86; 1 I. D. (O. S.) 836 (841) there is a note that "The necessity of the husband's permission to legalize the widow's adoption in Bengal is established by many printed cases."

(11) *Shumshere (Raja) v. Dilraj Konwur*, (1816) 2 S. D. A. B. 216; 6 I. D. (O. S.) 523 (525) (a Gorakhpur case).

replaced by the authority of his kindred. (1) The same opinion was expressed as regards the *Dattak* adoption in Bihar, and on the same grounds. (2)

In all these cases the permission is assumed to be express and not merely implied.

That is how they have been understood by the Calcutta High Court. (3) It has already been stated that the written authority of her husband releases her power, which the widow may then exercise or not at her discretion, and unless her authority is limited as to time, there is no limitation to its exercise. (4)

605. Adoption by a Minor Female.—The Indian Majority Act saves a Hindu as regards marriage, dower, and adoption (5) which means that in these matters the Hindu law remains unaffected by that Act. The question therefore arises as to the age of majority of a Hindu female. The Smritis prescribe an age of majority for a male to be the 15th (6) or the 16th year (7) which may mean either the commencement or completion of that year. (8) This has been assumed to be the age of majority also for a Hindu female in a case in which it has been accordingly held that no Hindu minor can make any adoption before completion of her 15th year. (9) But this assumption would appear to be unjustifiable since while the Smritis have of necessity, to prescribe an age of adolescence for males, after which they have to enter upon their pre-ordained duties, there is no necessity to prescribe the same or any age for the majority of women, who according to the oft repeated text are condemned to life long dependence upon men (10) and who, therefore, never in the eye of the law, attain the age of discretion in the same way as men.

606. There being then a paucity of express texts prescribing an age of majority for women, the only view possible is that the age of discretion for women must be deemed to be the same age as is prescribed by the Indian Majority Act, not *proprio vigore*, but as embodying the rule of justice, equity and good conscience. In this view a woman on completion of her 18th year may validly make an adoption, though even then there must be some evidence that she had done so after taking independent advice, and realizing the nature of her act and its effect upon her own rights. The necessity for such independent advice will be greater if she is a young *pardanashin* woman leading a secluded life, who is ignorant and had taken no part in the business of her husband.

607. If the adopter was below 18 then her tender years would be her best protection, and no Court would drive her to the logical consequence of her act unless, it is convinced that she had acted of her own free will with due advertence to the sacrifice she was making in letting a stranger into her family.

608. Where a person claims to disinherit such a minor heir on the score of his adoption by her, the burden is upon him to shew not only that he had been

(1) *Ib.* p. 526.

(2) *Jai Ram v. Musan*, (1880) S. D. A. B. 8; 7 I. D. (O.S.), 856 (840)

(3) *Lala Parbhu Lal v. Mylne*, 14 C. 401, (115, 416)

(4) *Bamundoss v. Tarinee*, 7 M. I. A. 169 (190); *Mutasaddi Lal v. Kundan Lal*, 28 A. 877 P. O.; *Uma Sundari v. Sornobinee*, 7 C. 288.

(5) Act IX of 1875 S. 2.

(6) *Madhu Sudan v. Debicbinda*, 1 B.L. R. 49 F. B.; *Mothoormohun v. Soorendra*, 1 C. 108 (114) F. B.; *Sattiraju v. Venkataswami*,

40 M. 925 (929.)

(7) *Manu VIII-27*

(8) But in *Verabhai v. Bai Hiraba*, 27 B. 452 P. C. the Privy Council regarded a boy before completion of his 16th year as a minor even under Hindu law. See *ib.* pp. 496-499 p. 496 for the S.J.'s opinion, affirmed by P. C. at p. 499. To the same effect *Kishori Lal v. Chunnital*, 31 A. 116 (127) P.C.

(9) *Sattiraju v. Venkataswami*, 40 M. 925

(10) *Manu IX-3; V 148; Yajnavalkya I-85*

duly and validly adopted, but that his adoptive mother had done so after mature reflexion and with the advice of her competent advisers.

609. If her husband had charged her with the power to take a particular boy in adoption and she does so, her act would be intelligible as in that case she was merely acting as the instrument of his will. There is then no necessity for independent advice. Even so, but to a less degree, would be an adoption made in pursuance of a general power to adopt conferred by her deceased husband. But time in such cases is a material factor. If the widow had refrained from making an adoption for, say 10 or 20 years, some explanation, may be necessary for the discharge of her delegated power.

610. This is the trend of cases which may be now considered. In 1866 Westropp, J., had to consider the legal effect of an adoption by a Hindu widow aged 17, wife of one Ramakant, Brahman, who carried on business as shroff and died leaving an estate mostly comprising moveable property worth over four lakhs. It was pleaded that the adoption was with the authority of her husband but it was not proved. Its factum was however established whereupon the learned Judge observed: "Not only was the appellant a Hindu female, whom the law only barely recognizes as *sui juris*, so careful does it require that the Court should be, in ascertaining that she has full knowledge of the nature and consequence of any acts affecting her legal rights, which she has been induced to perform—but she was only seventeen years of age at the time of the alleged adoption (as was admitted in the course of the argument), and she could have had little more experience or knowledge of the world than a mere child. If she adopted, or assented to the adoption of, the infant plaintiff at all, she manifestly did so at the suggestion of the Brahmins, Gumashtas, and clerks who surrounded her, and who were the real actors on the occasion, and who were desirous to transfer to their own hands, the control and management of Ramakant's property and firm during the minority of the infant plaintiff. Looking at the effect of adoption upon the rights of a Hindu woman who succeeds to the property of her husband, we should expect clear evidence that she was fully informed of those rights, and of the effect of the act of adoption upon them—an act which reduces her from the position of complete and absolute mistress of her husband's moveable property, and tenant for life at least, of his immoveable property, to a mere right of maintenance. Hindu women should be shielded from cajolery and undue influence with nearly all the jealous strictness with which the rights of a minor or other person not *sui juris* are watched—not an iota of which strictness should be abated in the instance of a widow just emerging from infancy, as was the case with the appellant at the time of the alleged adoption. Some relaxation of this strictness would, of course, be allowable in the case of a Hindu woman whose husband has directed that she should adopt. She is then under at least a moral duty to adopt, and the act of adoption by her is one which may justly be expected. It is different in the case of a woman whose husband leaves no such direction, because the act is one in derogation of her own right, and not in obedience to any order of her husband, and especially so in this case, in which the husband, from an anxiety to preserve his estate intact for his wife, has positively refused to adopt. If the conscience of the Court were satisfied that the widow voluntarily performed the ceremonies absolutely essential for adoption, and had been previously fully informed, first, of her rights, and secondly, that the effect of an adoption upon them must be wholly to divest

her of those rights and to reduce her to a maintenance, it would be the duty of the Court to uphold the act of adoption." (1)

611. In another case one Balkrishnan had adopted a son in whose favour he had executed a will a few hours before his death, in the presence of his wife who participated in it. Balkrishnan was then in a dying condition and was barely conscious. On his death his widow allowed the adopted son to perform the funeral rites of her deceased husband and on the day after the adoption and the death, she affixed her mark to a petition addressed to the Collector informing him of the adoption and performance of the obsequies by the adopted son, and praying for mutation in his favour. Both the Courts in India found these facts proved and decreed the son's claim for possession of the estate against the widow, but the Privy Council reversed the decree holding that even if all these acts be proved against the widow, it did not prove that a *legal* adoption had been made. Their Lordships held that so far as regards the husband, he was insensible, and as both the adoption and the will were not shown to be supported by antecedent circumstances and there was nothing to show that the deceased even though conscious, was possessed of a mind capable of judgment and reflection, his acts must be ignored as of no account. There then remained the act and conduct of the wife, as to whom they observed: "The appellant is a Hindu female. So long as she is acting without the guidance of a disinterested adviser her acquiescence in an alleged adoption or will ought not to prejudice her. In such a case as the present, it was hardly to be expected that she would be capable of distinguishing between an adoption in fact, and a legal adoption, or between a will in fact, and a valid will." (2) In other words, in their Lordships' view, it was incumbent upon those who relied upon the dual acts to shew not only that the wife had consented to them but also that she was made aware of the effect of those acts upon her rights. These two cases were not cases of *Pardanashins* whose helplessness is greater and in dealing with whom a much higher degree of responsibility rests with those who rely upon acts imputed to them to the prejudice of their interest. (3)

612. Such cases bear no analogy to male adoptions by minors though they are equally entitled to protection. As previously remarked (§ 593) adoption to a Hindu is a religious necessity and adoption, if otherwise valid, cannot be held invalid, merely because it was made with the authority of a minor husband, or was made by the minor himself (4) provided he had then attained years of discretion, (5) that is to say, was in or had completed his sixteenth year.

613. Adoption by Dravid woman.—As the whole law of adoption by a female has been evolved out of a single sentence of Vashisth's, so the whole of the Dravid view of that law is the outcome of a single sentence in Colebrooke's note on the *Mitakshara* (6) where he says that in some of the schools adoption is admitted to be valid "if made by the widow with the assent

(1) *Bayabai v. Bala*, 7 B. H. C. R. (App.) 1 followed in *Somasekhara v. Subba drama*, 6 B. 524.

(2) *Tayamma v. Sashachalla*, 1 M. L. A. 429 (488); *Ranganayakamma v. Alwar*, 13 M. 214 (221).

(3) *Sajjad Hussain v. Wazir Ali*, 31 A. 456 (462) P. C.; *Kali Baksh v. Ram Gopal*,

36 A. 81 (89) P. C.

(4) *Rajendro v. Saroda Soonduree*, 15 W. R. 548; *Jumona v. Bama Sundari*, 1 C. 289 P. C.; *Alendakini v. Adinath*, 18 C. 69 (72).

(5) *Jumona v. Bama Sundari*, 1 C. 289 (296) P. C. following *Rajendro v. Saroda Soonduree*, 15 W. R. 548.

(6) Ch. 1, Sec. XI § 9.

of the husband's kindred." This statement was repeated by Sir Thomas Strange in his Hindu Law ⁽¹⁾ in which he said, "According to the doctrine of the Benares and Maharashtra schools prevailing in the Peninsula it (*i. e.*, the husband's assent) may be supplied by that of his kindred, her natural guardians." The Privy Council quoted and accepted these opinions, ⁽²⁾ and held them to reflect the current usage of the Dravid country also, supported to that extent by a collection of Sanskrit texts made for the purpose of the case before their Lordships ⁽³⁾ as well as by the opinions of the Pandits ⁽⁴⁾ and of the decided cases ⁽⁵⁾ cited and discussed in the court below. ⁽⁶⁾

614. The statement that in the absence of the husband's authority the widow could adopt, with the "assent of her husband's kindred" has thus been the foundation of all law relating to the subject of woman's right to adopt in the Dravid country, now to be examined. That Colebrooke's statement is as vague as the text of Vashisth was admitted by the Privy Council ⁽⁷⁾ who said: "It must, however, be admitted that the doctrine is stated in the old treatises and even by Mr. Colebrooke, with a degree of vagueness that may occasion considerable difficulties and inconveniences in its practical application. The question who are the kinsmen whose assent will supply the want of positive authority from the deceased husband, is the first to suggest itself. Where the husband's family is in the normal condition of a Hindu family—*i. e.*, undivided—that question is of comparatively easy solution. In such a case the widow, under the law of all the Schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorize an adoption by her, yet, if there be no father, the consent of all the brothers, who, in default of adoption, would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new co-parcener against their will. Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband, there is greater difficulty in laying down a rule.

615. The power to adopt when not actually given by the husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindus. Their Lordships do not think there is any ground for saying, that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think, that the consent of the father-in-law, to whom the law points as the natural guardian and "venerable protector" of the widow, would be sufficient. It is not easy to lay down an

(1) 1 Strange H. L., p. 79.

(2) *Collector of Madura v. Mootoo Ramalinga*, 12 M. I. A. 397 (432, 433).

(3) Dattaka Mimamsa of Vidyaranya-swami in which the widow is declared to possess the right to adopt with the authority of her father-in-law, etc cited *per curiam* in *Collector of Madura v. Muttu*, 2 M. H. C. R. 206 (221) O. A. 12 M. I. A. 397 (438).

(4) See them collected in the H. C. judgment *Collector of Madura v. Muttu*, 2 M. H. C. R. 206 affirmed O. 12, A. M. I. A. 397.

(5) *Appanienger v. Alemaloo*, (1858) D. A. M. 5, 6.

(6) *Collector of Madura v. Muttu*, 2 M. H. C. R. 206.

(7) *Collector of Madura v. Mootoo Ramalinga*, 12 M. I. A. 397 (441, 442).

inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the widow in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive.

616. The Dravid widow takes an intermediate place, between the Bengal and Benares schools on the one hand, and the Maharashtra school on the other, inasmuch as her power to adopt depends either on the consent of her husband or on that of his Sapindas. So far then as she may adopt with the express authority of her husband, her power is the same as in the Bengal and Benares schools. But so far as she may adopt without such authority but with the assent of her husband's *Sapindas*, she possesses an added power denied to her sisters subject to those two schools.

This power she may invoke only if her husband has not prohibited an adoption. In fact no widow under any system can adopt in such a case. It is only when there is neither prohibition nor permission that it is possible for the Dravid and Maharashtra widows to exercise their power. As between them, the Dravid widow must seek the counsel and consent of her husband's *Sapindas*. This is equally necessary whether the family to which her husband belonged was joint or separate, and consequently the other interest affected by her adoption would be that of a co-parcener or a reversioner. Their consent she must ask for, and the consent of some of them she must get, otherwise, she cannot adopt at all.

617. But if her husband was a joint member of the family which remains joint on the date of sanction, then the widow is allowed the alternative of seeking and obtaining only the consent of her husband's father who as the head of the family and the natural guardian of the widow, is competent, by his sole assent to authorize an adoption by her. ⁽¹⁾

618. But if there be no father-in-law, by parity of reasoning, the consent of the managing member of the family should be equally sufficient. As the Privy Council observed: "The requisite authority is, in the case of an undivided family, to be sought within that family. The joint and undivided family is the normal condition of Hindu society. An undivided Hindu joint family is ordinarily joint not only in estate, but in food and worship; therefore not only the concerns of the joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by its members, or by the manager to whom they have expressly or by implication delegated the task of regulation." ⁽²⁾ This case is then an authority for two propositions: (i) That where the family is joint, the widow must seek permission of its joint members. In that case "she cannot at her will, travel out of that undivided family, and obtain the authorisation required, from a separated and remote kinsmen of her husband." ⁽³⁾ (ii) Such consent may be accorded by the manager as its head representative, as a part of his ordinary duties.

(1) *Collector of Madura v. Mootoo Ramalinga*, 12 M. I A 397 (441, 442) The Datt Mim. of Vidyanayagawami explicitly declares the authority of the "father-in-law, etc." to

sanction the adoption.—See *Ib* p. 488.

(2) *Protapa v. Kishuro*, 1 M. 59 (81)

P. C

(3) *Ib* p. 81.

619. But if the consent of either the father-in-law or of the manager is not available, then the widow must consult all her husband's *Sapindas*, i. e., her own reversionary heirs. And amongst them, it is essential that she should consult and if possible, receive the assent of her next reversioners whose reversionary right will be defeated by the adoption. If these do not agree to the adoption she may then secure the assent of those next to them and so on, but the question of consent cannot be decided by the numerical votes of the reversioners but rather by the nature of the interest possessed by those who have consented to the act. For instance, an adoption would probably be upheld, if it is made with the consent of the next reversioner though it be opposed by the rest. ⁽¹⁾

620. To enable her to adopt she is not bound to obtain their unanimous assent to her act. This was the view of the Madras High Court in a case which was affirmed on appeal by the Privy Council ⁽²⁾ who admitted that the assent of all the kinsmen was not necessary but that "there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive." ⁽³⁾

621. On the assumption made by the Privy Council that the propriety of such an act should be referred to and decided by a family council ⁽⁴⁾ it is clear that if the majority of the members consent then the adoption will be presumed to be *prima facie* justifiable and valid. ⁽⁵⁾ But it does not mean that all the available *Sapindas* should be made to sit in conclave and decide the question. ⁽⁶⁾ As was observed in a case affirmed by the Privy Council "The expression 'family council' in the above extract is no doubt rather too general and comprehensive. It is not probable that it was intended to include the whole circle of *Sapindas* and *Samanodakas* or to imply that they should assemble. The presumptive reversionary heir or heirs are the nearest of kin to the deceased husband and as such the natural advisers of the widow; and if his or their assent be obtained and the same be given *bona fide*, and not from any corrupt motive, that would be sufficient authority on which she could act, and it would not be necessary that she should seek the assent of remoter reversionary heirs" ⁽⁷⁾ whose dissent is then immaterial. ⁽⁸⁾ But, of course, it is not always that the expectant heir is anxious to forswear his heritage. In that case the widow must seek the counsel and consent of those in the next degree, and finally, of the general body without reference to their propinquity.

622. It is, of course, a counsel of perfection to the next reversioner to subordinate his self-interest to his duty and to offer disinterested advice to the widow, though such is the behest of law. ⁽⁹⁾ But as this is sometimes paid for, if received and often refused, the widow is not helpless in the exercise of her power which she may do, even with the consent of remote reversioners account-

(1) *Kandukuri, v. Kandukuri* 28 C. W. N. 251 P. C.

(2) *Collector of Madura v. Moottoo*, 2 M. H. C. R. 205 (230) O. A. 12 M. I. A 397.

(3) *Collector of Madura v. Moottoo*, 12 M. I. A 397 (442, 443) explained in *Arundadi v. Kuppanimal*, 3 M. H. C. R. 233; *Raghunadha v. Brozo*, 1 M. 69 (79) P. C.; *Parasara v. Rangaraja*, 2 M 202; *Venkata Krishnamma v. Annappuramamma*, 23 M. 436 (488)

(4) *Vellanki v. Venkata*, 1 M. 174 (191) P.C.

(5) *Venkata Krishnamma v. Annapur-*

namma, 23 M. 486 (488, 489).

(6) *Adusumalli v. Adusumalli*, 30 M. L. J. 265; 32 I. C. 253

(7) *Subramanyam v. Venkamma*, 26 M. 627 affirmed O. A. 30 M. 50 P.C. *Veera Basavaraja v. Balasuriya*, (1914) M. W. N. 502; 25 I. C. 3 affirmed O. A. 11 M. 928 P. C. *Adusumalli v. Adusumalli*, 30 M. L. J. 265; 32 I. C. 253; *Parasara v. Rangaraja*, 2 M. 202.

(8) *Sohaj Ram v. Ramlal*, (1914) P. L. R. 78; 22 I. C. 542

(9) *Venkatarama v. Bappamma*, 30 M. 77.

ing for the refusal of the nearest on the ground of self-interest, in which case the court will uphold the adoption regarding their refusal as improper. (1)

But it may be that the widow does not even secure a majority, as while some consent the majority might dissent from her decision. In that case too, the adoption may be valid, though its validity cannot be presumed; but nevertheless the widow or her adopted son may establish its validity by proving that the adoption was made "in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive."

Proof of this must necessarily depend upon the circumstances of the family. But in such a case the court will require strong evidence to support an adoption affecting the rights of parties in actual possession not forgetting the "pernicious influences which interested advisers are too apt in India to exert over women possessed of or capable of exercising dominion over property." (2) On the other hand, it must not be forgotten that the right of adoption is inherent in the widow and the consent of the kinsmen is required, not because their rights in property will be prejudicially affected by her act, but rather because law assigns to the woman a position of perpetual incapacity without the direction of a masculine mind. (3)

623. It is perhaps unnecessary to add that such a consent must be by a person, who, if otherwise competent, though a female, must not be a minor. (4) It was so held where the widow of a predeceased son of one Vithoba justified her adoption on the ground that it had been consented to by his two daughters aged 25 and 12 in whom the estate had vested on their father's death. The only fact proved was that they were both present at the adoption. But the court threw out the adopted son's suit holding *first* that one of the daughters, being a minor, could not legally consent and that the consent of the adult daughter could not be proved by her mere presence at the adoption. Even if such presence amounted to acquiescence it is not equivalent to the consent legally necessary to legalize such an adoption. (5) As the Privy Council remarked "one of the plaintiffs in this case is an infant, the other is a Hindu female. Against neither is it the practice of the courts in India to press a presumption by acquiescence in a rival claim, from the mere non-contestation for a limited time of an adverse title, and especially not of such a title as this certificate evidences." (6) But this does not preclude such evidence being given in support of ratification in a case properly pleaded or where it is relied upon to prove consent or a case of estoppel. (7) But since previous consent of the reversioners is a *conditio sine qua non* under the textual law, a mere ratification *ex post facto* is not such consent as the law contemplates (8) though it may estop a party from pleading it. (9)

(1) *Adusumalli v. Adusumalli*, 30 M.L.J. 265; 32 I.C. 253; *Nagarampalli v. Nagarampalli*, (1914) M.W.N. 650, 24 I.C. 257.

(2) *Raghunatha v. Brozo*, 1 M. 69 (83) P.C. (3) *Collector of Madura v. Mootoo*, 12 M.I.A. 397 (442); *Narayanasami v. Mangammal*, 28 M. 815 (819).

(4) *Vasudeo v. Ramchandra*, 22 B. 551

(5) *Vasudeo v. Ramchandra*, 22 B. 551 (557, 558) following on the subject of presence as being insufficient to prove consent: *Ramamani v. Kulanthai*, 14 M.I.A. 346;

Rungama v. Achama, 4 M.I.A. 1 (107, 108) followed in *Bhimappa v. Basawa*, 29 B. 400 (403) To the same effect *Tarinee v. Shoroda*, 11 W. R. 468 (476).

(6) *Ramamani v. Kulanthai*, 14 M.I.A. 346 (360).

(7) *Bhimappa v. Basawa*, 29 B. 400 (408). See this subject discussed *post*, under the head "Evidence of Adoption."

(8) *Dorasami v. Chinna*, 22 M.L.T. 538.

(9) *Dharam Kunwar v. Balwant Sing*, 34 A. 398 I.P.C.

624. No consent is valid if it is obtained by corruption, coercion, undue influence, fraud or misrepresentation. These facts vitiate both the consent as well as the adoption consequent thereon (§ 635).

A consent purchased is not a free consent, though there is nothing illegal in a co-parcener of the husband stipulating with his consent that his own share should remain undisturbed by the adoption, since the protection of one's share in such cases cannot be said to constitute a corrupt or improper motive actuating his consent if it did not prejudice those for whom he was equally consenting. (1) The question is really one of degree. Where however, the consenting Sapinda had stipulated for some land to be transferred to him by the widow (2) or some one offered him Rs. 1,000 for his consent (3) the court naturally regarded them as cases of naked bribery. Such was the case where the consenting manager of the family agreed to an adoption stipulating for himself, that he should be its guardian and obtained a declaration from the widow that a village admittedly belonging to the joint family was his self-acquisition, as having descended to him from his maternal grandfather. The adoption was sought to be put in force against the manager's brothers but the Privy Council held that, in the circumstances, it could not bind them. (4)

The question of coercion and the rest are dealt with under a separate section (S. 33 § 653).

625. From this it follows that the widow is not bound to consult any female member of her household not even her junior co-widow. (5) She is in an equal position of dependence with herself though as between her and herself the latter occupies a position of pre-eminence due to her being the elder wife of her husband.

Consent of co-widow unnecessary.

626. A reversioner may revoke his consent to an adoption before it takes place. As his consent is gratuitous, made in the sole exercise of his discretion, it is necessarily subject to revision and he is not bound to assign any cause for it. (6)

Consent Revocable.

627. Though the Maharashtra widow in an undivided family and the Dravid in any case, has to secure the assent of her husband's kinsmen for the validity of her adoption, the question arises in both places as to whose consent is sufficient.

Case of divided Counsels.

It has already been seen that the consent of the father-in-law as the head and manager of the undivided family and in his absence, the consent of the manager is sufficient without reference to the other co-parceners. (7) But if the manager's consent is not available and in the Dravid country there is no manager, the family being divided, whose consent should then be applied for?

It is conceded that if all the Sapindas or the majority of them consent, then it has the same effect, in the absence of which, consent of the

(1) *Srinivasa v Rangasami*, 30 M. 450.

(2) *Rami v. Rangamma*, 11 M. L. J. 20.

(3) *Danakoti v. Bala Sundara*, 36 M. 19(37)

(4) *Ganesh v. Gopala*, 2 M. 270 (280, 281) P. C.

(5) *Ib.*

(6) *Vithoba v. Bapu*, 15 B. 110 (114, 115), *Subramanyam v. Venkammal*, 26 M. 627 affirmed, O. A 30 M. 50 P. C.

(7) *Mami v. Subbarayar*, 36 M. 145.

nearest Sapinda is essential and sufficient. Consequently, if the deceased has left an undivided brother or brothers related to him in equal degree, the consent of one of them should suffice, though the rest may withhold their consent for reasons of their own. (1) But she is bound to consult them although she might believe that some of them were hostile to her proposal and would certainly refuse their assent. (2) The general rule applicable to such cases was stated by the Privy Council to be "that there should be such proof of assent on the part of the Sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that Sapinda, but upon a fair consideration by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband." (3)

628. In accordance with the *dictum* of the Privy Council which applies to widow's adoptions whether in the Maharashtra or the Dravid peninsula, even where the widow adopts to her separated husband her act may be challenged on the ground that the adoption had been induced by corrupt motives and not in the *bona fide* assertion of a right. Such charge was made against a widow who had admittedly received Rs. 4,000 from the father of the adopted boy as a consideration for the latter's adoption, but the court held it to be insufficient to rebut the presumption in her favour. (4) In a later case the Full Bench of the same court had to consider the question of motive and held it to be altogether irrelevant. (5) This is in consonance with the principle that a person having a right to do a thing is entitled to do it whatever his motive. In the case of adoption in an undivided family it was observed "that even supposing that the motives which influence the widow may be puerile or even malicious, still if no fraud or deception has been practised on the head of the family, who is her rightful guardian and protector, and with whom she lives, and to whom she must look for maintenance, and if he had assented to her taking a proper person in adoption, then that son takes the estate of the widow's late husband." (6) The fact that the motive was to defeat or divest her husband's kinsmen of her husband's interest which had devolved on them, by survivorship is no ground for attacking an adoption, for it is one of its necessary incidents. As the Privy Council observed "it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow." (7)

629. Punjab adoptions.—The law of adoption in the Punjab is mostly dominated by custom, in which the leading principles of Hindu Law are faintly reflected. As such, adoptions in the Punjab may generally be said to be subject to the rule that where the adopter is a wife or widow, her power to adopt is limited by the authority of her husband or her husband's kinsmen.

630. Adoption by the Maharashtra Widow.—In the matter of adoption the Maratha widow possesses a peculiar privilege of adopting to her separated husband without his or anybody else's permission. The genesis of this rule is the outcome of the following reasoning. There is nothing in Manu or in the Mital shara on

(1) *Parasara v. Rangaraja*, 2 M. 202 (206, 207) explaining *Sri Virada v. Sri Brozo*, 1 M. 69 P. O.

(2) *Subrahmanyam v. Venkamma*, 26 M. 627 affirmed, O. A. 80 M. 50 P. C.; *Palani-sawmy v. Vanjiammal*, 4 I. C. (M) 86; *Veera Basavaraju Balasurga Prasad Row*, 41 M. 998 (P. O.)

(3) *Vellanki v. Venkata*, 1 M. 174 (190, 191) P. C.

(4) *Mahableshwar v. Durga Bai*, 22 B. 199.

(5) *Ramchandra v. Mulji*, 22 B. 558 (568)

F. B.

(6) *Vithoba v. Bapu*, 15 B. 110 (134, 135).

(7) *Vellanki v. Venkata*, 1 M. 174 (190) P. C.

the subject of woman's adoption. Therefore the Bombay school turn to their local authorities for the definition of her power. The Mayukh carries it no further than the Dravid school for it says :

"Therefore if there must be an order from the husband, it is for a married woman only, as above shown ; but for a widow even without it, adoption may be made with the permission of her father, or, on failure of him, of the relations under this precept : " Let a woman be taken care of by her father while a child, by her husband when married, by her sons in her old age. If none of these exist let her other relations take care of her. A woman is never fit for independence." This has been declared by Yajnavalkya only with reference to difference of age, and the circumstances of a woman being under the power of her husband. In case of his being dead, or unable from old age or other disqualification or from helplessness, then she is indeed under the power of her sons or other relatives. ⁽¹⁾

Her power is carried a step further in the *Dattak Chandrika* which is a recognized authority in the Maratha country :—

" But by a woman the gift may be made with her husband's sanction if he be alive ; or even without it if he be dead, have emigrated, or entered a religious order.

" Now, if there be no prohibition even, there is assent : on account of the maxim ' The intention of another, not prohibited is sanctioned ' " ⁽²⁾

631. These works merely reflected the usage to that effect which had taken root in the Maratha country as is testified to by the Pandits consulted, whose opinions will be found recorded in several old cases ⁽³⁾ passed in review by Sir Michael Westropp in 1866 ⁽⁴⁾ and two years later by Sir Richard Couch ⁽⁵⁾. The tendency in the Western school has throughout been favourable to the emancipation of woman. Kaustubh in his Sanskar written about 1750 A. D. ⁽⁶⁾ dispenses with all consent, holding that adoption being a religious ceremony, required no male direction ⁽⁶⁾ and could be made by a widow even against the consent of her guardians. ⁽⁷⁾ The Privy Council had previously, in a case decided in 1834, recognized the exceptional position of women in the Marathi country referring to whom Parke, J., said : " According to the native text-writers, it seems to be clear, that the ancient law of Hindustan required the authority of the husband ; but it is also clear that the strictness of that law has been in many districts, relaxed, or modified by local usage ; and the opinion of the Shastris as published in Mr. Borrodaile's Bombay Reports is very strong to show, that in the Malhratha States, to the west of the Peninsula the law does not require any such authority to render the act valid." ⁽⁸⁾ This view was echoed by the same high tribunal in several subsequent cases. ⁽⁹⁾ But this plenary power of adoption was in later cases held to be limited only to where the husband had died a separated member.

632. The necessity for the limitation which arose from the observations of the Privy Council in the Ramnad case, ⁽¹⁰⁾ was further accentuated by the remark of the Board in a later case, ⁽¹¹⁾ in which some limitation on the widow's

(1) Mayukh, Ch. IV. Sect. V § 17.

(2) Datt Chand. Sect. 1-§§ 31, 32.

(3) 2 Dig. 257; *Brijbhoojanjee v. Goolootsanji*, 1825) 1 Borr. 181; Huebat v. Gorind Rao, 2 Borr. 75 appended to which are the opinions of the Shastris, *Thukoo v. Rama*, 2 Borr. 446; *Virbudra v. Rase*, 2 Morr. S. D. A. B. p. 1; *Abajee v. Gungadhar* 3 Morr. S. D. A. B. 420. *Bhashkar v. Narro*, B.S.R. 24

(4) *Bayabai v. Bala*, 7 B.H.C.R. (App) 1.

(5) *Raktambia v. Radha Bai*, 5 B. H.O.R. (A.C) 181.

(6) Steele's Law of Caste p. 10

(7) *Per Curiam in Bayabai v. Bala*, 7 B

C. R. (App) 1 (XIII)

(8) *Raja Haimun Chul v. Koomer Gun*, (1834) 2 Knapp, P. C. 203 (221); 11 F. R. 457 (464)

(9) *Collector of Madura v. Moottoo*, (1868) 12 M. I. A. 397 (440); *Chowdry Pudumsingh v. Keer Oddey Singh*, ib. 350; *Raja Vellanki v. Venkata*, 1 M. 174 P. C.

(10) *Collector of Madura v. Moottoo*, 12 M. I. A. 397 (441, 442). See the point discussed in *Ramji v. Ghannu*, 6 B. 498, F. B.

(11) *Sri Virada v. Sri Brozo*, 1 M. 69 (82, 83) P. C.

power to adopt when she was a member of a joint family in which she had no interest beyond a bare right of maintenance, was insisted upon. The whole question came before a Full Bench who accepted the distinction pointed out by the Privy Council between a divided and an undivided family, and held her power of unfettered adoption as merely limited to the latter case. In the case of an undivided family, where the widow of a joint member had no right beyond one for maintenance, they agreed that her adoption to her husband must be subject to the approval of her husband's co-parceners. (1)

633. These decisions placed the Maratha widow of an undivided co-parcener exactly in the same position as the Dravid widow of a divided or undivided family. In other words, except that in Bombay the widow of a separated member may adopt acting on a presumed authority of her husband, her power of adoption is otherwise generally the same as in the Dravid country, with the necessary exception due to the greater restriction placed on the power of the Dravid widow who even where her husband died a separated member, has still to obtain the sanction of his separated *Sapindus*. But leaving this question out for the present and confining the discussion only to a case of joint family, in the two systems, the consent to be taken in the one case is of the "*Sapindus*" while in the other, of the husband's "undivided co-parcener."

634. It is admitted on both sides that the consent of all, however desirable, is not always possible. It is equally conceded that in an undivided family the consent of the father-in-law as its head and manager should in any case be sufficient if the adoption is made while he continues to occupy that position (2) and that since the father-in-law's consent is valid in Bombay *qua* manager and not *qua* father-in-law, there is no reason why the consent of any other managing member should not be equally sufficient. (3) Such manager is ordinarily the seniormost male member of the family but it does not necessarily follow that he is the nearest relative of the husband. It may sometimes happen that he is the most remote. Is his consent then to prevail against the combined dissent of the other and nearer co-parceners? These questions can only be answered in the language of the Privy Council already quoted, *viz.*, the question is then reduced to this: Was the adoption made capriciously or from a corrupt motive, or was it done in the proper *bona fide* performance of a religious duty? (4) In other words, the test here is the same as in Madras.

30. The authority by the husband to adopt may be verbal or in writing, but if it is in writing **Form of authority.** of a non-testamentary nature, it must be stamped and registered.

Synopsis.

(1) *Form of authority* (635-636).

(2) *Construction of authority* (637).

635. Form of authority.—There is no general law (5) requiring the husband's authority to be in writing and without such law, its reduction to

(1) *Ramji v. Ghamnu*, 6 B 498 (503) F. B.; *Dinkar v. Ganesh*, *ib* 505 (.08) F. B.

(2) *Vithoba v. Bapu*, 15 B. 110; *Lakshmi Bai v. Vishnu*, 29 B 410. In Madras the pre-eminence of the father-in-law is established by direct text. See discussion *ante* (§ 617).

(3) *Bachoo v. Manisorebai*, 31 B. 373 (390)

P. C.

(4) *Collector of Madura v. Mootloo*, 12 M. I. A. 397 (442, 443).

(5) Under the Oudh Estates Act (1 of 1869) the Taluqadar's authority to adopt should have been in writing—*Bharba v. Indar Kunwar*, 16 C. 556 (562) P. C.

writing is optional. (1) If the writing be in the nature of a will then its registration is optional; otherwise such authority must both bear Rs. 10-stamp (2) and be registered. (3) Otherwise it cannot be used in evidence at all (4) and secondary evidence of that fact would be barred by S. 91 of the Evidence Act; which means that the authority cannot be proved at all. It has already been stated before, that for this purpose, the husband is subject to the Majority Act, and that if he has not attained the age of majority there fixed, he cannot register his authority as the registrar is bound to refuse registration of a document presented to him for registration by a minor within the meaning of that Act, inasmuch the Registration Act has not saved any rule of Hindu Law on the subject of majority. (5) Law has prescribed no form in which an authority to adopt should be couched.

636. Such a writting is known as *Anumati Patra* or consent deed and it usually recites the status of the husband in his family—whether he is joint or separate, the fact that he is without any male issue, the reason and necessity for adoption, and why it was deferred during his own life-time. Where the husband has more than one wife the authority may further define how far they are to act in concert. The boy to be adopted may also be named. It is usual however to confer upon the wife full discretion both as to the choice of the boy and the time of adoption. The question whether a writing constitutes a will or a mere authority to adopt depends upon whether the primary purpose was the one or the other. Such a case arose before the Privy Council who had to construe a deed styled *Anumati Patra* (or a permission deed) by which the executant empowered his wife to adopt a son. His wife was afterwards delivered of a son. Two years after his birth, he executed another deed similarly styled, authorising his wife to adopt on death of his legitimate son and to make successive adoptions to avoid extinction of the name. The son came of age and succeeded to his father and on his death his widow entered upon the inheritance as his heir. Some time after the son's death, his mother exercised the power given to her by her husband. The Sadar Diwani Court construed the deed as a will and held upon its construction as such, that it created a limitation on failure of male issue of the testator, in the life-time of his wife, to the son to be adopted by her as a *persona designata*. But the Privy Council deprecated the introduction of English rules of construction which were wholly inapplicable to the deeds executed by Indians. "There is no doubt that by the decision of courts of justice, the testamentary powers of disposition by Hindus, has been established within the Presidency of Bengal, but it would be to apply a very false and mischievous principle if it were held that the nature and extent of such power can be governed by any analogy to the law of England. Our system is one of the most artificial character, founded in a great degree on feudal rules, regulated by acts of Parliament, and adjusted by a long course of judicial determinations to the wants of a state of society differing as far as possible from that which prevails amongst Hindus in India." (6) Finally they held the deed to be what it was called and construed it as such, with the result that they set aside the adoption holding that the power must be exercised within reasonable time and that its

(1) *Soondar v. Gadudhar*, 7 M. I. A. 54

(64); *Mutasaddi Lal v. Kundan Lal*, 28 A 877 P C

(2) Stamp Act (II of 1899) Sec. I Art. 3.

(8) Registration Act (XVI of 1908) S 17

(8); *Gopalswami v. Arunachalam*, 27 M 33

Kachoo v. Khushaldas 4 Bom. L.R. 888 (1886).

(4) Registration Act (XVI of 1908) S. 49; *Gopalswami v. Arunachalam*, 27 M. 33.

(5) Act XVI of 1908 S. 1

(6) *Bhobun v. Ram Kishore*, 10 M. I. A. 279 (808, 809).

exercise would be to divest the son's widow which it could not be permitted to do, whatever may have been the intention of the husband. An incomplete testament may be legitimately used as evidence to establish the husband's authority. (1)

637. An authority to adopt must be strictly proved and pursued. (2) If he authorizes her to adopt A or B, minor sons of his junior paternal uncle, it is not open to her to adopt C, quite a different person without making any attempt to secure either A or B. (8) A Bengal father may, by his authority to adopt, direct that the adopted son should not interfere with or divest his adoptive mother of the estate during her life, just as he has the power to postpone the succession of his natural born son by interposing a life-estate. (4)

Where the authority is in writing, the question whether it empowers the wife in sufficiently clear terms to make an adoption, is simplified to a mere question of its interpretation. But where it is alleged to be verbal, which in the present unsatisfactory state of law, possesses some advantage over written authority, the question becomes more involved. For the court has then to find both the factum as well as its terms. And it is not always easy. Both the questions are of course, questions of fact in the determination of which the court cannot disregard antecedent probabilities. It is sometimes said that there is an antecedent probability in favour of such authority because every Hindu desires a son and every sonless Hindu must therefore desire to adopt one. (5) This is no doubt true. But as the Privy Council observed, cases cannot be decided upon mere probabilities. The court must look to the facts. And even against this probability one must also consider the circumstance that if the Hindu longed for such a son why did he not make an adoption before his very eyes. It may be that the pious thought arose uppermost in his mind as death approached and with it the fear of an unredeemed purgatory. The fact that the deceased could have committed his authority to writing but did not, that he was not imbued with an ultra orthodox value of adoption, that he was young and was carried off in a short illness from which he hoped to recover; that he was attached to his nephews or any of them whom he should have named, that he could have made no provision for adoption without making some provision for the maintenance of his wife and those near and dear to him whom the tenour of his whole life seemed to favour, are only some of the numerous questions that present themselves for consideration and will be found more fully set out in the sequel.

638 An authority to adopt given by a husband in a will subject to the provisions of the Hindu Wills Act (6) which extends to the Province of Bengal and to the towns of Madras and Bombay, must conform to its provisions. (7)

(1) *Brijkishoree v. Sreenath*, 9 W. R. 468.

(2) *Pudum Singh (Chowdhry) v. Koeroodey Singh*, 12 M. I. A. 350 (356) where the Privy Council are reported to have said "of course, such a power must be strictly pursued" but in the report of the case in 2 B. L. R. (P. C.) 101 (102) the words reported are "of course such authority must be strictly proved." *Amrito Lal v. Surmomya*, 27 C.

996 P. C.; *Mutasaddi Lal v. Kundan Lal*, 28 A. 377 P. C.

(3) *Sindigi v. Sindigi*, 32 M. L. J. 47, 38 I. C. 164.

(4) *Bhupendra v. Amarendra*, 43 C. 432 P. C.

(5) *Scondur Koomaree v. Gudadhur*, 7 M. I. A. 54 (64).

(6) Act XXI of 1870.

(7) S. 2

31. (1) The authority of the husband to adopt must be **liberally, though reasonably, construed so as to advance the purpose he had in view.**

Construction and limits of authority.

(2) Such authority may be general or limited, but it will be ineffectual if it is illegal, vague or void.

(3) The authority to adopt can only be conferred on, and used by, the wife.

(4) He who confers the authority may revoke it at any time before it is used.

Illustrations.

(a) A authorized his wife B to adopt a son. B adopted C who died after the adoption, where upon B adopted D. The adoption of D is valid for the general authority to adopt empowered B to make any number of successive adoptions.

(b) A authorizes his wife B to adopt C. C dies. B has no power to adopt.

(c) A authorizes B to adopt a son should their son C die unmarried. C dies unmarried. B adopts. The adoption is valid.

(d) A authorizes his wife B to make an adoption should their son C, die. C died leaving his widow D surviving him as his heir. B adopted E. The adoption is invalid as it would divest D.

(e) A authorized B to adopt C. B adopts D. The adoption is invalid for B's authority was limited to the adoption of C.

(f) A authorizes his wife B and executor C to adopt. The authority is invalid as A was legally competent only to authorize B.

Synopsis.

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| (1) <i>Successive adoptions</i> (539). | (5) <i>Provision for obtaining consent of others</i> (643). |
| (2) <i>Liberal construction of authority</i> (640). | (6) <i>Limited authority</i> (644). |
| (3) <i>Authority to adopt a person designata.</i> (641). | (7) <i>Illegal authority</i> (645-646). |
| (4) <i>Construction of authority to be reasonable</i> (642). | (8) <i>Vague authority</i> (647). |
| | (9) <i>Revocation of authority</i> (648). |

639. Analogous Law.—Clause (1) is supported by the authority of the Privy Council (1) who have overruled the earlier view that such authority must be strictly construed. (2)

Clause 2 recognizes that the authority to adopt may be general, in which case the widow's power to adopt is co-extensive with that of her husband and extends to any number of successive adoptions (1) or it may be limited, in which case she is bound by the limits of her authority. (2) But illustration (c) drawn from a reported case clearly shows that an authority however

(1) *Suryanarayana v Venkataramana*, 29 M. 382 P. C. affirming O. A. 26 M 681; overruling *contra Gour Nath v. Annopoorna*, (1852) S.D.A.B. 332: 12 I. D. (O. S.) 257; *Dharam Kunwar v. Balwant Singh*, 80 A. 549 affirmed O.A. 81 A. 398 P. C. in which

however, the right to successive adoptions was upheld on the ground of estoppel. *Bhagwat Prasad v. Murarilal*, 15 C. L. J. 97 (105).

(2) *Gour Nath v Annopoorna*, (1852) S. D. A. B. 332. 12 I. D. (O. S.) 25.

unlimited by intention, may necessarily become limited by the interposition of other interests. In this case the husband had, when his son was two years old, executed an *Anumati Patra* dated 1819 in favour of his wife empowering her to adopt should his son die and to make successive adoptions to preserve the line. The son grew to manhood and then died in 1840 being succeeded by his widow who entered upon the inheritance. The mother then exercised her power and in 1843 adopted a son who sued to eject the son's widow. The *Sadar* Court decreed the claim but the Privy Council threw out his suit holding his adoption invalid on the ground that the power had become spent by the intervention of an heir who could not be divested: "If Bhawani Kishore (the son) had died unmarried, his mother, Chandrabali Devi would have been his heir, and the question of adoption would have stood on quite different grounds. (1) By exercising the power of adoption she would have divested, no estate but her own, and this would have brought the case within the ordinary rule, but no case has been produced, no decision has been cited from the text books, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession can be defeated and divested." (2)

640. Liberal construction.—It was at one time held that the authority of the husband being in derogation of the rights of the other members of the joint family, might be strictly construed. This view is now no longer tenable for it is settled that it must not be strictly but liberally construed with a view to advance the purpose the husband had in view. (3) But though the construction must be liberal it must not be loose, being reasonable and limited by the words used. For instance where the husband gives permission to adopt, it would be construed as a permission for successive adoptions in case of necessity. So where the husband authorized one of the sons of Hardeo Das to be adopted "within a year or two" and the adoption was not in fact made until about six years after the husband's death, and the boy adopted was not any of the four sons which Hardeo Das had at the time of the husband's authority, but a son subsequently born, the Privy Council upheld the adoption holding that inasmuch as the husband had named none of Hardeo's sons to be adopted, he had apparently intended merely to indicate that one of Hardeo's family should be adopted and that the direction had been sufficiently complied with by the affiliation of a boy who was of a more suitable age than his elder brothers and that as regards the time, the words when read contextually could not be treated as words of limitation. (4) Where the husband had given the power to his two widows jointly, having made no provision, what was to happen if one of them died before any adoption was made, the court held that as the exercise of the power was vested in the discretion of the joint donees, the death of one of them put an end to the power and the survivor of them could not make a valid adoption. The conclusion at which their Lordships arrived was based not on any peculiar doctrine of English law or the English cases but on the very nature and incidents of a joint power. (5) Where a person could exercise the power in one character but not in another, the court will

(1) Such was the case of *Vellanki v. Venkata*, 1 M. 174 P. C.

(2) *Bhoobun Mayee v. Ramkishore*, 10 M. I. A. 269 (311, 312).

(3) *Suryanarayana v. Venkataramana*, 29 M. 382 P. C. *Ram Soondur v. Surbence*, 22 W. R. 121; *Chenga v. Vasudeva*, 29 M. L. J. 144; 29

I. C. 770; *Bhagabat v. Murari*, 15 C. W. N. 524; 7 I. C. 427.

(4) *Mutasaddi Lal v. Kundan Lal*, 28 A. 737 (382) P. C.

(5) *Narasimhav Parthasarathy*, 37 M. 199 (P. C.) overruling *Narasimha v. Rangaya Appa Rao*, 29 M. 437.

presume that the power was conferred only in the character in which it could be exercised. The testator (A) father of his deceased son (B) executed a will in which he expressed a desire to adopt his nephew C but added that if he could not do so, then his daughter-in-law (D), B's widow was to adopt C whom he added, he had appointed as his heir. It was held that the direction to D to adopt must be construed as a direction to her to adopt a son to her deceased husband B and not a son to her father-in-law A, as that was the only adoption which she was by Hindu Law competent to make. (1)

641. This doctrine of liberal construction has been put in force in the case of a direction to adopt a *persona designata*. So when the husband authorized his wife to adopt a boy named by him the courts construed the naming of the boy as merely indicating a preference, so that if he was not available being dead or refused, the widow was at liberty to adopt any other boy unless her authority was expressly limited as if the direction were: "adopt A and no other." (2)

642. But a construction, though liberal, must be equally reasonable and not outside the pale of probability and the rules of judicial interpretation. This was pointed out in a case in which the son had executed a will appointing his wife, father and uncle his executors, and the latter two trustees as well, conferring upon all the three an authority to adopt and providing for his trustees to adopt should his wife die without making an adoption. The wife adopted the plaintiff with the consent of the uncle, her husband's father being then dead. It was contended that as the wife only could adopt, this power must be treated as one merely authorizing the wife and providing for the concurrence of the two executors. But the Privy Council held this to be a mere speculation which could not override the clear provisions of the will which intended to confer the power of adoption on all the three and in case of the wife's death, on his two executors, which showed the father and the uncle were conferred a power to adopt independently of the widow. The joint power being invalid, the adoption made by the widow with the consent of one of the executors was equally invalid. (3)

The same view was held in cases where the testator had empowered his wife to adopt a son along with a living son in which case the direction could not be construed to mean an authority to adopt on the death of the son. (4)

643. Such joint authority which is inconsistent with the sole legal authority inherent in the widow, for the proper exercise of which the consent of the husband is made pre-requisite, is not to be confused with a condition providing for the consultation or advice of a person named. So where the testator appointed his cousin as manager of his estate and provided that his wife will "manage all his affairs with the consent of the said manager," that if she did any wrongful act the said manager could cancel it and that his wife "will adopt a son with the good advice and opinion of the

(1) *Karsandas v. Ladhavahu*, 12 B. 185 (199).

(2) *Ramchandra v. Bapu* (1877) B.P.J. 42; *Lakshmi Bai v. Rajaji* 22 B. 996 followed in *Suryanarayana v. Venkataramana*, 26 M. 681 (684). The somewhat narrower construction in *Amirthayyan v. Ketharamayyan*, 14 M. 65 may be justified on the terms of the will

the court had to construe.

(3) *Amrito Lall v. Surmomoni*, 25 C. 662, affirmed O. A. 27 C. 996 (1002, 1008) P. C.

(4) *Joy Chundro v. Bhyrub*, (1849) S.D.A.B. 461; *Basoo v. Basoo* (1856) S. D. A. M. 20; *Veraprasaia v. Santanraja* (1860) S. D. A. M. 165.

manager" the wife adopted without the advice of the manager who refused to advise or attend the ceremony. The court held the adoption good on the ground that while the will prescribed a penalty for mismanagement, it did not say that the manager's non-consent should invalidate the adoption. That the condition as to his consent was therefore not a condition precedent to the validity of an adoption by her, and as adoption by his wife was the testator's primary purpose, it could not fail for want of the manager's consent. ⁽¹⁾ This was the view taken in another, case in which the authority was given in the following words: "If my younger brother has children, and if he would give his second son among them in adoption he should be taken. In the meanwhile if another son is adopted, much trouble would occur. If a boy is available among relations, with reference to whom trouble may not ensue, he may be taken." It was held that these words were merely commendatory and not imperative and that it left the wife free to adopt a stranger. ⁽²⁾ A Hindu testator by his will appointed five trustees of his property, and gave power to his widow to adopt a son with their consent and advice. One of the trustees declined to act. She adopted a boy with the consent of the remaining trustees who had in fact made the selection. The Privy Council upheld the adoption holding that the refusal of one of the trustees to act could not invalidate it and that the real authority to adopt was vested in the widow. ⁽³⁾

644. The authority may be conditional, contingent or limited, but whatever its nature "it must be strictly pursued." ⁽⁴⁾ So the

Limited authority. husband may direct that his wife may adopt on the death of his legitimate son ⁽⁵⁾ or that the adoption should be of a boy from a certain family in which case the wife is bound to execute the limited authority. So where a Hindu made a will executed in favour of his wife addressing whom, he said therein, "You must adopt for me a boy you like from the children that may be born in the families of my brothers" and later on added, "the principal object of this will is that you should adopt for me any suitable boy" and the wife adopted one outside the husband's brothers' family, though one of the brothers had offered his own son in adoption, the court set aside the adoption holding the second clause controlled by the first and thereby limiting her authority, which she could not exceed, by adopting an outsider. ⁽⁶⁾

645. Of course, it is a well-known principle of law that a person cannot authorize another to do what he is not able to do himself. ⁽⁷⁾ Consequently the husband being unable to make

Illegal authority. an illegal adoption cannot confer larger powers upon his wife. He cannot, for instance, make an adoption during the life-time of a son. If, therefore, he permitted his wife to make an adoption of a co-heir with his son, the authority is altogether invalid and cannot be validated by construing it to authorize an adoption on the death of the natural son then living. As the court observed: "It is impossible to convert this permission into a permission for what is altogether a distinct purpose, i.e., the adoption of a son after the death of the natural son then living . . . It can furnish no authority for enabling a widow to correct an illegal permission by modifying it,

(1) *Surendra v. Sailaja*, 18 C. 385 391.
Channappa v. Ramappa 10 M. L. J. 131.

(2) *Radha v. Narasimha*, 17 M. L. J. 186.

(3) *Bal Gangadar Tilak v. Shrinivas Pandit*, 89 B. 411 P. C.

(4) *Padum Singh v. Koer Oodey Singh*, 12 M.L.A. 850 (856.)

(5) *Solukhna v. Ramdolal*, 1 Beng. S.R. 484;

6 I. D. (O. S.) 318; *Bhubonmoyi v. Ramakishore*, 10 M. L. A. 279; *Bykant v. Kisto Sromderee* 7 W. R. 302; *Valanki v. Venkata*, 1 M. 174 P.C.

(6) *Amirthayyan v. Ketharamayyan*, 14 M. 66.

(7) *Gopee Lal v. Chunderboles*, 11 B.L.R. 391 P. C.

or groundlessly assuming the existence of a permission which might have been legal." (1) So where the husband had two wives and a son by the senior wife, and when ill his junior wife complained to him of the ill-treatment awaiting her at the hands of her co-wife and her son, whereupon the husband empowered her to adopt a son if she could not agree with her step-son, it was held that as the husband could not adopt while his son was alive, so could not his widow. (2) So where the husband gave each of his two wives permission to adopt three sons in succession and acting upon this authority the two widows adopted two sons simultaneously and the question was, which of any of the two adoptions was valid, their Lordships had the two simultaneous adoptions invalid *first* because such adoptions are illegal and *secondly* because, if reasonably construed, the permission gave not a power to the widows to adopt simultaneously but first to the elder widow power to adopt three sons successively and then a similar power to the younger widow. (3)

646. So an authority, legal and sufficient, may by the intervention of other interests, become invalid if exercised thereafter. Such would be the case where the power to adopt by the widow in the event of the death of a legitimate son then living was exercised on his death after his marriage and when his wife entered into possession as his heir and when the adoption made by his mother in the exercise of her power had the effect of divesting her daughter-in-law. (4)

So it is illegal to authorize any person other than the wife to make an adoption, since the power is exercisable by the widow alone, though restrictions may be placed upon her choice of a boy, by the husband making it a condition that the person named by him should concur in the choice. But such power of concurrence is very different to a power of participation in the adoption. (5) So where the testator purported to authorize his widow, whom he made his executrix jointly with two other persons whom he appointed his executors to adopt a son to him, the court held the power invalid. They observed: "That no one can adopt a son to a dead man except his widow is such a rudimentary principle of Hindu Law and one constantly occurring in ordinary life, that it is difficult to suppose any educated man to be ignorant of it. That the widow's choice of a boy may be restricted in various ways, and among them, by requiring the consent of persons named by the husband, is also familiar law. If it turns out that such consent cannot be procured she has no authority to adopt, and that is the question which has been raised in this case with reference to the death of Madhusudan. (6) But the fundamental objection arises not on the events that have happened but on the provisions of the will as it stood at the testator's death. It never gave any authority at all to the widow." (7)

647. So an authority may be void for vagueness. Such was the case of the

Vague authority.

husband who authorized his wife to adopt a boy "from amongst my near relatives" which clause was held to be too vague and therefore inoperative. (8) But in such cases

(1) *Jou Chunder v. Bhjrub* (1849) 5 S. D. A. B. 462; 10 I. D. (O.S.) 1006 (1009).

(2) *Solukhna v. Ram Dolal*, 1 B. S. R. 434; 6 I. D. (O. S.) 318 (320).

(3) *Akhoy Chunder v. Kalapahar*, 12 C. 406 (411, 414) P. C.

(4) *Bhocbun v. Ramkishore*, 10 M. I. A. 299 (811, 812); *Sri Virada v. Sri Brozo*, 1 M. 69 P. C.; *Ram Krishna v. Sham Rao*, 26 B. 526 (532); *Bachoo v. Mankorebai*, 31 B. 373 P. C.; *Amulya v. Kalidas*, 32 C. 861 P. B.; *Dutto v. Panjurang*, 32 B. 499; *Maniyamala v. Nanda Kumar*, 33 C. 1806;

Madana Mohana Purshotama, 41 M. 855 P. C. affirming *O. A. Madana Mohana v. Purshotama* 98 M. 1105.

(5) *Amritolal v. Surnomoye*, 27 C. 996 P. C.; *Venkata v. Rangayya*, 29 M. 437 (444, 445) P. C.

(6) The testator's father appointed as a co-executor and co-trustee.

(7) *Amrito Lal v. Surnomoye*, 27 C. 996 (1002, 1003) P. C.

(8) *Sarda Prasad v. Rama*, 17 C. W. N. 319 (323).

the court strives as far as possible to place a reasonable and probable construction upon vague and incomplete words.

The testator, the Taluqdar of Balrampur in Oudh, who died childless leaving two widows, bequeathed to "the Maharani Sahiba" his entire estate, giving her also a power to adopt, and also providing maintenance for both his widows after such adoption. On the question arising whether the term "Maharani Sahiba" applied to the senior or to the junior widow, the Judicial Commissioner held that term to refer to both the wives considered collectively, but the Privy Council overruled him holding that the employment of a singular number pointed only to one individual, which was otherwise consistent with the context, and that in that view the senior widow who retained the pre-eminence of an elder wife must be held to be the donee of her husband's power. ⁽¹⁾

648. He who gives the authority may equally revoke it before it has been acted upon. Such revocation may be express or implied. **Revocation of authority.** Such revocation will be presumed where after the authority is given, he himself gets a son or makes an adoption. ⁽²⁾

32. (1) Where the authority to adopt devolves or is conferred on two or more widows, in the absence of any express direction to the contrary, it may be used by the senior widow then living at the time of adoption.

Adoption by co-widows.

(2) But no co-widow can make an adoption without the consent of the other co-widow in whom by inheritance from her son the whole estate had become vested. ⁽³⁾

Illustrations.

(a) A directs that his two wives B and C may jointly adopt a son. Here B, though senior, cannot adopt without C and if one of them dies, the other cannot adopt. ⁽⁴⁾

(b) A directs that his two wives A and B should make an adoption. There is nothing to indicate that they are to act jointly. A if senior, may adopt and if she dies or refuses, B, may do so. ⁽⁵⁾

A has two wives B and C of whom C has a son by him who survives A. A authorizes B to adopt in case his son by C should die. The son dies and his estate vests in his mother C. B cannot divest C by adopting to A without C's consent. ⁽⁶⁾

Synopsis.

- (1) *Adoption by co-widows* (649-650). (2) *Preferential right of senior widow* (651).

649. Analogous Law.—Ordinarily where two or more co-widows survive their husband of a divided family in Bombay where his authority to adopt is presumed, that right is held to belong to the senior widow ⁽⁷⁾ by reason of her

(1) *Indar Kunwar v. Jaipal*, 15 C. 725 (748) P. O.

(2) *Goureespershand v. Jymala*, 2 B. S. R. 174; 6 I. D. (O S) 491 (492). The legality of two successive adoptions by two co-widows upheld in this case is now no longer tenable.

(3) *Anandi Bai v. Kashibai*, 28 B 461 (465); *Faizuddin v. Tincowri Shaha*, 24 C. 565.

(4) *Narasimha v. Parthasaradhy*, 37 M.

225 P. C.

(5) *Mondakim Dasi v. Adinath Dey*, 18 C. 69 (71, 72).

(6) *Faizuddin Ali Khan v. Tincowri Shaha*, 22 C 568.

(7) *Anandi Bai v. Kashibai*, 28 B. 461: (465) seniority being of course, determined by the order in which they were married and not by the seniority of age (*Ranjit Lal v. Bijoy*, 39 C. (582).

pre-eminence as the senior wife of her husband who may adopt without even consulting his junior co-widow ⁽¹⁾ even though her interest may be affected adversely by the adoption, ⁽²⁾ by divesting the estate which she may have inherited. ⁽³⁾ This view is supported by the theory of the spiritual benefit accruing to the husband which it is the study of all widows to strive for. ⁽⁴⁾ This rule applies equally to the case of Jains though its underlying principle of spiritual benefit is wholly inapplicable to them. ⁽⁵⁾

650. But the case is different where the junior co-widow succeeds to the estate as the heir of her son in which case the senior by her adoption could not divest her of the estate which has already vested in her as her son's heir unless she had consented to the adoption ⁽⁶⁾ for which she is under no religious obligation, to consent for she inherits the property not from her husband but from her son. ⁽⁷⁾ But this is an exceptional case.

651. Ordinarily, where the testator empowers his two or more widows to adopt and both have equal rights, the authority to adopt devolves upon them in their order of seniority. If the seniormost should refuse or become incapable of adopting then the right devolves on the one next senior to her. ⁽⁸⁾ It is however, open to the senior to waive her preferential right to adopt in favour of a junior widow. The latter would then become entitled to make the adoption. ⁽⁹⁾ But without such authority, the junior cannot even perform the ceremony of adoption of a boy selected by the senior for that purpose, since adoption implies the mutual acts of giving and receiving the child, and until they take place there is necessarily a *locus penitentiae* for the elder widow of which she may avail herself, although contrary to the wishes of the other widows, by changing her mind and selecting another child. To hold that any one of the junior widows might perform the formal act of adoption of the selected child, whenever it pleased her, is to force the hand of the elder widow, and compel her to complete the adoption, which, till it is completed, is at the most only *in fieri*. ⁽¹⁰⁾ Where both widows have equal presumed authority to adopt, the senior may adopt not only without consulting her junior but even in opposition to her wishes and even though it shall be may prejudice her right. ⁽¹¹⁾ But this is only so where the husband does not give any specific directions to the contrary. He may, for instance, direct that it competent to his two widows to adopt jointly. In that case the exercise of the power being vested in the discretion of the joint donees, one is incompetent to act without the other, so that if one of them dies the power is at end. ⁽¹²⁾ It is, of course, competent to the husband to authorize his junior widow to adopt to the exclusion of the senior widow. ⁽¹³⁾

(1) *Rakhmabai v. Radhabai*, 5 B. H.C.R. (A.C.) 181; *Rupchand v. Rakhmabai*, 8 B. H.C.R. (A.C.) 114; *Ramji v. Ghamau*, 6 B. 498; *Keshav v. G. vind*, 9 B. 94; *Padajirav v. Ramrav*, 13 B. 160; *Ranjit Lal v. Bijoy*, 88 C. 694 O. A. 39 C. 532; *Kakarla v. Kakarla*, 28 M. L. J. 72; 27 I.C. 775; *Damara v. Damara*, 29 M. L. J. 13; 27 I. C. 775

(2) *Bhagubai v. Kato*, (1875) B. P. J. 45; *Padajirav v. Ramrav*, 13 B. 160; *Bhimava v. Sangawa*, 22 B. 206 (211, 212).

(3) *Amava v. Mahadgauda*, 22 B. 416.

(4) *Rakhmabai v. Radhabai*, 5 B. H. C. R. (A.C.) 181; *Ramji v. Ghamau*, 6 B. 498.

(5) *Amava v. Mahadgauda*, 22 B. 416 (423).

(6) *Ramkrishna v. Shamrao*, 26 B. 526 F.

B; Anandi Bai v. Kashi Bai, 28 B. 461 (464, 465); *Datto v. Pandurang*, 32 B. 499.

(7) *Fauzuddin v. Tincouri*, 22 C. 555 (572).

(8) *Sarada Prosad v. Rama*, 17 C. W. N. 819; *Mondakini v. Adinath*, 18 C. 69 (71, 72); *Doorga v. Soorendra*, 12 C. 686; *Padajirav v. Ramrav*, 13 B. 160

(9) *Padajirav v. Ramrav*, 13 B. 160 (167).

(10) *Ib p.* 167.

(11) *Bhimava v. Sangawa*, (1896) B. P. J. 351.

(12) *Narasimha v. Parthasarathy* 87 M. 199 (225) P. C. overruling *Narasimha v. Rangayya*, 29 M. 487.

(13) *Chennappa v. Ramappa*, 10 M. L. J. 131.

33. An adoption brought about by coercion, undue influence, fraud or misrepresentation, mistake or otherwise than by the free consent of the parties thereto, is voidable at the instance of the party wronged, but subject to the rights of other parties, it may be confirmed.

Illustrations.

(a) A a widow in the Dravid country falsely represented to her husband's Sapindas that she had authority from her husband to adopt. They thereupon accorded their consent. The adoption is invalid as their consent was obtained by a misrepresentation. ⁽¹⁾

(b) A threatened B with a criminal prosecution falsely accusing her of forgery. B thereupon adopted A's son C. She treated C as her son for years. B could not afterwards avoid it, for she had ratified it.

Synopsis.

- (1) *Voidable adoption* (653). (655-658).
 (2) *Ratification when possible* (654). (4) *Corrupt adoption* (659).
 (3) *Adoption must be voluntary* (5) *Adoption by fraud, etc.* (661).

652. Analogous Law.—This section merely applies the general law to the subject of adoption, and is amply supported by authorities. (—) So the Succession Act ⁽³⁾ embodies the following provision equally applicable to Hindus subject to the Hindu Wills Act. ⁽⁴⁾

Will obtained by fraud, coercion or importunity. **653.** A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator is void and the court is bound to ignore it. But assuming that fraud, etc., is pleaded, the proof by which it is supported must be precise and sufficient and as it is too often ignored, the fraud proved must be the fraud pleaded and not some other fraud which had never been pleaded at all and of which the other party had no notice. In the case of marriage and adoption which materially alter the status of the person married or adopted, this precaution is especially necessary; for it may affect his rights though, being a minor, he may have had no share in it at all.

654. As regards the effect of these acts, it has been held that neither coercion nor fraud nor undue influence nor misrepresentation renders an adoption invalid or void, though they make it voidable at the instance of the party coerced or the adopted son, whose *status* is altered to his prejudice by such coercion. But a party may have been coerced into the doing of a thing which he may ratify afterwards. Such was the case of the Hindu widow who had been coerced into making an adoption of a boy by an attorney who threatened the mother with prosecution for the forgery of a will executed in her favour, whereupon she took the boy in adoption, ratifying her act when the threat was removed by acknowledging the adoption and upholding it as a valid one. ⁽⁵⁾

(1) *Jonalagadda Venkamma v. Jonalagadda Subramaniam* 30 M. 50 (52, 53).

(2) *Venkata v. Rangayya*, 29 M. 437 (445 446); *Venkamma v. Subramaniam*, 30 M. 50 (58) P. C.; *Bal Gangadhar Tylak v. Shrinivas*, 39 B. 441 (467) P. C.; *Shamsunder Lal v. Achan Kunwar*, 28 A. 188 (189) P. C.; *Sitaram v. Hurihar*, 12 Bom. L. R. 910; 8 I. C. 626

(8) Act X of 1865.

(4) Act XXI of 1870, S. 2

(5) *Venkata v. Rangayya*, 29 M. 437 (445, 446) reversed O. A. *Narasimha v. Parithasarathy*, 37 M. 199 P. C. though on a different point. The view set out in the text was dissented from in *Satiraju v. Venkataswami*, 40 M. 925 (980).

655. The first pre-requisite of a valid adoption is that it should be made and taken out of affection ⁽¹⁾ which, of course, implies that

(1) It must be voluntary.

it should be the voluntary act of parties and not one brought about by corruption coercion, or any of the other circumstances mentioned in the section which may defeat the very purpose of adoption. So, in setting aside the death-bed adoption of a person, the Privy Council said:—"How is it possible that a person in such a condition could be capable of any act requiring judgment and reflection, especially one to which no antecedent circumstances appear to have led, and for which the enfeebled and scarcely conscious mind was unprepared? In such a state as that described, even if the mind were passively awake to the suggestions made to it, it would naturally cling to repose, and yield, for the sake of it, to any external suggestion." ⁽²⁾

656. Of course a person who from extreme youth or old age is unable to judge the nature of the act and its effect upon his rights, is equally incompetent to make an adoption. As was observed in a case, "a minor might make a valid adoption for the spiritual benefit of her husband, yet there must be cogent evidence to show that she did so under the intelligent and disinterested guidance of her legal guardian, seeking *bona fide* to provide for a spiritual necessity, with due regard to her interest as far as it is compatible with such necessity". ⁽³⁾ The plaintiff (a Vaishya by caste) claimed to be the adopted son of the defendant whom he sued for possession. Reversing the judgments of the two Lower Courts, the High Court set aside the adoption as brought about by coercion and undue influence of the defendant's caste people who hurriedly sent for the plaintiff who was a pauper and caused the defendant, then aged only 13 to adopt him in accordance with the authority of her husband before his corpse was removed from the house. There was a sufficient gift and acceptance though the performance of *Datta Homam* was deferred. Next day the defendant wrote to the Revenue Officers a petition announcing her husband's death and adoption by her of the plaintiff to perpetuate his family. The adoption was made in the presence and with the advice of the relations and caste people. Eight days after her husband's death she repudiated and turned the plaintiff out of the house. In reversing the concurrent findings of the two courts below and in holding the adoption coerced or unduly influenced, the High Court however, took account of the following facts namely (a) the adopter was aged 13. (b) her husband's corpse lay in the house till 10 A. M., as the assembled relatives persisted in the adoption and would not permit its removal till the adoption was made, (c) plaintiff's adoption was antecedently improbable as the defendant had more eligible relatives for adoption, (d) the plaintiff was a pauper and a recent arrival in the village but the defendant was well to do, (e) plaintiff was expelled from the house within 8 days of the defendant's husband's death and before the funeral ceremonies were completed. The court further found that the presence of the assembled relatives did not make the adoption voluntary, for they had all joined in exerting pressure upon the young widow to make the adoption. ⁽⁴⁾ A similar view was taken by Westropp, J., in another case ⁽⁵⁾ already cited in which an adoption by a young widow of 17 years of age was set aside as induced by undue

(1) Manu IX-168.

(2) *Tayammaul v. Sashachalla*, 10 M. I. A. 429 (435). To the same effect *Bullub Kant v. Kishenpria*, 6 B.S. R. 271; 6 I. D. (O S.) 869 (871).

(3) *Ranganayakamma v. Alwar Setti*, 18

M 214 (221).

(4) *Ranganayakamma v. Alwar Setti*, 18 M. 214.

(5) *Bayabai v. Bala*, 7 B. H. C. R. (App.) 1 (20-24) followed in *Somasekharaja v. Subhadramiji*, 6 B. 524.

influence. The same learned Judge set aside another similar adoption in another case in which a recently bereaved widow aged about 17 had been induced to adopt the plaintiff, the second cousin of her husband, whom her husband had requested the plaintiff's mother to give him in adoption. The court found that there was coercion or undue influence and the absence of independent advice which rendered the adoption invalid. (1)

657. In another case a child-widow aged 11 was authorized by her husband to make an adoption if, and when, she chose. Soon after his death she was induced by her father to make an adoption which the court set aside on the ground that she was then a minor even under Hindu Law, and therefore legally incapable of making an adoption, and secondly because there was no evidence to show that she had disinterested and independent advice to give her discretion. The court further held that such adoption was absolutely void and not merely voidable and could not be legally ratified by the minor on coming of age. (-)

A case where the widow has to form an independent judgment is of course distinguishable from that in which she merely executes the command of her husband. Such was the case of the widow under 15 who took a boy in adoption in accordance with the direction of her husband (3) in which case the scope of the inquiry is shifted to a consideration not whether the widow's act was right, but whether the husband's authority was unobjectionable. These cases establish the duty that lies on the court to protect minors who under the guise of an adoption, are only too frequently stripped of their heritage. Those who are young or old, weak or feeble, are alike entitled to the same protection. (4)

658. The fact that the adopter was a young, inexperienced, female and a pardanashin, surrounded by interested councillors to whom independent advice was not available, are all facts which would strongly raise a presumption of undue influence in an adoption made, especially if it had not been thought of by the husband during his own life-time. As will be seen in the sequel, the courts require very clear and cogent evidence not only of the factum of adoption but also of its antecedent probability before disinheriting the natural heirs. The Privy Council even regret that writing and registration is not made compulsory in all cases of adoptions; (5) but so long as law remains in the imperfect state in which it is at present, the court must shoulder the heavy duty that lies on it to scrutinize every case with that care and circumspection that the highest tribunal has enjoined as essential for the right determination of all transactions made to the prejudice of persons placed in a position of helplessness and dependence.

659. Any consideration paid to the father for giving away his son in adoption is really the sale of the child, and is as such, now illegal and opposed to public policy. (6) But an adoption like a marriage involves the change of status and law does not ordinarily permit the cancellation of a filial relationship once completed (7) any more than it favours the cancellation of a marriage. But

(1) *Somasekharaja v Subhadramji*, 6 B. 624.
(2) *Satteraju v. Venkataswami*, 40 M. 925 (1980) dissenting from *contra* in *Venkata v. Rangayya*, 29 M. 487.

(3) *Mondakini v. Adinath*, 18 C. 69.

(4) *Benee Prasad v. Abdool*, 25 W. R. 192 (195) adoption by a man of weak intellect.

(5) *Sutroogun v. Sabitra*, 5 W. R. 109 P.C.

(6) A "son-bought" is the 8th out of the 12 recognized sons in the *Smritis* but he is no longer so recognized; *Eslam Kishore v Hurish Chunder*, 21 W. R. 881 (382); *Murugappa v. Nagappa*, 29 M. 161.

(7) *Murugappa v. Nagappa*, 29 M. 161 (164, 165).

nevertheless it discourages trafficking in children and regarding the passage of all consideration between the natural parent and the adopter as illegal, it would do all it can to prevent the parent profiting by it. Consequently if the adopter borrowed for payment to the natural parent the money so borrowed is not recoverable from his estate or his heirs including the adopted son. (1) And if the amount is promised but not paid it cannot be sued for. (2) But in such cases the reason why the adoption is not cancelled is, that it may cause irreparable loss to the adopted son. As was observed in a case: "That a rule which makes an agreement to pay, or the payment of such a consideration as that in question invalidate the adoption itself, would strike at the mischief more effectually than one which only prohibits the grant of relief in respect of the agreement or the payment, it would be idle to suppose, so long as the sentiments of the people concerned remain what they are. It is abundantly clear from the evidence that in the community to which the parties belong such payments form the rule, and the contrary, the exception. And so long as these men continue to be moved by the desire for the perpetuation of lineage by recourse to the fiction of adoption, the payments will not cease and the consequence of the stricter rule would only be that the payments would be made in secret" (3)

660. The court, however, takes this view in the interests of the adoptee and if he feels injured by his affiliation, he is entitled to have it cancelled on the ground of corruption. But otherwise the question of motive is immaterial to its validity and the court will not allow a stranger to shake his title on that ground.

But as pointed out in a later case, this view is not sustainable, as the act of adoption is not an act in the nature of a contract, and the validity of the act changing the status of a person cannot be made to remain in suspense at the option of one of the actors in the transaction. (4) Such cases may more appropriately be supported on the ground of estoppel rather than of ratification.

But in another case the widow in Madras being required to obtain the consent of her Sapindas to her adoption, falsely stated to them that she had the authority of her husband to adopt, which rendered their consent supererogatory. They, however, consented and the widow went through the form of adoption, but the court declared it to be a nullity on the ground that the widow had obtained the necessary sanction of the Sapindas by misrepresentation and that their consent was not the "independent approval of her natural advisers, the absence of which sufficed to vitiate the adoption. (5)

661. Adoption by fraud, etc.—An adoption by a widow must be made with an eye solely to the fitness of the boy to be adopted to fulfil the religious and secular duties binding on a son. That object is likely to be frustrated, if she is induced to adopt a boy out of greed for money and for pecuniary benefit to herself. If she is so induced, the money paid to her is a bribe, which is condemned by all *Smṛiti* writers as an illegal payment. Still less is the object fulfilled if she is defrauded or coerced into accepting a boy whom she is constrained to adopt, without the exercise of that unfettered judgment which is essential to the efficient discharge of her duties. It is consequently clear, that no adoption can be upheld, that is the result of coercion, fraud, misrepresentation

(1) *Sitaram v Harihar*, 35 B. 169 (181).

(2) *Eshan Kishore v. Hurish Chunder*, 21 W. R. 381 (382).

(3) *Murugappa v. Nagappa*, 29 M. 161 (165).

(4) *Sattiraju v. Venkataswami*, 40 M. 925 (980);

(5) *Venkamma v. Jonalagadda*, 30 M. 50.

(6) *Sitaram v. Harihar*, 35 B. 169 (180, 181).

or undue influence. These are large words and commonly used in concatenation but as the Privy Council remarked "coercion, undue influence, fraud, and misrepresentation are all separate and separable categories of law. It is true that they may overlap or may be combined." (1) But it is nevertheless necessary and is indeed a well recognized rule of pleading (2) that he who relies upon them for relief must plead them specifically giving particulars, without which the court will take no notice of general allegations which do not amount even to an averment of fraud. (3)

34. The widow's power to adopt becomes incapable of execution on the vesting of her husband's estate in another by inheritance.

Provided that when the estate of the husband has vested in his co-widows by inheritance to him, an adoption made by one of them will not be invalid by reason of the fact that it has the effect of divesting them.

Illustrations.

(a) A the father of B then aged 2 years, empowers his wife C to adopt should B die. B lived to be of age, married D and on A's death inherited his estate. He then died and was succeeded by his widow D. C then adopted E. The adoption is invalid as E could not divest D in whom A's estate had vested as the heir of his son B (4)

(b) But if in the last case B had died unmarried and on his death the estate had vested in his mother C, C could have adopted to A as by so doing she would have merely divested her own estate (5)

(c) A and B are joint brothers. B predeceases A who succeeds to his share by survivorship. B's widow adopts to her husband. The adoption is valid as A has not inherited B's share (6)

(d) But if in the last case A had also died and his estate had vested in his widow then B's widow could not adopt (7)

(e) A dies leaving two co-widows B and C in whom his estate vests by inheritance to him. B adopts divesting C. The adoption is valid (8)

Synopsis.

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| (1) Limits of widow's power to adopt (662). | (6) Adoption when estate is vested in co-widows (667). |
| (2) No revival of power once at an end (663). | (7) Consent if effective to revive power (668). |
| (3) Widow adopting as Gotraj Sapinda (664). | (8) Rule applicable to joint family (669). |
| (4) Rule applicable to grandmother (665). | (9) Estate vesting by inheritance (670). |
| (5) Alter when son dies minor and unmarried (666). | (10) Fraud when immaterial (671). |

662. Analogous Law.—The rule set out in the section is the net result of numerous decisions, some of them conflicting and by no means reconcilable to the main principle here formulated. The leading principle was

(1) *Bal Gangadhar Tilak v. Shrinivas*, 39 B. 441 (467) P. C.

(2) O. 6 R. 4 C. P. Code (V of 1908).

(3) *Wallington v. Mutual Society*, 5 App. Cas. 685 (697); *Ganga Narain v. Tiluckram*, 15 C. 588 P. C.; *Bal Gangadhar Tilak v. Shrinivas*, 39 B. 441 (467) P. C.

(4) *Bhoobun Moyee v. Ramkishore*, 10 M. I. A. 279.

(5) *Ib. Verabhar Ajubhar v. Bai Hiraba*, 27 B. 492 (499) P. C.

(6) *Modan Mohan v. Purushotama*, 38 M. 1105

(7) *Adivi Suryaprakash Rao v. Nidamarty Gangaraju*, 38 M. 228.

(8) *Amara v. Mahadgauda*, 22 B. 416.

stated by the Privy Council in a case in which the husband had empowered his wife to make an adoption should his son then aged 2 die. The son inherited his father's estate on coming of age and then died, whereupon his widow entered upon the estate as his heir. The mother-in-law then adopted a son to her husband which had the effect of divesting her son's widow. But the Privy Council held that by the vesting of her husband's estate in his son's widow, her power of adoption had become incapable of execution. "It might well have been that Bhawani (the son) had left a son, natural born or adopted, and that such son had died himself, leaving a son, and that such son had attained his majority in the life-time of Chandra Bulli Debi (the mother-in-law). It could hardly have been intended that after the lapse of several successive heirs, a son should be adopted to the great-grandfather of the last taker, when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied. But whatever may have been the intention, would the law allow it to be effected? . . . The question is whether the estate of his son being unlimited, and that son having married and left a widow as his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate and take as an adopted son what a legitimate son of Gouri Kishore would not have taken. . . . If Bhawani had died unmarried, his mother, Chandra Bulli Debi would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption she would have divested no estate but her own and this would have brought the case within the ordinary rule, but no case has been produced, no decision has been cited from the text books, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased person vested in possession, can be defeated and divested." (1) Their Lordships had to test the same rule in the converse case in which the son having died a minor and unmarried, an adoption by the mother was upheld. (2) They have since reiterated their view in several other cases (3) and its application to other facts will be found illustrated in the Indian decisions. Where for instance, a Mitakshara father died leaving two widows *G & B* and a son *S* by *G*. By his will he authorized *B* to adopt a son in the event of *S* dying unmarried, which he did in 1883 whereupon *B* immediately adopted without consulting *G*. Six years later, both the widows mortgaged their land to pay off their husband's debts upon which mortgage the mortgagee *F* obtained a decree in 1892 and in execution sale the mortgaged property was purchased by a third party who applied for cancellation of the sale on the

(1) *Bhoobun Moyee v. Ram Kishore*, 10 M. I. A. 279 (309, 312).

(2) *Verabhai v. Bai Hiraba*, 27 B. 492 (499) P. C.

(3) *Padmakumari v. Court of Wards* 8 C. 302 P. C. reversing *Puddo Kumari v. Juggut Kishore*, 5 C. 615 (642, 643) in which the effect of the Privy Council ruling in 10 M. I. A. 279 was misunderstood, in that the court supposed that their Lordships had merely held that the vested estate could not be divested and not, that the adoption itself was invalid. The case in *Ramsondur v. Surbanee*, 22 W. R. 121 also proceeds upon the same erroneous view. In reversing 5 C. 615 the Privy Council made it clear that what they

had decided in 10 M. I. A. 279 was not merely that a vested estate could not be divested but on that account, no adoption which had that effect could be valid. It is now so settled: *Annamma v. Mabbu*, 8 M. H. C. R. 108; *Rupchand v. Rakhmabai*, 8 B. H. C. R. (Ac) 114; *Ramji v. Chamaru*, 6 B. 498; *Keshav v. Govind*, 9 B. 91; *Chondra v. Goparabai*, 14 B. 463; *Krishnarav v. Shankarav*, 17 B. 164; *Vasudeo v. Ramchandra*, 22 B. 551 F. B.; *Ramkrishna v. Sham Rao*, 26 B. 526 F. B. approved in *Madana v. Pureshottama*, 41 M. 855 P. C.; *Manikyamala v. Nanda Kumar*, 38 C. 1806 and cases therein cited at p. 1320.

ground that the property having vested in the adopted son, the widows had no saleable interest, and the Court held that since before the adoption the estate had already vested in G on the death of her son that estate could not be divested by any subsequent adoption by the junior co-widow. (1)

663. It is also manifest that where the power is once determined, it cannot be revived upon the estate reverting to the widow. It was so held in a case in which the husband's estate became re-vested in his widow on the death of his son, after attaining majority and of his widow, when the estate reverted to his mother who then exercised the power of adoption given to her by her husband. But the court held that her power was not suspended but determined by the vesting of the estate in her son's widow and that therefore, there could be no revival of that power to support her adoption. And the same view was taken where the son was subsequently adopted into another family. (2)

664. The same principle was applied to a woman in Bombay who had succeeded to her husband's brother as his Gotraj Sapinda. The argument was that since her husband and his brother were both joint, the death of the former vested the estate in the latter and that destroyed her power to adopt to her husband. Consequently, when she succeeded to her brother-in-law in the absence of his widow, mother or grandmother, the right which had become extinguished by the vesting of the estate in the brother could not revive afterwards when it chanced to re-vest in her. (3)

665. Of course the principle is equally applicable where the son instead of leaving a widow, leaves a son whether natural or by adoption, in which case the son's estate instead of vesting in his widow, vests in his son and this was a case *a fortiori* supported by the Privy Council (4) in a passage already quoted (§ 662). The same view was taken where the estate instead of vesting in the son had vested in his two daughters and the adoption was by the widow of a predeceased son. (5)

666. The facts that the son comes of age and is married, are both essential factors in determining the widow's power. For until he is major he cannot attain ceremonial competence and unless he attains ceremonial competence he cannot convey the spiritual benefit to his father for which he is prized. But this fact alone will not prevent the vesting of his estate in his widow if he is married. Therefore marriage is even more essential than the attainment of majority. If he had attained majority and died unmarried, his mother would be his heir and there being no other interest to divest, her power of adoption continues. (6)

(1) *Faisuddin v. Tincowri*, 22 C. 565.

(2) *Sinnachami v. Ramasamy*, 22 M. L. J. 85; 18 I. C. 7; *Rampearl v. Bhogis*, 8 I. C. (C) 718.

(3) *Datto v. Pandurang*, 82 B. 499 (508).

(4) *Bhoobun Majee v. Ramkashore*, 10

M. L. A. 279; *Krishnarav v. Shankarav*, 17 B. 164; *Vasudeo v. Ramchandra*, 22 B. 551

F. B.; *Dharnidhar v. Chinto*, 20 B. 250; *Ramachandra v. Sham Rao*, 26 B. 526 (531).

F. B. contra *Babu v. Ratnaji*, 21 B. 319.

(5) *Vasudeo v. Ramchandra* 22 B. 551

F. B.; *Gayabai v. Shridharachaya*, (1881)

B. P. J. 115.

(6) *Verabhai Ajubhai v. Bai Hiraba*, 27 B. 492 (499) P. C.

667. The rule is also inapplicable where the husband's estate vests in his co-widows. Such an estate is limited and joint, and as all co-widows are equally bound to join in an act conducive to their husband's spiritual beatitude, any refusal by the junior to the pious act of the senior, cannot invalidate the adoption in which they are by duty, all equally interested. ⁽¹⁾ As was observed in a case: "It would seem to be unjust to allow the elder widow to defeat the interest of the younger by an adoption against her wish, yet if the adoption is regarded as the performance of a religious duty and a meritorious act, to which the assent of the husband is to be implied wherever he has not forbidden it, it would seem that the younger widow is bound to give her consent being entitled to a due provision for her maintenance, and if she refuses, the elder widow may adopt without it." ⁽²⁾ This rule is spoken of as an exception to the general rule on the divesting of vested interests and it is said to support the wider exception that a person whose interest is threatened may validate the adoption by his consent. ⁽³⁾ But as already pointed out this position is untenable and the only ground upon which the rule can be logically defended is the legal identity of all the widows. The widow whose estate is thus divested is entitled to maintenance from the property. ⁽⁴⁾ The divesting of the widows by the adopted son naturally destroys the reversion, diverting the succession to another channel. For instance it will entirely destroy the reversionary right of the daughter or her son. ⁽⁵⁾

668. The question whether the determination of such power can be prevented by consent of the vested interest has been considered and answered in the affirmative in a case in which the court upheld an adoption by the widow of a predeceased son on the ground that it had been made with the contemporaneous consent of the mother-in-law in whom the estate of the last full owner had then vested as an heir. ⁽⁶⁾ This view is in conflict with that taken in Calcutta, ⁽⁷⁾ Madras, ⁽⁸⁾ and in some cases in Bombay itself ⁽⁹⁾ where, it is submitted, the question was considered from the right standpoint.

669. Limits of the rule.—The rule here enacted only applies where the estate has vested in another by inheritance and not when it had devolved upon another by survivorship. ⁽¹⁰⁾ So where an estate vests in two undivided co-parceners, *A* and *B*, and on the death of *A* it passes by survivorship to *B* the widow of the former may, subject to proper consent, make an adoption; but her power to adopt would end with the death of the other, *B* and the vesting of his estate in his widow. ⁽¹¹⁾

(1) *Rakhabai v. Radhabai*, 5 B. H. C. R. 192; *Rupchand v. Rakhabai*, 8 B. H. C. R. (A. C.) 1; *Ramji v. Ghamau*, 6 B. 4'8'; *Keshav v. Govind*, 9 B. 91; *Bhāmara v. Sangawa* 22 B. 206 (211); *Anava v. Mahadgauda*, Ib. 416; *Narayanaswami v. Mangammal*, 28 M. 915.

(2) *Rakhabai v. Radhabai*, 5 B. H. C. R. 181 (1921).

(3) *Anava v. Mahadgauda*, 22 B. 416 (430).

(4) *Rakhabai v. Radhabai*, 5 B. H. C. R. (A. C.) 181 (198); *Jamnabai v. Raychand*, 7 B. 225.

(5) *Ramkishan v. Dibia*, 3 Beng. S. R. 459.

(6) *Payappa v. Appanna*, 23 B. 327 followed in *Siddappa v. Ningangouda*, 38 B. 724.

(7) *Maniyamala v. Nanda Kumar*, 28 C. 1806.

(8) *Adivi v. Nidamarty*, 38 M. 229; *Annamah v. Mabbu*, 8 M. H. C. R. 108.

(9) *Ramkrishna v. Shamrao*, 26 B. 266 F. B.; explained per Jenkins, C. J., in *Anandi Bai v. Kashi Bai*, 28 B. 461 (465).

(10) *Madana v. Purshotama*, 38 M. 1105, O. A. 41 M. 855 P. O.; *Chandra v. Gojarabai*, 14 B. 463.

(11) *Adivi v. Nidamarty*, 38 M. 228 (231); *Sri Vurada v. Sri Brozo*, 1 M. 69; *Chandra v. Gojarabai*, 14 B. 463.

670. The rule is not limited to the vesting of the husband's estate by inheritance to himself, for it applies equally where the estate **Where estate vests in succession to another.** has vested in a collateral relation of the husband in succession to some other person, who had himself become owner in the meantime. (1) Such was the view taken in a case in which one Bapuji had a son Vasudeo and two daughters Bagubai and Lakshmi. Vasudeo predeceased his father leaving a widow Gangu. The father died four years later leaving a will authorizing his daughter-in-law to adopt. She adopted the plaintiff who sued Lakshmi on the basis of his adoption. But his suit was thrown out on the ground that on Bapuji's death the estate having vested in his two daughters, the daughter-in-law could not by her adoption divest it. (2)

671. It has been said that the rule is not affected even though the adoption be delayed by the fraud of the person who has thereby **Fraud when immaterial.** procured the vesting of the estate in him (3) but the statement is too wide and is not supported by the precedent cited for it. (4) In that case the Privy Council found that the fraud did not affect the adopted son who was not even born when the estate became vested in the person who practised it. (5) The defendant who was the reversioner of his brother's widow Chandramoni had prevented another brother's widow from making an adoption by fraudulently setting up a later will of her husband which cancelled the earlier will relied on by her and which empowered her to make an adoption. While litigation on this disputed will was going on Chandramoni died and her estate became vested in the defendant as her sole reversioner which he would not have been, had the plaintiff been adopted before Chandramoni's death. The plaintiff complained that the defendant's fraud in setting up a false will had delayed his adoption, but the reply was that though it had certainly delayed adoption it did not prejudice the plaintiff who could not have been adopted before Chandramoni's death as he was not even then in existence. In other words the fraud practised on the mother did not prejudice the son but on the other hand favoured him as it made his adoption possible. The case would have been very differently decided if the plaintiff had been in existence when Chandramoni died.

35. (1) A boy may be given in adoption by his natural **Power to give in adoption.** father, or by the mother with his consent, except where such consent cannot be obtained owing to his death or disability, provided that he had not at any time expressly or impliedly prohibited her from so doing.

Explanation.—Where the gift and acceptance of the boy to be adopted is completed by the parents in a manner required by law, the fact that they had in their unavoidable absence, delegated the performance of any of its ceremonies to a near relation on their behalf, will not render the adoption invalid.

(1) *Chandra v. Gojarabai*, 14 B. 463 (470); *Lakshmi Bai v. Vishnu*, 29 B. 410 (414).

(2) *Lakshmi Bai v. Vishnu*, 29 B. 410 (414).

(3) *Trev. H. L.* (2nd Ed.) p. 198.

(4) *Bhubaneswari v. Nilcumul*, 7 C. 178 affirmed, O. A. 12 C. 18 P. C.

(5) *Bhubaneswari v. Nilcumul*, 12 C 18 (*arguendo* at pp. 21 and 28) P. C.

Synopsis.

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|---|--|
| (1) <i>Father's power to give in adoption</i> (672-674). | (5) <i>Power and limits of delegation</i> (680). |
| (2) <i>Right unaffected by age or conversion</i> (675-677). | (6) <i>Conditional delegation</i> (681). |
| (3) <i>Mother's authority</i> (678). | (7) <i>Who cannot give in adoption</i> (682). |
| (4) <i>Unaffected by remarriage</i> (679). | |

672. Analogous Law.—The following texts refer to the persons entitled to give in adoption:—

Manu:—"He is called an adopted son whom his mother or father or both parents affectionately give, as a son, being alike and in time of distress, the gift being confirmed with water." (1)

Yashisth:—"A son formed of seminal fluids and of blood proceeds from his father and mother as an effect from its cause; both parents have power to give or sell or desert him" (2) "Let not a woman give or accept a son, unless with the assent of her husband" (3)

Yajñavalkya:—"He whom his father or mother gives for adoption shall be considered as a son given." (4)

Mitākshara:—"He who is given by his mother with her husband's consent, while her husband is absent or incapable though present, or without his assent after her husband's decease, or who is given by his father, or by both, being of the same class with the person to whom he is given, becomes his given son." (5)

Dattak Chandrika:—"But, by a woman, the gift may be made, with her husband's sanction, if he be alive; or even without it, if he be dead, have emigrated, or entered a religious order" (6)

As previously explained, children being the property of their father he has the right of their disposal, of which adoption is one. After the father, the mother possesses the same right, but subject to control when possible. If, therefore, he is dead or incapable of consenting by loss of reason or otherwise, or if he is permanently absent from home, as if he has entered a religious order, then the mother may in the absence of any express or implied prohibition from him, give away her son in adoption. (7)

673. Father's authority to give in adoption.—The person who adopts or with or without his authority his wife may, in accordance with the rules already set out, take a boy in adoption. But the authority to give remains. Primarily only the natural father possesses that power. An adoptive father has no right to give his adoptive son in adoption, for the simple reason that a boy who has once been taken in adoption cannot be again adopted. (8) Consequently, if the adoptive father begets a son he may give away in adoption this son, but not his adopted son.

674. The right of the father to give is uncontrolled by the mother. Even if she objects, he has still the right to give his son in adoption for "in the eye of Hindu Law, when a man gives his son in adoption he would seem to exercise a power, more like the power of an absolute proprietor than of a guardian." (9)

(1) Manu, IX-168.

(2) Yashisth, XV-172, 14 S. B. E. p. 75.

(3) *Ib.* XV 4; cited in Datt. Mim. 1-§§ 15 and 16 (Suth.) p. 4 This is repeated in Mayukh Ch. IV-Sec. V § 1c.

(4) Yajñavalkya, II 180.

(5) Mit. Ch. I Sec. XI § 9.

(6) Datt. Ch. 1-§ 31 (Suth.) p. 115.

(7) Datt. Ch. 1-32 (Suth.) p. 11b.

(8) Datt. Mim. 1-§ 80 (Suth.) p. 7 "The

same son must not be adopted, by two or three persons."

(9) *Chitko v. Janaki*, 11 B. H. C. R. 199; In *Atank v. Fakirchand*, 5 Beng. S. R. 418 (420): 7 I. D. (O. S.) 650 (651) the Judge having questioned the *pandit* of the court whether "the assent of the wife of the adopter was necessary to legalize the adoption" received a reply in the negative.

675. If a minor father can adopt or authorize an adoption, there seems no reason why such a father should not be competent to give his son in adoption. The question in each case is whether he had at the time, attained the age of discretion so as to be able to understand the nature of his act and its effect upon his rights. ⁽¹⁾

676. His conversion to an alien faith, *e.g.*, Mahomedanism, ⁽²⁾ *a fortiori* Brahmoism, ⁽³⁾ does not affect his paternal right of giving his son in adoption. The fact that he may have by his conversion incapacitated himself from performing the religious ceremony, *e.g.*, *Datt Homam*, is no disqualification since law allows such rituals to be performed vicariously in case of necessity.

677. There is no text that a person suffering from any of the disabilities such as congenital leprosy ⁽⁴⁾ impotency, blindness, deafness, idiocy or the like has no right to give in adoption ⁽⁵⁾ and as the gift of a son is a meritorious act, a father so afflicted would not be debarred from exercising a right which his position and his religious dogma alike justify.

678. Mother's authority.—While, therefore, the father has an absolute authority, the mother's authority to give is subject to his consent when possible. ⁽⁶⁾ Consequently if he is dead ⁽⁷⁾ or "has emigrated, or entered a religious order" ⁽⁸⁾ she can give. But these instances are merely illustrative and support the view that in the absence of the husband, the wife is competent to give her son in adoption ⁽⁹⁾ unless the husband has at any time expressly or impliedly prohibited. ⁽¹⁰⁾ In other words, in the absence of any such prohibition, she has the presumed authority of her husband in favour of her power. ⁽¹¹⁾ According to the Madras High Court her implied authority can be curtailed only by an express prohibition of the husband to the contrary. ⁽¹²⁾ In any case, her right arises from maternal relation and not by any presumed delegation from her husband. ⁽¹³⁾

679. Consequently, she does not forfeit that right by reason of her remarriage, whether or not she belongs to a caste in which remarriage is customary. ⁽¹⁴⁾ Nor has her conversion to an alien faith any effect upon it. ⁽¹⁵⁾

(1) In *Jumona v. Bamasoondari*, 1 C. 289 (296) P. C a minor under 18 was held competent to adopt as well as authorize an adoption. If so, he should be equally competent to give in adoption.

(2) *Shamsingh v. Santa Bai*, 25 B. 551 (554, 555)

(3) *Kusum Kumari v. Satyanarajan*, 80 C. 199.

(4) *Anund Mohun v. Gobind*, (1864) W. R. 178.

(5) *Ib.*

(6) *Narayan v. Nana*, 7 B. H. C. R. (Ac) 153 (167, 168); *Bashettiappa v. Shintinaappa*, 10 B. H. C. R. 263 (271, 272); *Hangubai v. Bhagirathi Bai*, 2 P. 377 (379, 380); *Lallu bai v. Manikvarbar*, *ib.* 388 (404) affirmed by F. B. at p. 435; *Santappayaya v. Rangappayaya*, 5 M. L. J. 66; *Arnachellum v. Iyasamy*, (1817) 1 M. S. D. 154; *Mhalsabai v. Vithoba*, 7 B. H. C. R. (App) xxvi (xxxi); *Hurosoondree v. Chundermoney*, (1863) Sev.

998; *Jogeshchandra v. Nrutyakalu*, 30 C. 965 (971)

(7) *Tarinee v. Sharada*, 11 W. R. 463 (476)

(8) *Datt Mim* 1- 81 (Suth) p. 115 cited *supra*, 1 Str. H. L. 82

(9) 1 Str. H. L. 95; *Mhalsabai v. Vithoba*, 7 B. H. C. R. (App) xxvi (xxxi-xxxii).

(10) *Mhalsabai v. Vithoba*, 7 B. H. C. R. (App) xxxvi (xxxii).

(11) *Datt. Ch. Sec. 1 §§ 81, 42; Mit. Ch. 1 Sec 11-§ 9, Colebrooke's note; Mayuk Ch. IV Sec V-§ 1; Rangubai v. Bhugirathi*, 2 B. 377 (380, 381); *Mhalsabai v. Vithoba*, 7 B. H. C. R. (App.) xxxvi (xxxii).

(12) *Narayanawami v. Kuppusami* 11 M. 48 (47, 48) followed in *Gurulingasami v. Ramalakshamma*, 18 M-53 (58).

(13) *Pullabai v. Mahadu*, 33 B. 107 (113).

(14) *Hindu Widows' Remarriage Act* (XV of 1856) S. 5; *Pullabai v. Mahadu*, 33 B. 109

(115); *Panchappa v. Sangambasawa*, 24 B. 87.

(15) *Ib.*

680. Power and limits of delegation.—Adoption is the gift of his son by the natural father to another, and is completed on its acceptance by the latter. (1) This may partake of a contract followed up by simultaneous or subsequent manual delivery and acceptance, which symbolizes and completes the transfer of the boy from one parental control to another. The first essential contract of gift and acceptance can only be made by the parent of the child. It cannot be left to be performed vicariously. But if the contract of gift and acceptance is concluded between the principals competent to give and take (2) and either of them is through illness or otherwise unable to perform the only indispensable ceremony of corporeal giving and taking (3) or of the *Datt Homam*, if necessary, its performance may be delegated to be performed by the wife (4) or another son (5) on the part of the giver and any relation such as the uncle, of the receiver. (6)

681. Conditional delegation. The father may depute his wife to give away his son. In that case she acts as his delegate and is bound to act strictly according to his instruction. If he had ordered her to act only on the fulfilment of a certain condition then she has no power to act till that condition, however unnecessary, and even though imposed in consequence of a mistake, is fulfilled, provided it was made an essential term of her employment. So where the father had agreed to give his boy in adoption duly if the adopter obtained the previous assent of the British Government to it, without which the mother was not to give away her son in adoption, as there had been "former wrangles" about the estate. In this he was mistaken. His wife completed the adoption but the court set it aside holding that the condition precedent to her authority had not been fulfilled. "The mere fact that a man might have judged more wisely or have obtained more accurate information, does not justify those to whom his permission is requisite for a legal transaction, to think and judge for him. His volition and its legal consequences are, in fact not affected by a mistake under which he may labour. The business of the other parties concerned is not to supersede but to persuade him." (7)

682. Who cannot give in adoption.—It has been already stated that except the parents no other relation has the right to give their child in adoption. Following this principle the courts have negatived the right of the adoptive father or mother (8) the step mother (9), the paternal grandfather (10) and of the brother (11) to give him in adoption.

(1) *Collector of Surat v. Dhirsingi* 10 B. H. C. R. 234 (287).

(2) *Bhagwandas v. Rajmal*, 10 B. H. C. R. 241 (265) citing *Kenchava v. Ningapa* *ib.* 265 note; *Venkata v. Subhadra*, 7 M. 548 (551); *Subbarayar v. Subbammal*, 21 M. 497 (502) O. A. 24 M. 214 P. C.; *Shamsingh v. Santabai*, 25 B. 551 (555).

(3) *Vijjarangam v. Lakshuman*, 8 B. H. C. R. O. C. 244 (257).

(4) *Subbarayar v. Subbammal*, 21 M. 497.

(5) *Venkata v. Subhadra*, 7 M. 548 (551)

(6) *Vijjarangam v. Lakshuman*, 8 B. H. C. R. (O. C.) 244 (257).

(7) *Rangu Bai v. Bagirathi Bai*, 2 B. 377

(888.)

(8) *Datt Mim* IV § 62.

(9) *Papamma v. Appa Ram* 16 M. 884 (394)

(10) *Tara Mune v. Devnarayan*, 8 Beng S. R. 516; *Moolhoosarmy v. Lutchmydavummah*, 1852) *Mad S D* 98, (contra) *Veevaizerumall v. Narrain*, 1 M N C 78 (109) dissented from in *Collector of Surat v. Dhirsingi*, 10 B H C. R. 235 (287); *Kenchava v. Ningapa* *ib.* 265 note.

(11) *Collector of Surat v. Dhirsingi*, 10 B. H.C.R. 235; *Bashetiappa v. Shivlingappa*, 10 B H C. R. 268 (274); *Venkata v. Subhadra* 7 M. 548 (551); *Taminabai v. Raychand*, 7 B. 225 (227, 228)

Qualification for adoption. **36.** A boy must possess the following qualifications to be eligible for adoption, namely :—

(1) He must belong to the same caste as the parties giving and taking him in adoption.

(2) He must not be an orphan.

(3) He must not have been adopted by any other person.

(4) Except in Bombay, he must not be married.

(5) Under the Bengal and Benares Schools, he must not have been invested with the sacred thread.

(6) In Dravid, he may be adopted after his investiture with the sacred thread provided he is not married.

(7) Except in Dravid, if the parties are *Davijas* he should not be the sister's son, daughter's son, and mother's sister's son of the adopter:

Provided that in the Bombay Presidency, and the Punjab, and amongst Jains, he may be adopted at any age, even though older than his adopter, is married and has children.

Exception.—Nothing in clauses (5) and (7) applies to Shudras.

Synopsis.

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|---|--|
| (1) <i>Textual rules regarding qualification of adopted boy</i> (683-688). | (699-702). |
| (2) <i>Niyoga Rules</i> (688). | (12) <i>Rule inapplicable to Shudras</i> (704). |
| (3) <i>Identity of caste</i> (689). | (13) <i>Adoption of daughter's son</i> (705). |
| (4) <i>Orphan ineligible</i> (690). | (14) „ <i>sister's son</i> (706). |
| (5) <i>Or a person already adopted</i> (691). | (15) „ <i>mother's sister's son</i> (707). |
| (6) <i>Age immaterial</i> (692-693). | (16) „ <i>wife's brother's son</i> (708). |
| (7) <i>Adoptee to be unmarried</i> (694). | (17) „ <i>brother</i> (709). |
| (8) <i>Exception in Bombay</i> (695). | (18) „ <i>uncle</i> (710). |
| (9) <i>Status of son of adoptee</i> (696). | (19) <i>Persons eligible for adoption</i> (713-716). |
| (10) <i>Adoption before investiture in Bengal and in Benares</i> (697-698). | (20) <i>Objection to extension of Niyoga rule</i> (717). |
| (11) <i>Adoption of prohibited relations</i> | |

683. Analogous Law.—The following texts support this section :—

Manu:—“ He is called a son given (*dattirima*) whom his father or mother affectionately gives as a son, being alike (by class) and in a time of distress, confirming the gift with water.” (1)

(1) Manu IX.168 quoted in Mit. Ch. I. Sec. XI. § 9; the words “and in a time of distress” do not occur in Sir W. Jones' translation (See *Ib.*, p. 210).

Mitakshara :—" By specifying distress, it is intimated, that the son should not be given unless there be distress. This prohibition regards the giver not the taker".⁽¹⁾

Sakala :—" Let one of a regenerate tribe, destitute of male issue, on that account adopt as a son, the offspring of a Sapinda relation particularly, or also, next to him, one born in the same general family (gotra). If such exist not let him adopt one born in another family, except a daughter's son, and a sister's son, and the son of the mother's sister."⁽²⁾

Saunaka :—" Of Kshatriyas, of their own class positively, and on default of a Sapinda kinsman, even in the general family following the same primitive spiritual guide (*guru*), of Vaishyas from amongst those of the Vaishya class, of Shudras from amongst those of the Shudra class; of all, and the tribe likewise, in their own classes only; and not otherwise. But a daughter's son, and a sister's son are affiliated by Shudras. For the three superior tribes, a sister's son is nowhere mentioned as a son."

Ib. :—" Having taken him by both hands, with the recitation of the prayer, having kissed the forehead of the child; having adorned with clothes and so forth, the boy . . . bearing the reflection of a son."⁽³⁾

Dattak Chandrika :—" Reflection of a son " in other words—the capability to have been begotten by the adopter through appointment and so forth.⁽⁵⁾

Dattak Mimansa :—Referring to Saunaka's text before cited, says—By this it is clearly established that the expression "sister's son" is illustrative of the daughter's son and mothers's sister's son and this is proper, for prohibited connection is common to all three. To enlarge would be useless.⁽⁶⁾

Shankar Bhatt :—" It is established that the daughter's or the sister's son can be adopted even by the Brahmin or the like (*i.e.* Kshatriya or Vaishya); and that a Shudra should adopt the daughter's or the sister's son wherever possible "⁽⁷⁾

Vyavhar Mayukh :—" The word "Jate" (class) is not to be narrowed down to the daughter's son and sister's son: because the being a daughter's son or a sister's son is not a co-extensive with being of the same class, and because there would also arise the difficulty of having in one and the same Smṛiti, a general proposition which would then become useless. This is fully explained by my venerable father in his *Dwaita Nirṇaya*.⁽⁸⁾

684. The sacred texts enunciate a large number of rules which have long since become obsolete and which the legal text books record and refute in their historical sequence. It is sufficient to say that the current adoption rules are those stated in the section. Even they are subject to local variations to be

Textual rules.

presently noticed.

A short historical retrospect of the archaic law is all that will be attempted here.

As caste rigidity in the matter of marriage and adoption is but the result of the growing reaction of the last three or four hundred years, prior to which inter-caste marriages were customary and legal, there are no specific rules in the earlier Smṛitis as to the qualifications of the son to be taken in adoption.

(1) Mit. Ch 1 Sec XI, § 10 "Distress is explained by *Prakash* cited by Chandeshwar as "inability of the natural father to maintain his offspring" Balam Bhutt explains it as meaning "famine or other calamity"—Colebrooke's note on *Ib*.

(2) Cited in Datt Ch 1-§ 12 (Suth) p. 10: also in Datt Mim II-107 (Suth), p 41

(3) Cited in Datt. Ch 1, § 17 (Suth), p. 110, also in Datt Mim II-74 (Suth) p 34. The words within crotchets are stated to be unauthorized interpolations.—See *Vaidyanada v. Appu* 9 M. 44 (51, 54) F. B. for a discussion thereon.

sion thereon.

(4) Datt Ch. II-§ 8 (Suth). p. 117; to the same effect Datt. Mim. v. §§ 15-16 (Suth). p. 62.

(5) Datt. Ch II-§ 8 (Suth), p 117.

(6) Datt. Mim. II-§ 108 (Suth), p. 41.

(7) Shankar Bhatt was the father of Nilkanth, author of the "Vyavhar Mayukh" and the quotation is from his *Dwaita Nirṇaya*. (from the chapter styled "The solution of doubts in regard to adoption") quoted in Mandlik's H L, pp 54, 56).

(8) Ch. IV-S V, § 41 (Mandlik, p. 54.

The only qualification Manu mentions is that the boy to be adopted must belong to the same caste or class as the adopter. (1)

Katyayan refers to adoption of a son of a different caste but adds that he is entitled to "food and raiment only." (2) Yajnavalkya also refers to such adoptions. (8)

Nanda Pandit quotes Vriddha Gautam in support of the view that the adopted son should belong to the adopter's *Gotra* (4) or be a *Sapinda* (5) but this rule is obsolete. (6)

685. The rule which has aroused much comment is that incidentally mentioned by Saunaka as an attribute of the adopted son. Describing the ceremony of adoption, he says, "Having kissed the forehead of the child, having adorned with clothes, and so forth, the boy bearing the reflection of a son—" This incomplete quotation Nanda Pandit subjects to a lengthy comment concluding that "such person is to be adopted as with the mother of whom, the adopter might have carnal knowledge". (7)

He refers to the practice of Niyog and adds that the adopted son must be one as could have been produced of the wife by Niyog, thereby expressly excluding the brother, paternal and maternal uncles, the daughter's son and that of the sister "for they bear not resemblance to a son". (8)

The rule has been understood as prohibiting adoption of a person whose mother the adopter could not have married.

686. It has been held applicable only to an adoption by a male and inapplicable to an adoption by a female to her husband (9) or any adoption by a Shudra. (10) Even where it is applicable, it is limited to the possibility of a marriage with her when she was a virgin, having reference only to the law of propinquity (11) without any reference to the law of appointment or Niyog, with reference to which the rule was framed. But as *Niyog* is now obsolete, the courts have made it a new rule of their own. The rule originally framed was no doubt intended to prevent an incestuous connection between the adoptive father and the natural mother of the boy adopted, in imitation of nature. The rule substituted in its place has the same purpose in view but since the original rule had reference to the relationship upon marriage while the rule substituted refers only to the relationship before marriage, it is apparent that two rules though possessing the same aim, are not in conflict, though they do not completely coincide.

Sakala:—"A sonless twice-born should also adopt a son of a *Sapinda*, next to him a *Sagotra*, in default of whom he should adopt *Agotra* excepting a daughter's son, sister's son and mother's sister's son. (12)

(1) IX-§§ 168, 169. Nanda Pandit points out that if Manu be followed the result would be 18 kinds of sons-Datt. Mim II § 55 (Suth) p. 30.

(2) Datt. Mim III § 3 (Suth) 42.

(3) *Ib.*

(4) Datt. Mim S. II § 4 (Suth) p. 18, § 71 (Suth) 84.

(5) Datt. Mim S. II § 8 (Suth) 18.

(6) *Gocoolanund v. Wooma Dass* 23 W.R. 340 O. A. *Uma Doyi v. Gocoolanund* 3 C. 587 P. C.; *Babaji v. Bagirathi Bai*, 6 B. H. O. R. (Ac) 701; *Dharma v. Ram Krishna*, 10 B. 80.

(7) Datt. Mim II-8 20 (Suth), 68.

(8) *Ib.*, § 16 17 (Suth) p. 63—See also Datt. Ch. S-V § 8.

(9) *Jwan v. Jwan* 2 M. H. C. R. 462. *Sriramulu v. Ramayya*, 3 M. 15; *Minakshi v. Ramayya*, 11 M. 49; *Cicpol v. Hanmant*, 3 B. 273 (298); *Vyas v. Vyas*, 24 B. 473.

(10) *Sriramulu v. Ramayya*, 3 M. 15.

(11) *Minakshi v. Ramayya*, 11 M. 49.

(12) Sakala cited in Datt. Mim. II-14, 107; literal translation quoted in Datt. Ch. I-10-17, 29, also in Mandlik's H. L. 52; *Wabhai v. Heerbai*, 34 B. 491 (495).

This is construed to mean that, "in the order of selection for adoption, the first choice is directed in favour of a Sapinda, failing him a Sagotra and in default of these, a stranger, excepting always the specific instances mentioned, viz., a daughter's son, a sister's son, and the mother's sister's son" these three being strangers and neither "Sapindas" nor "Sagotras" of the adopter. (1)

687. But even any of these three, though excepted by the text, may be adopted if permitted by custom and one such custom in favour of the validity of adoption of a daughter's son being proved in a case arising in the Umbala District of the Punjab, the Privy Council held it unobjectionable (2) and even in the case of Brahmins of Southern India the custom of adopting a sister's or daughter's son has been recognized by the courts. (3) And so Strange wrote in 1806 that "in practice the adoption of a sister's son by persons of all castes is not uncommon" (4) And similarly the custom of adopting the daughter's son has survived the appointment of a daughter for that purpose. (5)

688. Niyog rules.—They prohibit adoption of the following relations: the paternal and maternal uncles, the brother, the four first cousins on the paternal and maternal side, the brother-in-law, the sister's son, and the daughter's son. The marriage rules do not exclude adoption of the father's brother's son and the mother's brother's son. (6)

The Bombay High Court has held the Niyog rules of ineligibility for adoption as merely directory and not imperative (7) and that the rule that no one can be adopted whose mother the adopter could not have legally married, is confined to the three specific instances forbidding the adoption of the son of a daughter or of a sister or of mother's sister (8) though he may also happen to be a son of his father's brother (9) as these three are expressly excluded by both the works on adoption. (10)

689. Persons eligible for adoption.—All schools and courts now agree that the first pre-requisite of eligibility for adoption is that

(1) **Identity of caste.** the boy selected must be of the same caste as the adopter. For this purpose law recognizes only the four primary castes and if the boy and his adopter both belong to any of them, then there is no Shastric impediment in the way of their adoption. (11)

This rule is sought to be justified on various grounds, that an adoption being an imitation of nature, and since a son if born, must belong to the father's caste, so must be the son adopted (12) or that since an adopter cannot marry a

(1) *Ramachandra v. Gopal*, 32 B 619; *Walbai v. Heerbai*, 24 L. 491 (495)

(2) *Itup Narain v. Gopal*, 36 C 780 (795) P. C.

(3) *Vandinnadu v. Appu*, 9 M 44 F B

(4) 2 Str H. L. 100 (App): To the same effect 2 West and Buhler's H. L. (3rd Ed.), pp. 884-888.

(5) 2 West and Buhler's H. L. (3rd Ed.), pp. 884-888 cited with approval *Vayidinada v. Appu*, 8 M. 44 (63) F.B

(6) *Minakshi v. Ramanada*, 11 M. 19 (54).

(7) *Virayya v. Hanuman'a*, 14 M. 459 (460, 461); *Ramachandra v. Gopal*, 32 B. 619 (630); *Walbhai v. Heerbai*, 34 B. 491.

(8) *Kyas v. Vyas*, 24 B. 478 (481); *Ramachandra v. Gopal*, 32 B. 619 *Yamnavu v.*

Laxman, 36 583; *Ramakrishna v. Chinnaji*, 15 Bom. L. R. 824; *Gajanan v. Kashi Nath*, 39 B. 410 (419); *Ragavendra v. Jayaram*, 20 M 283. *contra Minakshi v. Ramanada*, 11 M. 19.

(9) *Ramachandra v. Gopal*, 32 B 619; *Bhagwan Singh v. Bhagawan Singh*, 21 A. 412 P. C overruling, 17 A. 294 F. B.

(10) *Walbai v. Heerbai*, 34 B. 491.

(11) Manu IX-168; *Yajnavalkya* II-132; *Mitak Ch 1 S XI § 9*; *Mayuk Ch 7-S. 5 § 4*; *Datt. Mim II § 22, 23-26 (Suth) p. 21*; *Saunaka cited ib § 21*; (Suth) p. 21; *Datt. Ch. 1 § § 12-16*.

(12) *Mit Ch 1 S. XI § 9*; *Datt. Mim. II 74*. 88

woman of a different caste and the fiction of adoption is founded upon the fiction that the adopter has begotten the boy upon his natural mother, therefore, it is necessary that she should be a person who might lawfully have been his wife—a rule which being pushed to its logical extreme implies (a) not only that the two must belong to the same caste; but (b) that the two must not be within the prohibited degree of relationship for marriage. (1) But the fact that the Mitakshara recognizes inter-marriages between different castes as lawful, (2) Saunaka recognizes adoption of sons of different castes and Nanda Pandit does not explain away this text but recognizes it as expounding the current law of his time (3) shows that the true reason to be found for desuetude of the custom is custom and that there is no logic behind it. (4) That there can be no adoption of a boy belonging to a different caste is, however, settled. So the court refused to countenance the adoption of a Brahmin boy by a widow of the Rajbansi Thakur caste. (5) But if the caste is one, the fact that the adoptee's father belonged to the Sadharan Brahmo Samaj is no obstacle to his adoption into an orthodox Hindu family. (6)

(2) Must not be an orphan

690. Secondly, the boy to be adopted must not be an orphan, that is to say one bereft of both parents, for in that case, he cannot be given in adoption (7) (§ 682).

691. Thirdly,

(3) Must not be adopted by another.

since a person cannot be the son of two fathers, his adoption to one disqualifies him for a second adoption. But if his first adoption was invalid, there being no adoption in law, it does not stand in the way of a second adoption.

692. The fitness of the boy for adoption by reason of his infancy is closely connected with his disqualification by reason of his marriage. In ancient times neither age nor marriage was a bar to adoption and an instance is frequently cited of the adoption of Sunahsepha by Vishwamitra in the vedic age.

Age immaterial.

The restrictions consequent on age and marriage are unquestionably innovations of a later age and so far as they are supported by the two law books on Adoption, they are based upon a passage in Kalika Puran, the authenticity of which is doubtful and has been doubted by the authors of Dattak Chandrika (8) of Vyvhar Mayuk, (9) and by Messrs. Colebrooke (10) and Sutherland. (11) This interpolated passage contains the following sentence: "O Lord of the Earth, a son, having been initiated under the family name of his father, unto the ceremony of tonsure inclusive, does not become the son of another man. The ceremony of tonsure and other rites of initiation being indeed performed under his family name, sons given, and the rest may be considered as issue; else, they are termed slaves. After their fifth year, O King, sons given, and the rest are not sons. But having taken a boy five years old, the adopter should not perform the sacrifice for male issue. But the son of a twice-married woman, immediately on being born, he should duly take as a son." (12)

This means that no adoption is valid unless the boy is below five, untorned and, therefore, necessarily unmarried.

(1) Sutherland's Synopsis II §1.

(2) Mit. Ch. 1 Sec VIII; Daybhag Ch. IX.

(3) Datt Mim. III §§ 1-3.

(4) Virayya v. Hanumanta, 14 M. 159 (460)

(5) Narain Singh v. Shiam Kali, 17 O. C. 186; 25 I. C. 45.

(6) Kusum Kumari v. Satya Ranjan, 30 C. 999 (1009, 1010).

(7) Balawantrao v. Bayabar 6 B. H. C. R.

(O. C.) 83; Bhashetrayya v. Shivlingappa, 10 B. H. C. R. 268; Srinivas v. Balwant, 37 B. 513 518.

(8) Datt, Ch. II-25 (Suth) pp 121, 122.

(9) Mandlik H. L. p 58.

(10) 2 Dig. § 273 p 391.

(11) Suth, Note to Datt Mim. pp 46 and 47.

(12) Cited in Datt. Mim. IV. 22 (Suth.) pp. 46 and 47.

693. This question was for the first time agitated in the Sudar Diwani court in Bengal in 1806 who laid down the rule that the adoption of a boy over five years of age though not laudable, was yet valid, provided his initiatory ceremonies (*Samskar*) were performed in the family of his adopter and not in that of his natural father. Holding this view they upheld the adoption of a boy aged 8 years. ⁽¹⁾ In another case decided in 1837 the Court even dispensed with the qualification of non-tonsure holding that its performance in the natural father's family could be expiated by a sacrifice. ⁽²⁾ Next year they had to deal with a Teli's adoption and on the present subject the Pandit's opinion was that in the case of Dwijas, adoption should be before the boy's thread ceremony and of a Shudra, before his marriage. ⁽³⁾ This is in accordance with the view of Vashishth quoted in the *Dattak Chandrika*. ⁽⁴⁾ In another case decided in 1859 an adoption of a Brahmin boy aged 12 was held good on the ground that the initiatory ceremony of investiture had not been performed. ⁽⁵⁾ The rules as to age and the non-performance of the ceremony of investiture have thus failed to obtain a foothold in the case-law of the country. On the other hand, the contrary custom has been found to exist even amongst the Brahmins of Southern India. ⁽⁶⁾

694. In the cases cited, it was pointed out that even in the case of Shudras marriage was bar to adoption ⁽⁷⁾ and this has been the law even in Madras where, however, there is no restriction as to age, so much so that if the person is unmarried the fact that he is aged 40 is no bar to adoption. ⁽⁸⁾ That a married man cannot be adopted has also been decided in Allahabad ⁽⁹⁾ and in Nagpur ⁽¹⁰⁾ and is now the established doctrine of the Benares school applicable alike to the regenerate castes and the Shudras ⁽¹¹⁾ and even to the Jains ⁽¹²⁾ amongst whom, however the custom of adoption of married men is not unknown and has been found proved in several cases. ⁽¹³⁾

695. But in the Bombay Presidency even marriage is no bar to an adoption ⁽¹⁴⁾ and is in accordance both with the written law ⁽¹⁵⁾ and the prevailing usage ⁽¹⁶⁾ which sanction such adoptions even where the married man is aged 45 and is himself the father of a son. ⁽¹⁷⁾

(1) *Kirubarnsen v. Bhubinesree*, 1 Beng. S. R. 213 (1887); 6 I D. (O.S) 157 (158).

(2) *Jaymonny v Sibosondry* Fulton, 75, following 1 Str. H. L. p. 91 in which they also upheld the adoption of an only son. But the parties were Shudras

(3) *Bullubakant v Kishempura*, 6 Beng. S R 270. 7 I D (OS) 869 (872). To the same effect *Niradaye v. Bhola Nauth* (1863) S.D.A 553.

(4) 11-29 (Suth) p 123.

(5) *Ram Kishore v. Bhaubharmoyee*, (1859) S. D. A. B. 229 affirmed on review (1860) 1 S D A B, 485; but the adoption was set aside on another ground by the Privy Council in 10 M. I. A. 279.

(6) *Viraragava v. Ramalingo*, 9 M 148.

(7) *Annasani v. Sivagamy*, 1 Mad. D. 106; *Chetticolam v. Venkatachella*, (1823) M S. D A 406; *Sreenivasain v. Sushyammal*, (1859) Mad. D. 118; *Vythilinga v. Vijayal ammal* 6 M 43; *Pichurayyan v. Subbayyan*, 18 M. 128.

(8) *Papamma v. Appara*, 16 M. 884.

(9) *Gengasahai v. Lekraj*, 9A. 253; *Damodarji v. Collector of Banda*, 7 A. L. J. 927.

(10) *Tejabai v. Molunlal*, 11 C.P. L. R. 56; *Kanhyalal v. Satija*, 1. N. L. R. 1.

(11) *Damodarji v. Collector of Banda*, 7 A. L. J 927; *Jankiram v. Venkiah*, 10 M L J. 21, 11 I. C. 388

(12) *Rupchand v. Jambuprasad*, 32 A. 247 P C in which their Lordships however confined their decision to the custom found not proved in that case.

(13) *Manoharlal v. Benarsidas*, 29 A. 495.

(14) *Mudisairai v. Vittoba*, 7 B. H. C. R (App) 26; *Nathaji v. Hari*, 8 B.H.C.R. (A C) 67; *Dharma v. Ramkrishna*, 10 B 80 *Query* as to Brahmins in *Sadaslav v. Hari*, 11 B. H. C. R 190; *Lekshmanappa v. Ramova*, 12 B. H. C. R 364

(15) *Mayukh Ch IV Sec. V (Mandlik)* p. 58.

(16) *Piri jbhukhanji v. Gokuloottanji*, 1 Borr 181.

(17) *Gopal v. Vishnu*, 23 B.250; *Kalgavada v. Somappa* 33 B. 669

696. Where a father becomes the son of another person, the latter acquires no right of accession in his adoptee's son who continues to retain his old gotra and his right of inheritance in the family of his birth. In other words, by his adoption into another family the father alone goes out of the family but he does not carry with him his son ⁽¹⁾ though he would necessarily have to take with him his wife who completes his individuality and who therefore like her husband acquires his new gotra. ⁽²⁾

697. The rule that in the case of the first three castes, the boy to be adopted must not have donned the sacred thread, is enforced only by the Benares and Bengal schools, the Dravid and the Bombay schools permitting such adoptions, the former only on condition that the adoptee is not married ⁽³⁾ which is the rule every where except in Bombay and the Punjab.

Adoption before investiture in Bengal and Benares. So dealing with the case of a Kshatriya adoption, Mahmud, J., held, "That according to the Hindu Law of adoption as prevalent in the Benares school, the performance of the *Upnayan* ⁽⁴⁾ or the ceremony of the investiture of the sacred thread, hallowed by the *Gayatri* representing as it does the sacred birth of a boy and the beginning of his education in the duties of his tribe as prescribed by Manu, is the ultimate limit when a valid adoption in the Dattak form can take place." ⁽⁵⁾ This doctrine has no application to the Shudras, for in their case the only ceremony of consequence in its theological and legal aspect in Hindu Law, is the ceremony of marriage. ⁽⁶⁾

698. Now since the ceremony of investiture as already stated, may be performed in the case of Brahmins at any time between the 8th and 16th year, that of a Kshatriya between the 11th and the 22nd year and that of a Vaishya between the 12th and 24th year, it follows that this is the extreme age limit for the performance of the investiture as also for adoption. ⁽⁷⁾ But should the boy be for any reason not invested with the sacred thread beyond this age, there appears to be no legal impediment to his adoption before marriage, for if his eligibility is determined by the *Upnayan*, it cannot be assumed where it has not been in fact performed.

699. The texts favour the adoption of near relations, Sapindas first, Gotrajas after, and strangers if the first two are not available. These injunctions have been held to be only monitory and not mandatory. Consequently the adopter is free to choose any boy from amongst his caste fellows. And amongst these last, the Privy Council has now settled that since the texts of Sakala and Saunaka cited with approval in the two Hindu treatises on adoption ⁽⁸⁾ expressly prohibit the adoption of the sons of one's daughter, sister and mother's sister, these cannot be adopted. ⁽⁹⁾

(1) *Kalgavda v. Somappa*, 33 B. 669.

(2) *Ib.* p 687.

(3) *Viraragava v. Ramalinga*, 9 M. 148 ; *Pichuwayyan v. Subhayan*, 18 M. 128.

(4) Lit. "up" near and "nayan" going, i.e., "going near the preceptor" for commencement of his vedic studies. All men are born Shudras and the ceremony of *Upnayan* symbolized by the investiture of the sacred thread is regarded as a sacred birth converting a Shudra into a *Dwij*a or twice born. It marks the termination of infancy and the com-

mencement of the term of studentship.

(5) *Ganga Sahai v. Lekhraj*, 9 A. 53 (328) following on this point *Keerutnarain v. Bhachunesree*, B S D A. 161 ; *Ramkishore v. Bhachumoyee*, (1859) S. D. A. B. p. 229 (cited *supra*.)

(6) *Ib.* p 328.

(7) Manu II §§ 86-88.

(8) See texts already cited. § 688.

(9) *Bhagwan Singh v. Bhagwan Singh*, 21 A. 412 (420-424) P. C. ; *Waltai v. Heerbai*, 84 B. 491.

700. There remains the question whether these texts equally prohibit the adoption of other relations with whose mother the adopter could not have at any time contracted a legal marriage. The Privy Council had not to and refrained from, deciding this general question as the case before them related to the adoption of a mother's sister's son which is expressly prohibited and as such their Lordships felt bound to follow the text, supported as it was by precedents and the opinion of text writers. The questions, therefore, still remain whether the prohibition is specifically confined to the specified relations, or is more general as stated in the rule.

701. The question has already been discussed in some detail (§§684-688) and all that is now necessary is to state the argument *pro* and *con* and the trend of decided cases. For the generality of the rule, the argument is, that since adoption strives to imitate nature, one cannot adopt a son with whose mother one had never any possibility of an intercourse even if one were to imagine oneself as appointed by her husband to raise an issue upon her. Now since such an impossibility exists only in the case of relations with whom intercourse would be incestuous, it follows that close female relations with whom *Niyog* was impossible are also relations whose sons can by no figure of speech be described as the "shadow of a son." This was the primary contention.

702. But since the discontinuance of *Niyog*, it is said, the essence of the rule remains; and if we substitute marriage for *Niyog* the modified rule holds good that no one can adopt a son whose mother one could never have lawfully married. The analogy of the two rules was thus defined in a Madras case. "There is no conflict between the law of appointment as to the person eligible for appointment and the law of marriage as to the person eligible for marriage. The object in both was that the sexual intercourse authorized by law should not be incestuous, and the religious foundation for the rule is that the offspring of incest is outcaste and not competent to offer funeral or annual oblations with efficacy. The point in analogy consists in securing a son competent to perform those oblations and the analogy holds good whether it is considered in connection with the law of appointment or the law of marriage." (1) On this principle a man cannot adopt his own brother or step-brother (2) or his uncle whether paternal or maternal (3) though he may adopt his brother's son, since he could have married his brother's wife when a maiden. (4) So again he may adopt his brother's son's son, (5) paternal uncle's son, (6) wife's brother, (7) wife's brother's son (8) or wife's sister's son. (9)

703. But the decided cases lack uniformity due to the variations sanctioned by local usage and the question therefore, now, is not only what the rule is, but how far it accords with existing practice. The cases that have so far attracted the notice of the court, are noted below.

704. The rule has in any case no application to Shudras. (10) They are expressly excepted in the very texts which are held to enounce the rule.

Or in Southern India Nor has it any force in Southern India. (11)

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- (1) *Vayidinada v. Appu* 9 M. 44 F. B. Borr. 656.
contra Minakshi v. Ramanada, 11 M. F. B. (8) *Sriramulu v. Ramayya*, 8 M. 15.
(2) *Sriramulu v. Ramayya* 8 M. 15. (9) *Ragavendra v. Jayaram*, 20 M. 283.
(3) *Haran Chunder v. Hurro*, 6 C. 41 (47). (10) *Nunkoo Singh v. Purm Dhun Singh*, 12 W. R. 356; *Phundo v. Janginath*, 15 A. 327; *Chinna v. Pedda*, 1 M. 63.
(4) *Bai Nani v. Chuni Lal*, 22 B. 973; (11) *Minakshi v. Ramanada*, 11 M. 49 (54) F. B.
Jaisingh v. Bijai, 27 A. 417.
(5) *Haran Chunder v. Hurro*, 6 C. 41.
(6) *Virayya v. Hanumantha*, 14 M. 459.
(7) *Ruvce Bhadr v. Roop Shunker*, 2

705. Invalid adoption.—Even the above express text has not received universal acceptance. For while the prohibition of adoption of a daughter's son is now accepted as the general

Daughter's son

rule of Hindu Law, deviation from it is permitted by custom. ⁽¹⁾ While it has been given effect to in the Benares school ², the contrary has become customary in the Southern Mahratta country, ³ the Punjab ⁽⁴⁾ and amongst the Havi Brahmins of Kanara, ⁵ Nambudri Brahmins of Malabar ⁽⁶⁾ and amongst the Brahmins generally in the Tanjore, Trichinopoly and Tinnevely districts of Southern India. ⁽⁷⁾

706. The same view holds good in the case of a sister's son, prohibition being the rule and premission an exception, when justified

Sister's son.

by custom. ⁽⁸⁾ Such custom was proved to exist amongst the Bhora Brahmins of the United Provinces ⁽⁹⁾ though not amongst the other Brahmins ⁽¹⁰⁾ and among the agricultural Khatri of the Punjab ⁽¹¹⁾ and the Vaishyas of Bombay ⁽¹²⁾ and even the Brahmins of Southern India. ⁽¹³⁾ But in the Andra country as in Bengal, the normal rule holds good. ⁽¹⁴⁾ As Kayasths are Shudras, they are free to adopt a sister's son. ⁽¹⁵⁾

707. So the prohibition of adoption of a mother's sister's son being covered by an express text, the prohibition is the rule and

Mother's sister's son.

extended over to one though he may happen to be also his father's brother's son, ⁽¹⁶⁾ but an exception has been allowed in the case of Purbia Kurmis who though they call themselves Purbia Kshatriyas, do not really belong to the regenerate caste. ⁽¹⁷⁾ In this case the court upheld the adoption of the father's sister's grandson.

708. But the court has not tolerated the adoption

Wife's brother's son.

by a woman of her brother's son. ⁽¹⁸⁾

709. Valid adoptions.—Nanda Pandit expressly

Brother.

excludes the brother and both the paternal and maternal uncles from adoption. ⁽¹⁹⁾

The Niyog rules exclude both the brother and the step-brother, but their adoption, though not general, is nevertheless not unknown. Steele infers that a younger brother may be adopted by an elder brother because the Ramayan speaks of the latter as "in the place of the father." ⁽²⁰⁾ But the Madras H. C. Court condemned the adoption of a brother and a step-brother, though it holds that the prohibition of the adoption of a half-brother had nothing to do with the possibility of a legal marriage between the son and his step-mother whose

(1) *Rup Narain v. Gopal Devi*, 36 C. 780 P. C.

(2) *Bhagwan Singh v. Bhagwan Singh*, 21 A. 412 (418) P. C.

(3) *Bai Nani v. Chumtial*, 22 B 978 (976).

(4) *Rup Narain v. Gopal Devi*, 36 C. 780 P. C.

(5) *contra Baij Nath v. Shamboo* (1908) P. W. R. 53

(6) *Gawri v. Shivaram* (1884) B P. J. 80

(7) *Vishnu v. Krishnan*, 7 M. 8.

(8) *Vayidinada v. Appu*, 9 M 44 F. B. : *Appayya v. Vengu*, 15 M. L. J. 311.

(9) *Mansa Ram v. Sundar*, 14 A 53, *Sunder v. Parbati*, 12 A. 61 P. C.

(10) *Mansa Ram v. Sundar*, 14 A. 53

(11) *Parbati v. Sundar*, 8 A 1.

(12) *Sabha Mal v. Nanakchand*, 16 P. L. R. 16; 9 I. C 96

(13) *Gampatray v. Vithoba*, 4 B. H (Ac) 188.

(14) *Vayidinada v. Appu*, 9 M 44 F. B.

(15) *Narasamma v. Bolamanchattu*, 1 M. H. C. R. 470

(16) *Rajcoomar Lall v. Bussessur*, 10 C. 688

(17) *Wabar v. Heerbar*, 34 B 491; *Bhagwan Singh v. Bhagwan Singh*, 21 A. 412 P. C.

(18) *Jivmal v. Kallumal* 28 A. 170.

(19) *Ballas Koer v. Lachmansingh*, 7 N. W. P. H. C. R. 117.

(20) *Datt. Mim.* V-17 (Suth), p 68.

(21) *Steele's L. C.*, p. 44.

virgin state. ⁽¹⁾ But such adoption was held valid in a Bombay case on the ground that he was not one of the relations expressly prohibited by Nanda Pandit. ⁽²⁾ It will be of course valid amongst Shudras ⁽³⁾ who are expressly exempted from the narrow texts. Whatever may be the established usage as regards the adoption of a younger brother, there can be no doubt that the latter cannot adopt his elder brother. Such a question was categorically put to the Pandit who opined that according to the doctrine of Saunaka stated in the Dattak Mimansa an elder brother, an uncle, etc., cannot become a son. ⁽⁴⁾

710. The ineligibility of the uncle, both paternal and maternal, was incidentally declared by the Pandit in the case last cited.
Uncle. They stand in *loco parentis* to their nephew who cannot turn the tables upon them by becoming their adoptive father. Moreover the restriction as to age would in most cases prevent their adoption except amongst the Jains in Bombay and in the Punjab, even where the metaphor has not probably yet spent its force.

Paternal and maternal uncle's son and grandson. **711.** But there is no objection to the adoption of the paternal ⁽⁵⁾ or maternal uncle's son, or even son's son. ⁽⁶⁾

Maternal aunt's daughter or latter's son. **712.** And neither text nor usage can oppose the adoption of the maternal aunt's daughter or the maternal son's aunt's daughter's son. ⁽⁷⁾

713. Eligible for adoption.—Of all relations, both the Smritis and later texts commend the adoption of a brother's son, ⁽⁸⁾ and even on the Niyog rule, the adoption of the latter's son is not repugnant to Hindu Law since no rule prevented the marriage of the adopter with his nephew's wife when a virgin. ⁽⁹⁾ So there is nothing illegal in the adoption of a cousin's grandson. ⁽¹⁰⁾

714. The adoption of a wife's brother is legal and its legality has been judicially affirmed ⁽¹¹⁾ and the legality of his son's adoption by his sister settled by the Privy Council ⁽¹²⁾ in the case of a Brahmin family of the United Provinces. In that case one Gandharv had authorized his widow Parbati to take in adoption her brother's son which she did. The High Court upheld it ⁽¹³⁾ and its decision was only affirmed on appeal by the Privy Council ⁽¹⁴⁾ but their observations

Sriramulu v. Ramayya, 3 M. 15
Gajanan v. Kashi Nath, 39 B. 410

Phundo v. Jangi Nath, 15 A. 327.
Sanjeet Singh v. Narain Singh, 2 R. 315; 6 I. D. (O. S.) 597.
Bata Singh v. Dial Singh, (1902) P

(6) *Virayya v. Hanumanta*, 14 M. 459
 (1) *Haranchunder v. Hurro Mohun*, 6 C.

14. *Venkata v. Subhadra*, 7 M. 548.

(8) *Wooma Daer v. Gokulchand*, 8 C. 587 (597, 598) P. C. in which the effect of Datt. Mim. 1 28-31, 67, 74 and Datt Ch. 1 20 22, 27, 28 enjoining the adoption of a brother's son was held to be merely directory and not imperative, and in any case condoned by application of the maxim *Factum valet* (Ib. p. 601).

(9) *Morun v. Bijoy Kisho*, W. R. (S. N.) F. B. 121 (122); *Haran Chunder v. Hurro Mohun*, 6 C. 41; *Virayya v. Hanumanta*, 14 M. 459.

(10) *Morun v. Bijoy*, W. R. (S. N.) F. B. 121 (122) explained in *Haran Chunder v. Hurro Mohun* 6 C. 41 (47).

(11) *Sriramulu v. Ramayya*, 3 M. 15; *Roop Shanker v. Shunkarjee*, 2 Borr. 662; *Kristnengar v. Vanamamalai*, (1856) Mad. Dec. 218; *Runganaigum v. Namosevaya*, Mad. Dec. 94; *Sarup Singh v. Jassi*, (1891) (1857) P. R. 22.

(12) *Puttu Lal v. Parbati*, 37 A. 359 P. C.
 (13) *Jai Singh v. Bajar*, 27 A. 417

(14) *Puttu Lal v. Parbati*, 27 A. 359 P. C. approving *Jai Singh v. Bijai*, 27 A. 417; *Sriramulu v. Ramayya*, 3 M. 15; *Bai Nani v. Chuniyal*, 22 B. 978 overruling *contra* in *Battas Kuar v. Lachman*, 7 N. W. P. H. C. R. 117.

shake to its very foundation the obsolete Niyog rule and its substituted analogue so far as that rule was attempted to be extended to an adoption by the widow. Their Lordships further expressed their approval of two cases decided by the Bombay ⁽¹⁾ and Madras High Court ⁽²⁾ in the latter of which the adoption was by the husband, which in their Lordships' view, would have made no difference.

715. So the adoption of a brother's daughter's son has become established as a rule in the Punjab so that its validity is presumed, ⁽³⁾ while it is customary in Southern India. ⁽⁴⁾

716. So the adoption by a man of his wife's sister's daughter's son has been held valid in Madras as would be a marriage between him and his adoptee's mother. ⁽⁵⁾

717. The substitution of a new rule divorced from its context has been criticized by the Madras High Court on the ground that the usage of Niyog being obsolete, the courts were not at liberty to refer to it or to engraft on it a new rule as evidenced by the usage of the people. As such, the court upheld the adoption of the son of the paternal uncle of the adopter which would, of course, have been contrary to the principle of *Niyog*. ⁽⁶⁾ In another case referring to the phrase "the reflection of a son" the court thought it "very questionable, whether it was intended to limit the generation from which a son might be adopted, or is anything more than a descriptive epithet applied to the child adopted. The phrase, as has been said, occurs only in the portion of the books which prescribe the ceremonial, and not in the part which lays down rules as to the selection of a son. Had the law giver intended to limit the choice to the one generation next below the intending adopter, he would have surely laid it down distinctly and not have left it doubtfully, and with much dispute, evolved from an epithet that applied to the child in the verses describing the ceremonies to be performed and as to whom those ceremonies have been nearly completed." ⁽⁷⁾ The authority of this rule and its analogue has been much shaken by a decision of the Privy Council ⁽⁸⁾ in which Sir John Edge delivering the judgment of the Privy Council reiterated his former view ⁽⁹⁾ that the glosses of Nanda Pandit should be received with caution where they deviated from or added to the Smritis, and as such their Lordships rejected his extension of the rule that no one can be adopted as a son whose mother the adoptee could not have legally married, to females as both unauthorized and unsupported by usage. Now since the widow adopts for and to her husband, it follows that there cannot be one rule for the husband and another for his widow.

(1) *Bai Nani v. Chunilal*, 22 B. 978.

(2) *Sriramulu v. Ramayya*, 3 M. 15.

(3) *Chuttan v. Ramchand*, (1904) P. R. 86.

(4) *Appayya v. Vengu*, 15 M. L. J. 211.

(5) *Ragavendra v. Jayaram*, 20 M. 293.

(6) *Vrayya v. Hanumanta*, 14 M. 45 (461).

(7) *Haran Chunder v. Hurro Mohun*, 6 C 41 (48).

(8) *Puttu Lal v. Parbati*, 37 A 359 P. C.

(9) Per Edge, C. J. and Banerji. J in *Bhagwan Singh v. Bhagwan Singh* 17 A. 294 F.B. reversed in 21 A 412 P. C. in *Puttu Lal v. Parbati*. 37 A 359 Sir John Edge supports Banerji, J's view on the general question in *Jai Singh v. Bijai*. 27 A 417 (433) and (it is submitted) rightly. This case approves of *Nani v. Chunilal*, 22 B 973 which cites and follows *Bhagwan Singh v. Bhagwan Singh*, 17 A. 294 F. B. (at p 977) which the P. C. overruled in 21 A. 412 P. C.

37. (1) No adoption is complete without the corporeal delivery of the adoptee to his adopter with a declaration by the person, delivering him, that he delivers him in adoption ; and of the adopter, that he so accepts him.

(2) Provided, that they have also performed such other act or ceremonies as may be required by law, or are customary to that end.

(3) Provided further, that if the parties thereto belong to any of the regenerate castes, and do not belong to the same *Gotra*, they must also perform the ceremony of *Datt Homa*.

(4) But non-performance of the *Datt Homa* or of the further ceremonies mentioned in clause (2) will not invalidate an adoption made as provided in clause (1) unless their performance is regarded by the caste as of the essence of the ceremony of adoption

Explanation.—No delivery and its acceptance is valid unless the parties thereto were capable of understanding the nature of the act and its effect upon their rights.

Illustrations.

(a) Amongst Nambudris an adoption is performed by burning a pan of sacred grass. *A* is a Nambudri. He adopts *B* without burning such grass. It is a question of fact whether without such burning, the adoption is complete.

(b) An adoption by a widow subject to the Oudh Estates Act (I of 1869) must be in writing attested as in the case of a will and registered. *A* is such widow. She performs the ceremony of giving and taking but omits to execute a registered deed of adoption. The adoption is invalid.

Synopsis.

- (1) *Textual ceremonies* (718). (3) *Datt Homa* (722-723).
 (2) *Giving and taking* (719-721).

718. Analogous Law.—The following texts refer to the necessary ceremonies for adoption.

Baudhayan :—“ One about to adopt produces two pieces of cloth, a pair of earrings, a ring and a priest thoroughly read in the Vedas, a bunch of 64 stems of the *Kus* grass and fuel of the *Purna* tree (1). Then having invited kinsmen into the middle of the dwelling, and having made a representation to the king, having sat down by the direction of a Brahmin in the assembly, or in the middle of his house, having caused to be exclaimed the auspicious day, benediction ‘prosperity’ having performed rites commencing with the recitation of the prayer ‘*Yaddevayajana*’ down to the placing of vessels for water; having advanced before the giver, let him beg “Give me thy son.” The other replies “I give.” He receives the child and says : ‘I receive thee for the sake of religious duty. I adopt thee for offspring’

(1) *Butea frondosa*.

"Then having adorned him with the clothes, the earrings and the ring, having performed the investiture and other ceremonials, down to the kindling a flame of fire, having dressed the oblations, he offers a burnt offering. After having recited the incantation in the first chapter of the *Yajur Veda* commencing *Yastwa*, etc' with recitation of the sacrificial prayer *Yastwa twen*, etc. he offers a burnt offering "

"Next having performed the burnt sacraments, where the prayers denominated *Vyahruti* are recited and that designated *Swishlakrit* with other ceremonials being completed down to bestowing an excellent cow, he presents the fee saying "Yours are these two clothes, the earrings and the ring likewise " (1)

Yashisth :—"He who desires to adopt a son, shall assemble his kinsmen, announce his intention to the king, make burnt offerings, in the middle of the house, reciting the *Vyahrutis* and take as a son a non-remote kinsmen, visit and the nearest among his relatives " (2)

Dattak Mimansa :—"The filial relation of these five sons proceeds from adoption only, with observance of the form of either Vashisth or Saunaka, not otherwise " (3)

Ib :—"It is therefore established that the filial relation of adopted son is occasioned only by the proper ceremonies of gift, acceptance, a burnt sacrifice and so forth. Should either be wanting, the filial relation even fails " (4)

Yama :—"The Homa or the like ceremony is not necessary in the case of adoption of the daughter's or the brother's son ; by the verbal gift and acceptance alone, that is accomplished : that is decided by Lord Yama." (5)

719. Giving and taking.—The indispensable and irreducible ceremony

Clause 1.

necessary to complete an adoption is that of giving and taking performed as stated in clause (1). (6) It may be supplemented but cannot be substituted by another ceremony. As the Privy Council observed, "according to Hindu usage, which the courts should accept as governing the law, the giving and taking ought to take place by the father handing over the child to the adoptive mother, and the adoptive mother declaring that she accepts the child in adoption." (7) The Madras Full Bench held this decision "as an authority for the proposition that any overt act is not sufficient, but that there must be corporeal delivery of the child by a person competent to give to a person competent to take, accompanied by the declaration on the one side "I give the child in adoption, and on the other, "I take the child in adoption." (8)

720. Such gift and acceptance are not merely necessary to furnish evidence of adoption but constitute its essential ceremony. Consequently even if the parties have executed and received a formal and duly registered deed of adoption evidencing such an intention, it is not sufficient to constitute a legal adoption unless there is the overt act of corporeal delivery of the child and its acceptance coupled with a declaration that the one was giving and the other receiving him in adoption. (9) This is the sole operative ceremony indispensable to all adoptions whether of the twice-born or of the Shudras (10) whether in the caste ridden Upper India or the custom ridden Punjab.

(1) Cited in Datt Mim. V 42 (Suth) pp 67, 68 ; Datt Ch. II. 1-13 (Suth) pp. 116 117

(2) Vashisth XV. 6 14 S.B.E. pp. 75, 76 cited in Datt. Mim. III 81 (Suth) p 65; Datt Ch. II. 11 (Suth) p. 116.

(3) Datt. Mim. V. 50 (Suth) 70.

(4) Ib V. 56 (Suth) 71; Datt Ch. ii 1-13 (Suth) pp. 116, 117

(5) Quoted and commented on in *Valubai v. Govind*, 24 B 213 (223).

(6) *Shosinath v. Krishnu*, 6 C. 381 (389) P. C.; *Bireswar v. Araha Chander*, 19 C. 452 (460 461) P. C.; *Govindayyar v. Dorasami*, 11 M 5 (7) P. C.; *Ranganayakamma v. Alwar Setti*, 13 M. 214, 218 219.

(7) *Shosinath v. Krishnu*, 6 C. 381 (389)

P. C

(8) *Govindayyar v Dorasami*, 11 M. 5 (7) P. B

(9) *Kenchawa v Ninjupa*, 10 B. H. C. R. 265 note, *Singanma v Vinjanmuri*, 4 M H. C. R 165 (167) following *Veeraperumal v Naraina*, 1 Str Notes 117 (quoted ib p. 167)

(10) *Indromani v. Behari Lal*, 5 C. 770 P. C.; *Shosinath v. Krishnu*, 6 C. 381 P. C.; (Shudra adoption), *Bireswar v Araha Chander*, 19 C. 452 P. C. (Brahmins); *Kuppusami v Venkata Lakshmi*, 18 M L T. 434; 31 I C. 855 (Shudra); *Sheelatan v Bhirgaon*, 2 Pat. L. J. 481; 41 I. C. 375; *Sukumari v. Anantha*, 28 C. 168.

721. As regards the performance of other ceremonies, they are important but not equally so. If they are customary, they will be

Clause 2. performed as a matter of course by parties who are interested in seeing that no ceremony customary in their caste is omitted. But if though inadvertance or otherwise they are omitted, it would not necessarily vitiate an adoption, if the operative ceremony mentioned in clause 1 is completed. As Sir Thomas Strange observed: "The operative part of the ceremony seems to be the giving and receiving, the rest is matter of customary solemnity, of decorum, of charity and conviviality varying under different circumstances in different parts of India." (1)

Amongst Marwadis, one such ceremony both customary and regarded as essential, is the tying of the turban of the adoptive father and seating the boy on his *guddi* (padded seat.) Presents called *tilak* are also made to the newly made son by the relatives and friends of the adopter.

One such ceremony is the *Putreshta Jag* which is usually performed by the twice-born, but it has been held to be a matter of form and not essential to an adoption. (2)

Datt Homa.

722. But the performance of the *Datt Homa* stands on a different footing.

"*Datt Homa*" is the service of the burning of clarified butter, which is offered as a sacrifice by fire by way of religious propitiation or oblation.

The Privy Council have recently affirmed the view previously maintained in several cases that the performance of this ceremony is not necessary where the two families belong to the same *Gotra*. (3)

Their Lordships however, refrained from deciding the general question as to the necessity of the ceremony of *Datt Homa* to complete an adoption, decided in the two cases of the Madras High Court which, however, they cited with apparent approval 'being of value as containing a careful study of the authorities and affirming that the ceremony of *Datt Homa* is not essential to a valid adoption among Brahmins in Southern India.' (4) In so holding they adopted both the reasons as well as the findings of Sir Lawrence Jenkins, C. J. in the under noted case (5) in which, though a Maratha Brahmin case, the learned Judge relied upon not only on the *stare decisis* but on the text of *Yama* already cited, which expressly dispenses with this ceremony in the case of the relations, because they are of the same *Gotra* and which furnishes a more general rule than that declared in the section.

There is no case in which the non-performance of *Datt Homa* has invalidated an adoption; and since the question has been canvassed by the courts for over a century, it may be safely asserted that however necessary may be this *Homa* to a twice-born, its non-performance would not seriously shake the legality of an adoption. (6)

(1) *Veerapermal v Naraina*, 1 Str. Notes. 117 cited in *Singamma v. Vingamuri* 4 M. I. C. R. 165 (167)

(2) *Sheo Lalun v Bhargun*, 2 Pat. L. J. 431; 41 I C 375 contra *Luchmun v Mohun Lall*, 16 W. R. 179 in which *Putreshi Jag* is said to have been an error for *Datt Homa*—*Sarkar's Adoption* p 383.

(3) *Bal Gangadhar Tilak v Shrinivas*, 39 B 441 (468 467) P. C. citing *Singamma v.*

Vingamuri, 4 M. H. C. R. 165, *Govindayyar v Dorasami*, 11 M. 5. F. B and following *Valubai v Govind*, 24 B. 218 (221).

(4) *Singamma v. Vingamuri* v 4 M. H. C. R 165, *Govindayyar v. Dorasami*, 11 M 5; F B cited in *Bal Gangadhar v. Shrinivas*, 39 B 441 455) P. C.

(5) *Valubai v. Gobind*, 24 B 218 (221)

(6) *Retki v. Lakpati*, 20 C. W. N. 19, 25.

723. In the case of a Shudra it is of course, both inadmissible and unnecessary. ⁽¹⁾ And in the case of the Dwijas besides the Deccan Brahmin Sagotras ⁽²⁾ which includes those of the Dravid country ⁽³⁾ it has been held that *Datt Homa* is not necessary to complete an adoption. This exemption has been held to extend to all Brahmins ⁽⁴⁾ while in the case of a Kshatriya in Madras ⁽⁵⁾ *Datt Homa* may be performed later on ⁽⁶⁾ and by a delegate ⁽⁷⁾ while it is wholly unnecessary in the Punjab ⁽⁸⁾ and amongst the Agarwal Banias of the United Provinces. ⁽⁹⁾

38. (1) No adoption may be set aside for a mere irregularity or for non-observance of a form not essential to its validity.

Factum valet. (2) In particular and without prejudice to the generality of the foregoing rule, it may not be set aside on any of the following grounds, namely :—

- (a) That the adopted son was the eldest, the youngest or the only son of his father ;
- (b) that he was given in adoption after his investiture with the sacred thread ;
- (c) that the adoptee was older than the adopter ; ⁽¹⁰⁾
- (d) that the adoption was made during pollution ; or
- (e) by an untoussured widow.

Synopsis.

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| (1) <i>Adoption of eldest or only son</i> (724). | (5) <i>Adoption by untoussured widow</i> (731). |
| (2) <i>Adoption of youngest son</i> (725). | (6) <i>Other disqualifications</i> (732). |
| (3) <i>Factum valet</i> (726-729). | (7) <i>Adoption through bribe</i> (733). |
| (4) <i>Adoption by widow pregnant in</i> | |

724. Analogous Law.—As regards the adoption of an only son, the following texts discourage or forbid it.

Yashisth :—"An only son should not be given nor accepted, for he is to continue the line of the ancestors" (11)

Clause (2) (a) condones the adoption of (i) the eldest son, (ii) the youngest, and (iii) of an only son. As to the adoption of an eldest son Manu belauds him as one on whose birth the father discharges his debt to his progenitors. "The first born (if virtuous) exalts the family, or (if

(1) *Thangathanni v. Ramu*, 5 M 358.
 (2) *Atma Ram v. Madho Rao*, 6 A 276
 F. R. : *Varada v. Gobind*, 24 B 218 (221)
 followed in *Bal Gangadhar Tilak v. Shrinivas*, 89 B. 441 (465) P. C.

(3) *Vedavalli v. Mangamma*, 27 M. 538.
 (4) *Singamma v. Vinjamuri* 4 M H C.R. 65.

(5) *Chandra Mala v. Muktanala*, 6 M 20.

(6) *Subbarayar v. Subbammal*, 21 M 497

(7) *Lakshmi Bai v. Ramachandra*, 22 B. 590.

(8) *Dumanchand v. Dwaruknath*, (1913) P. L. R. 271 20 I. C. 303

(9) *Gangadot v. Gopaladas*, 20 O. C. 356.

(10) *Gopal v. Vishnu* 23 B. 250 (257).

(11) 1 Str. 11. L. 85 ; 1 W. Mac. H. L. pp. 67, 77 ; 2 W. Macn pp. 178 179 and note : *Seetaram v. Dhunook*, 1 Hay, 268 ; *Janoke v. Gopal* 2 C 365 ; *Kashi Bai v. Talia*, 7 B. 221 ; *Jammabai v. Raychand* Ib. 225. The same text repeated in Baudhayan.

vicious) destroys it: the first born is in this world the most respectable; and the good never treat him with disdain " (1) From the position of pre-eminence he should not be given away in adoption. But there is no text in support of the rule except that of a modern work (2) which declares that "the first born should not be given." (3)

Referring to the text of Manu before cited, the Mitakshara says "An only son should not be given for Vashisth ordains, "Let no man give or accept an only son." (4) This statement is regarded by Nanda Pandit in his two works, as addressed to the parties rather than enacting a prohibition. (5) The author of Dattak Chandrika circumvents the text of Vashisth by interpreting it to refer to a *Dwamushyayan* adoption in which the adoptee being the son of both his natural and adopted father, the objection taken by Vashisth should disappear. (6) Jagannath regards the injunction to be remembered before making the gift, though it does not affect its validity. (7)

The courts appear to have vacillated between the two views, some declared it invalid (8) while others declared it to be improper though not illegal, (9) till the Privy Council finally settled the question by upholding its validity. (10)

725. Against the adoption of the youngest son there is no text at all, except the vedic legend already quoted (§ 692) of the adoption by Vishwamitra of Sunashepha who was the second of the three sons of his parents who could not give away the first son as he was dearest to the father, the youngest because he was dearest to the mother, which is regarded as a precedent in support of the view opposing the adoption of the youngest son.

In an old case (11) the Pandit consulted, gave his opinion against the validity of an adoption of the eldest son; but no case has found a similar champion for the youngest, while even as regards the former, later cases have settled the rule to be dissuasive and not peremptory.

726. Factum valet.—"Quod per non debuit factum valet" (12) is a well-known maxim of civil law applied to cure mere irregularities in form and defects

(1) IX-109.

(2) Dattak Didhiti, Sarkar's Adoption 2nd Ed. 238; Mayukh says that there is no precept prohibiting the adoption of an only son, (Mandlik) p. 51

(3) Dattak Didhiti cited in Sarkar on Adoption 2nd Ed. 238

(4) Mit Ch. 1 Sect 1 §§ 10-12.

(5) In his Vajiyanti and Datt. Mim IV-1-8, 18-20

(6) Datt. Ch. 1-28; Sutherland adopts this view in his synopsis Head II.

(7) 2 Dig. 278

(8) *Teja Singh v. Sachet Singh* (1872) P. R. 78; *Shumsher Mull v. Ram Dibruf*, 2 Beng. S. R. 216 (valid only if *Dwamushyayan*); *Nundram v. Kashee*, 3 Beng. S. R. 310 (invalid); *Debee v. Hursingh* 4 Beng. S. R. 320 (mother gave without husband's authority); *Upendur Lall v. Prasanna*, 1 B. L. R. (Ac.) 221 S. C. *Opendur v. Baom Moyee*, 10 W. R. 847; *Manick v. Bhugobutty*, 8 C. 448; *Bhaskar v. Mahadev*, 6 B. H. C. R. (O. C.) 1; *Lakshmappa v.*

Ramava, 12 B. H. C. R. 361; *Rangu Bai v. Bhagirathi Bai*, 2 B. 377; *Somashekara v. Subhadramji*, 6 B. 524; *Kashi Bai v. Tania*, 7 B. 221; *Waman v. Krishnaji*, 14 B. 249; *Raiji v. Bai*, 19 B. 658.

(9) *Jaymonae v. Sibasoondery Fulton*, 75; *Takdey v. Hurreelal W. R.* (Gap) 188; *Veernpermau v. Narayan Pillay*, Str. Notes of cases pag. 91; *Arunachallam v. Ayyaswami* 1 M. S. L. 156; *China v. Kumara*, 1 M. H. C. R. 54; *Hannuman v. Chirrai*, 2 A. 164 F. B.; *Beni v. Haridi* 14 A. 67; *Husbat Rao v. Govindrao*, 2 B. R. 88; *Vyankatrao v. Anandray*, 4 B. H. C. R. (Ac.) 191; *Mhalsabai v. Vitthoba*, 7 B. H. C. R. (App) 26; *Basava v. Lingangauda*, 19 B. 428; *Harisingh v. Guloba*, (1874) P. R. 188; *Divansingh v. Subbon*, (1878) P. R. 238.

(10) *Sri Balusu v. Sri Balusu*, 22 M. 393 P. C.

(11) *Permaul v. Pottes*, (1851) M. S. D. A. 281.

(12) "What should not be done, yet being done, shall be valid."

in procedure not affecting the essential principle. The Indian Legislature has inserted such saving clauses in several of its acts, as for instance in S. 87 of the Registration Act which provides that nothing done in good faith pursuant to the Act or any Act thereby repealed, by any registering officer shall be deemed invalid merely by reason of any defect in his appointment or procedure. (1) So Lord Mansfield said that there was a known distinction between circumstances which are of the essence of the thing required to be done by an Act of Parliament and clauses merely directory; (2) between a restriction and a moral precept only. (3)

The principle is frequently applied to cure formal defects in matters relating to marriage and adoption.

727. As regards adoption, it has been held that the maxim is applicable only "to cases in which there is neither want of authority to give or accept, nor imperative interdiction of adoption." "In cases in which the Shashtra is merely directory, or only points out particular persons as more eligible for adoption than others", (4) or where it prescribes a form or procedure without prescribing any penalty for its non-observance, the maxim may be usefully and properly applied if the moral precept or recommendation is disregarded or the procedure is not strictly complied with. As Sir M. Westropp pointed out, in the maxim *Quod fieri non debuit factum valet*, on the one hand, "*factum*" must not be understood to mean a transaction which is a mere nullity; nor, on the other hand, should "*debuit*" be read as if it were "*posuit*". (5) So Mahmud, J., said: "Now, in the case of adoption, there are of course, formalities, ceremonies, preference in the matter of selection, and other points, which amount to moral and religious suggestions. Such matters, speaking generally, are dealt with in the texts in a directory manner, relating to what I may perhaps call the "*Modus operandi*" of adoption. To such matters, which do not affect the essence of the adoption, the doctrine of "*factum valet*" would undoubtedly apply upon general grounds of justice, equity and good conscience and irrespective of the authority of any text in the Hindu Law itself. There may, indeed, be cases where the express letter of the texts renders that which would, in other systems, be regarded as a matter of form, a matter of imperative mandate or prohibition affecting the very essence of the transaction. . . . There may, of course, be definite texts of the Hindu Law of adoption itself which, though, relating to matters of form, would be sufficiently imperative to vitiate an adoption in which they have been disregarded. But unless such texts are express and undoubted in their meaning, I would apply the doctrine of *factum valet* to adoptions which, having been made in substantial conformity to the law, have infringed only minor matters of form or selection." (6) So it was held that since the adoption of a daughter's son is incestuous amongst Brahmins, such adoption could not be legalized by the application of this maxim. (7) So when the Mitakshara widow adopted a son without the express authority of her husband, the court held it to be an adoption "wholly illegal and invalid, null and void" and such as could not be condoned by the application of

(1) *R. v. Lowdale*, 1 Burr. 447 adopted by Tyndal, C. J., in *Southampton Dock Co., v. Richards*, 1 Scott, 329

(2) *Wright v. Horton* 12 App. Cas. 371; *Bosanguet v. Woodford*, 5 Q. B. 310

(3) *Mangala v. Dinanath*, 4 B. L. R. (O. C.) 172

(4) *Lakshmappa v. Ramana*, 12 B. H. C. R. 364 (397, 398); *Gopal v. Hanuman*, 3 B.

278 (293, 294).

(5) *Lakshmappa v. Ramana*, 12 B. H. C. R. 364; *Gopal v. Hanuman*, 3 B. 278 followed in *Sri Balusu v. Sri Balusu* 22 M. 398 P. C. "*Non debuit*" should not be done; "*non posuit*" not possible to be done

(6) *Ganga Sahai v. Lekhras*, 9 A. 253 (296, 297).

(7) *Bhagirath Bai v. Hanuman*, 3 B. 298.

the maxim. (1) On the other hand where an act is merely sinful but not illegal, it is a fit subject for application of the rule. As such, it was held to justify the adoption of an only son which is condemned, though not prohibited under sanction. (2)

728 Referring to this maxim, the Privy Council observed: "That unhappily expressed maxim clearly causes trouble in Indian courts. Sir M. Westropp is quite right in pointing out that if the *factum*, the external act, is void in law, there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in morals stands good in morals, or what ought not to be done in law stands good in law. Sir M. Westropp has, not without cause, reduced the ambiguous maxim to its proper meaning."⁽³⁾ Their Lordships then upheld the adoption on the ground that there was no obligatory prohibition against it. The same high tribunal in another case refused to give effect to the injunction contained in the two treatises on adoption, that a person wishing to adopt should adopt in the first instance his brother's son if available, holding it as merely binding upon the conscience of the adopter and as not being so imperative as to have the force of law the violation of which would invalidate an adoption. (4)

729. The same principle would support the adoption of a married man of advanced age (5) or of one not otherwise a proper person for adoption (6) and would repel any objection on the ground that the adoptee was the eldest, the youngest, or the only son or that the adopter had previously agreed to adopt one boy and then capriciously adopted another, (7) or that the adoption was made in any of the circumstances mentioned in the section.

730. The question whether a widow pregnant in concubinage can make a valid adoption without expiation for her unchastity was answered in the negative by Norman, J., in a case in which however he completed that finding with a finding that there had been in fact no adoption at all. (8) The validity of such an adoption may be challenged by the reversioner as it vitally affects his interest. (9)

731. Among the Mahratta Brahmins a widow on attaining puberty cannot perform any religious act and therefore cannot adopt until she has undergone tonsure. (10) The validity of an adoption was challenged on this ground. The court found that some *Shastris* were consulted as to whether an untoussured widow could adopt and on making certain expiatory gifts, she was pronounced competent. The court held it to be sufficient to validate the adoption as "even if other *Shastris* were of a different opinion, it would be a delicate

(1) *Tulshi Ram v. Behari Lal*, 1232 A S (385, 386) F B.

(2) *Hannuman v Chirai*, 2 A 164 F B.; *Beni Prasad v. Herdai Bibi*, 4 A. 67 F.B.O.A *Sri Balusu v Sri Balusu*, 22 M 398 (428) P. C.; S C 21 A 460 (487) P. C.

(3) *Sri Balusu v. Sri Balusu*, 22 M. 398 (428) P.C

(4) *Wooma Dase v. Gokoolanwad*, 8 C. 587 (597, 598) P.C.

(5) *Dharma v. Ramkrishna*, 10 B. 80 (66)

(6) *Nimbalkar v. Jayvantrav*, 4 B.H.C.R (A.C.) 191 (195).

(7) *Dharma v Ramkrishna*, 10 B. 80 (86); *Lakshmappa v. Ramava*, 12 B. H. C. R. 364 (398).

(8) *Sayamalala v. Saudamini*, 5 B L. R. 362 (370) cited but neither followed nor discussed in *Keri v. Moneeram*, 13 B. L. R. 1 (14) F. B

(9) *Kalava v. Padapa*, 1 B. 248.

(10) *West & B. H. L. p. 998.*

task for the court to decide between conflicting opinions upon such a question of ecclesiastical etiquette." (1)

732. West and Buhler state that a woman who is afflicted with leprosy, (2) is unchaste and is pregnant in concubinage (3) cannot adopt, though she may do so after removal of the sin by penance. But a person himself incompetent to perform a religious act may do so through a delegated Brahmin priest. (4)

733. So again, while the giving of a bribe to the natural father to secure his son is now both illegal and opposed to public policy, (5) it does not vitiate an adoption already made though the payment itself is illegal. "To go further and lay down that the adopted son's status itself is affected thereby, would be to confound two transactions which, in the eye of the law, are independent of each other, since the transaction of the gift and acceptance which effects the change in the status of the son, is clearly separable from the agreement or payment which the law prohibits." (6)

But the result might be different if the adoptee complained of a status forced on him by his father being moved by mercenary motives.

39. An adoption is irrevocable but the rights thereby acquired may be limited or postponed to any reasonable extent.

Conditional adoption.

Illustrations

(a) *A* adopts *B* on condition that it shall be void on the birth of a son to *A*. The condition is invalid as an adoption when once completed cannot be revoked (7)

(b) *A* Hindu widow in possession of her limited estate adopts *B* on condition that *A* shall have full power of its disposal during her life time. The condition is invalid for it creates in *A* an unqualified power of disposal. (8)

(c) *A* adopts *B* on condition that *A* shall continue to manage her estate during her life time. The condition being reasonable is valid. (9)

(d) *A* directed in his will that his wife *B* should adopt a son who should take one third of his estate giving two-thirds to his wife and daughter. *A* adopted *C*. *C* is bound by *A*'s direction. (10)

(e) *A* adopts *B* on condition that *B* shall not call for partition during *A*'s life time. *B* is bound by the condition as it is reasonable (11)

Synopsis.

(1) *Conditional adoptions* (734).

(2) *Anti-adoption agreements, how far valid* (735-737).

734. Analogous Law.—An adoption may be void or invalid, in which case there is no legal adoption; but an adoption which is legal and complete cannot be revoked or cancelled at the instance of either a party or by consent of both,

(1) *Ravi v. Lakshmi Bai*, 11 B. 381 (395).

(2) West & B. H. L., p. 598.

(3) *Citing Moniram v. Keri*, 5 C. 776 P. C. But all this case lays down is that a widow inheriting her husband's estate cannot be divested of it by her subsequent unchastity.

(4) *Indromoni v. Behari Lal*, 5 C. 770 (774) P. C.

(5) A "son bought" is not recognized in the present age (or Kali Yuga) *Pshan Kishore v. Hursh Chunder*, 21 W. R. 381.

(6) *Murugappa v. Nagappa*, 29 M. 161 (164); *Sitaram v. Harinar*, 85 B. 169 (170, 180).

(7) *Sant Singh v. Mula*, 17 I. C. 350 (P)

(8) *Purshottam v. Rakhmabai*, 16 Bom. L. R. 57.

(9) *Visalakshi v. Sivaramien*, 27 M. 577 F. B. contra *Purshottam v. Rakhmabai*, 16 Bom. L. R. 57.

(10) *Bachoo v. Manmorebai*, 31 B. 373 P. C. *Tootsi Dass v. Madan*, 28 C. 439; *Surenara v. Kalachand*, 12 C. W. N. 663; *Lokshmi v. Subramanya*, 12 M. 496; *Narayanamsami v. Ramasami*, 14 M. 172.

(11) *Korab v. Fancham*, 12 N. L. R. 29

since adoption, like marriage, creates a *status* which cannot be annulled save as provided by law. ⁽¹⁾ As such it is not open to the natural parents of the adoptee or the adoptee himself to renounce the legal status conferred on him on adoption though he may give up his right of inheritance. ⁽²⁾

And before his adoption it is open to his parent to enter into a binding agreement limiting or postponing his right thereto. If his right is so qualified by the terms of the authority of the husband which empowered his widow to receive him in adoption, then the authority being conditional, he is bound by its terms and he cannot be heard to question its legality or justice. ⁽³⁾

735. He is also bound, though not to the same extent, by an agreement made with his natural father as a condition of his adoption that his adoptive mother should continue to retain her limited estate during her own life-time, or, in other words, relegating his right as son to that of a reversioner. ⁽⁴⁾ He acquires his status because his father submitted to the agreement. He cannot have the benefit of his status without submitting to its condition, provided it is reasonable and not such as might deprive him of his entire inheritance. As Farran, J., said: "By Hindu Law an infant will be bound by the act of his guardian when *bona fide* and for his interest, and when it is such as the infant might reasonably and prudently have done for himself if he had been of full age, but not where the act appears not to have been for his benefit, unless he has ratified it on reaching majority. I cannot but think that this principle ought to guide the courts in considering whether agreements like the one under consideration can be upheld or not. If the stipulations are unreasonable, such as giving to the widow an absolute power of disposition over the property, they should be rejected as *ultra vires* of the father; if reasonable, such as only to define and limit the son's enjoyment of the property, they should be upheld." ⁽⁵⁾

736. As pointed out by a Madras Full Bench: "The validity of the adoption, if legally made, is quite independent of the validity of any agreement as to the property. If the agreement is such as to be inconsistent with the fundamental idea underlying adoption and the purpose for which it is sanctioned under Hindu Law, as for instance, if it deprived the adopted son of all right to the property of the adoptive father and so left him without any means of performing the necessary religious offices towards the manes of his adoptive father and his ancestors, it may well be that the courts will regard the condition as essentially repugnant to Hindu Law, and would refuse to uphold it. But it would seem that a fair and reasonable disposition of

(1) 2 Dig. 111; 2 Str. H. L. 108; *Huebat Rao v. Govind Rao*, 2 Borr. 75; *Sukhibasi v. Gungan Singh*, 2 A. 386; *Sadashiv v. Hari*, 11 B. H. C. R. 190; *Chinnu v. Dhondu*, Ib. p. 192 note (a); *Itarji v. Lakshminibai*, 11 B. 381, (adopter estopped); *Bhasbi v. Indra Kumar*, 16 C. 556, 564; P. C.: *Bhupendra v. Amarendra*, 43 C. 432; P. C.: *Dwarkan Rao v. Chandan Lal*, 44 C. 401, 406 P. C.

(2) *Ituvee v. Kupshumkar*, 2 Borr. 713, 729; *Balkrishna v. Savitribai*, 8 B. 54, 57; *Mahadu v. Bayaji*, 19 B. 289 (241, 245).

(3) *Lakshmi v. Subramanya*, 12 M. 490; *Narayanasami v. Ramasami*, 14 M. 172; *Ganpati v. Savithri*, 21 M. 10; *Shalia v. Pillay*, 31 M. 446 (450).

(4) *Vinayak v. Govind Rao*, G B. H. C. R. (A.C.) 224; *Chitko v. Janaki*, 11 B. H. C. R. 199; *Radhika*

bai v. Ganesh, 3 B. 1 (8); *Itarji v. Lakshminibai*, 11 B. 381 (400, 401) explaining dictum of P. C. in *Lamasawmi v. Venkataramanayyan*, 2 d. 91; *Vyasacharya v. Venkubai*, 8 B. 251; *Venkappa v. Fakurgowda*, 8 Bom. L. R. 846; *Per Beemar, J.*, in *Parsob v. Gurappa*, 88 B. 227 (contra by the same learned Judge in *Vyasacharya v. Venkubai*, F. B. must be taken as corrected in *supra*); *Radhabai v. Damodar*, (1878) B. P. J. 9 proceeded upon the construction of the deed which made the widow *matrilineal*; *Visalakshi v. Sivaraman*, 27 M. 577 (586) F. B. overruling *Jagannadha v. Papanna*, 16 M. 400.

(5) *Itarji v. Lakshminibai*, 11 B. 381 (408); *Purshottam v. Rakhinabai*, 16 Bom. L. R. 57 (60.)

the property is not essentially repugnant to Hindu Law, or the purpose for which adoption is allowed, and is nowhere forbidden by that law." (1)

737. So the adoptive father may validly stipulate with the father of the adoptee that the latter shall not call for partition during his own life-time. (2) So again he may before or at the time of adopting a son, give a portion of his ancestral property to his daughters which the adopted son cannot resume. (3) Of course, he who relies upon a condition as qualifying the legal right of the adopted son must prove it by as strong evidence as is necessary to establish a nuncupative will. (4)

40. A son may be given in adoption on condition that he shall be the son of both the natural and the adoptive fathers. Such a son is called the *Dvamushyayan* adoption.

Synopsis.

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|--|---|
| (1) <i>Texts on Dvamushyayan adoption</i> (738-739). | (3) <i>Conditions of Dvamushyayan adoption</i> (741). |
| (2) <i>Evolution of the law on the subject</i> (740) | (4) <i>Local varieties</i> (742-744). |

738. Analogous Law.—The Mitakshara devotes one whole section to the rights of the *Dvamushyayan* son, or the son of two fathers. (5) But the son there intended is the *Kshetraj* or the son of the wife (6) who is so defined:—

"If the husband's brother, or other person duly authorized and being himself destitute of male issue, proceed to an intercourse with the wife of a childless man for the sake of raising issue both for himself and for the other the son, whom he so begets is the child of two fathers and denominated *Dvamushyayan*. He is heir to both, and offers funeral oblations to their manes (7)

This is the prototype of the modern *Dvamushyayan* who owes his existence originally to the procreation by *Niyog* or appointment. As this practice became obsolete, the *Dvamushyayan* lost his original character, giving place to his modern analogue, which was originally sub-divided into a *Nitya* or permanent or absolute, and an *Anitya* i.e., a temporary son of two fathers.

739. The difference between the two is thus explained in the *Dattak Mimamsa*. "Sons of two fathers are of two descriptions—those absolute sons of two fathers, and those incompletely so. Of these those are named absolute *Dvamushyayans* who are given in adoption with this stipulation, this is son of us two (the natural father and the adopter). The incomplete *Dvamushyayans* are those, who are initiated by their natural father, in ceremonies ending with that of tonsure, and by the adoptive father, in those commencing with the investiture of the characteristic thread. Since they are initiated under the family names of both even, they are sons of two fathers; but incompletely so. Should a child directly on being born, be adopted, as his

(1) *Visalakshi v. Sivaramien*, 27 M. 577 R. 76.
(587) F. B.

(2) *Korat v. Pancham*, 12 N. L. R. 29 (84).

(3) *Basava v. Lingangaula*, 19 B. 428.

(4) *Imrit Koonder v. Reep Narain*, 6 C L

(5) *Yaj.* 1.69. 70.

(6) *Mit. Ch. I. S. X. To the same effect*
Manu 1X 182.

(7) *Mit Ch. 1 S X-§ 3*

initiation under both family names would be wanting, he would partake only of the family of the adopter." (1)

740. The author of *Dattak Chandrika* recommends such an adoption to remove the objection to the adoption of an only son as entailing extinction of the lineage of the natural father (2) and this view received the sanction of the court in an old case; (3), but the validity of the adoption of an only son has been since otherwise settled, and the temporary son of two fathers has gone with the reason which restricted adoption within the narrow limits set out by the *Dattak Mimamsa*.

Even as regards the "perpetual *Dvamushyayan*" only the term remains, but its connotations have so materially changed that there is nothing but an identity of name to connect the new *Dvamushyayan* with his pristine prototype.

741. Conditions of a *Dvamushyayan* adoption.—The *Dvamushyayan* son or son of two fathers is a modern relic of the old but now obsolete institution of *Niyog*. As such, he has passed through four stages. In the first stage, he was the *Kshetraj* son of the wife who belonged both to the begetter as well as to his mother's legitimate husband, the rule being that if any one sows on my land, he shares the crop with me. In the second stage he was the son of *Niyog* or a relation or a priest appointed to procreate him on the wife. In the third stage he being the only son of his father, he was permitted to be shared by his brother who would have formerly been entitled to the *Niyog* company of his wife and who, therefore, was entitled to a share in his brother's son even though begotten by him without his assistance. (4) In the fourth and present stage he is merely the son of two fathers whether these be brothers or not and the only condition required for their joint paternity is that they should, before the adoption, have agreed to treat the son as the common son of both. Such an agreement may be express or implied, (5) but it cannot be presumed from the mere fact that the adopter was the full brother of the father (6) Not only the brothers but their widows may adopt a *Dvamushyayan*. (7)

742. Though the practice of filial partnerships is on the wane, the reported cases show that it is not yet dead, and amongst certain people as in the case of Nambudri Brahmins of Malabar it appears to be the usual form of adoption. (8) It is practised amongst Lingayats whether the brothers are joint or divided (9) and in the southern districts of the Bombay presidency (10) and is not unknown in Bengal, (11) the United (12) and the Central Provinces. (13)

(1) Datt, Mim. VI 41 (Suth) 85; Datt. Ch. 1.28 (Suth) 114

(2) Datt Ch.1 28 (Suth) 114.

(3) *Shumshere Mall v. Dulraj*, 2 Beng. S. R. 216; 6 I.D (O S.) 523.

(4) So Manu (IX-182) "if among several brothers of the whole blood one has son born, Manu pronounces them all fathers of male issue by means of that son." There is no such presumption now for the simple reason that there can be no partnership in a wife.

(5) *Wooma Des v. Gokoolanund* 8 C. 587 (598), P. C.; *Behari Lal v. Shab Lal*, 26 A. 472

(6) *Laxmaputras v. Venkatesh*, 41 B 315 (810, 941); *Buchrao v. Bhurao*, 42 B. 277 (275) in which 41 B. 315 is followed and

cited as an authority for an express agreement, but that case does not support the view that the agreement should be express.

(7) *Krishna v. Parameshwari*, 25 B. 587.

(8) *Vasudev v. Secretary of State*, 11 M. 157 (167, 179).

(9) *Basava v. Lingangauda*, 19 B. 455; *Chenava v. Basangauda*, 21 B. 105

(10) *Steele, L. C.* pp. 45, 47, 168, 884; *Basava v. Lingangauda*, 19 B. 428 (466, 467); *Krishna v. Parameshwari*, 25 B. 587 (548).

(11) *Nil Madhub v. Bishumter*, 18 M I.A. 85 (100, 101)

(12) *Behari Lal v. Shab Lal*, 26 A. 472

(13) *Laxmi Bai v. Shri Krishna*, (1877) C.P.L.R.; Pt. 8; No. 50.

743. Though Dvamushyayan is ordinarily confined to the adoption of a brother's son still this is not necessary for any two persons may agree to hold a son in common (1) provided they follow the form and condition which are the same as in the Dattak adoption. (2)

744. A peculiar custom was proved to exist amongst the *Pandus* of Gaya whose son on adoption continues to retain his rights in his natural family. (3)

Rights of a Dvamushyayan.

41. A *Dvamushyayan* is entitled to inherit in both the families of his natural and adoptive fathers

745. Analogous Law.—(1) The *Dvamushyayan's* right of inheritance to his two fathers is thus set out in the Dattak Chandrika:—

“The son given, who is a Dvamushyayan, if both his adoptive and natural fathers have no other male issue, takes the whole estate of both : one adopted, where legitimate issue of the adopter existed, does not participate in the estate of the adopter ; but a legitimate son, being born, to the natural father subsequent to the adoption, the adopted son takes half of the share of a legitimate son. If however such issue be subsequently born to the adopter, the adopted son in question takes half of the share which is prescribed by law for an adopted son, exclusively related to his adoptive father, where legitimate issue may be subsequently born to that person.” (4)

If his two fathers both have legitimate sons he offers no oblation to either but takes “a quarter of the share allotted to a legitimate son of his adoptive father.” (5)

746. The Dvamushyayan son being the son of two fathers, it follows that he possesses all the rights and is equally subject to all the obligations of a son, in the two families. But as regards his status in his adoptive father's household, his position is different to that of a *Dattak* son, since his own sons revert to his natural family. (6)

His own mother remains his heir and may succeed to him in the absence of nearer heirs. (7)

42. (1) Customary adoptions.—A husband or wife may adopt a Kritrim son to himself or herself either jointly or separately in accordance with the following rules :—

(a) The adopter must have no son, grandson or great-grandson living at the time of adoption.

(1) Sutherland's Synopsis 5th Head. Datt. Mim VI 41 (before quoted) : 1 att Ch II 35

(2) *Krishna v. Permeswari*, 25 B 587.

(3) *Lachman Lal v. Karhaya Lal*, 22 C. 609 P. C

(4) Datt. Chand. V. 38.

(5) Mayukh, Ch 4 S V §§ 24-26 citing Vashisth quoted in Mit. II 1 55 (Mandlik) p. 60.

(6) *Wooma Dace v. Gokochanand*, 3 C. 587 (598) P C

(7) *Behari Lal v. Shih Lal*, 26 A. 472.

- (b) The adoptee may be an adult and married.
- (c) Both he and his parents must consent to his adoption.
- (d) A husband or wife may adopt jointly, or they may each adopt a separate son.
- (e) The son so adopted is the son of the adopter, even if she be a wife or widow.
- (f) A wife or widow may adopt a son in her own right, and without the assent of her husband or his kinsmen
- (g) Any relation, or a stranger may be so adopted.

(2) Such an adoption can only be made in the Mithila Province and the districts adjoining it ; in the Punjab, and elsewhere if permitted by custom.

Illustration.

A is the father of B. B adopts A as his Kritrim son The adoption is valid.

Incidents of a Kritrim adoption. **43.** A Kritrim adoption is subject to the following incidents :—

- (1) The adoption is concluded by contract, no ceremony being necessary.
- (2) There is no restriction as to the qualifications of the adoptee except that he should of the same caste as the adopter.
- (3) For the purpose of marriage his Sapinda relationship in the family of his adopter extends only to three degrees. ⁽¹⁾
- (4) He does not assume the surname of his adoptive father.

Synopsis.

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|---|---|
| (1) <i>History of Kritrim adoption</i> (747). | (4) <i>Who can adopt ?</i> (751) |
| (2) <i>Ceremonies necessary for</i> (747). | (5) <i>Relationship personal</i> (752). |
| (3) <i>Incidents of Kritrim adoption</i> (750). | (6) <i>Adoption completed by contract</i> (753) |
| | (7) <i>Qualifications of adoptee</i> (754). |

747. Analogous Law.—The Kritrim ⁽²⁾ son of old was a recognized subsidiary son like the “Swayumdatt” or “Self given” son

Its history.

Kritrim was an orphan and was hired by the wealth of his adopter to accept his proposal to become his son, while a *Swayumdatt* was

(1) Suth. Note, p. 162.

(2) Sk. Krit-made, a son made.

one, who, being abandoned by his parents, did the same. Both these sons have long since become obsolete, and the *Kritrim* son whose adoption is recognized in Tirhut is quite a modern institution engrafted on the old texts and said to flow from the absolute incompetency of a widow to adopt to her deceased husband. (1) "The practice (says Mr. Colebrooke) of adopting sons given by their parents was there abolished by Shridutt and Pratihast, although the latter had been himself adopted in that manner. Their motive was lest a child already recognized in one family, being again registered in another, a confusion of families should thence ensue." (2)

748. The Dattak adoption (3) having thus become obsolete, a substitute had to be found, and it is thus justified by Vachaspati Misra (4) an author of paramount authority in the Mithila country in his *Dwanta Nirmay* as follows:—

"Its purpose, for the man, that he may be excluded from the hell denominated 'put' : for the woman, that some one may exist, capable of performing her right of *Sapindan*, or association with departed ancestors. Should individuals, capable of promoting these objects exist, a son must not be adopted." (5).

The right of the widow to adopt a son of her own is justified on the ground that he is necessary for the performance of her *Sapindi Karan* or the rite of association with departed ancestors, the observance of which on the 11th day from her death exempts the other relatives, who are unable to celebrate such ceremony, from observing in her honour (as otherwise they would have to do) twelve monthly funeral repasts.

749. The ceremony of *Kritrim* (vulgarly) called *Karta putra* is thus described by Rudradhar in his *Sudhivivek*, a treatise on *Kritrim* adoption:—

"At an auspicious time, the adopter of a son, having bathed, addressing the person to be adopted, who has bathed, and to whom he has given some acceptable chattel says, "Be my son." "He replies I am become your son." This giving some chattel to him arises merely from custom. It is not necessary to the adoption. The assent of both parties is the only requisite, and a set form of speech is not essential." (6)

750. Incidents of Kritrim Adoption.—There can be no adoption in any but the *Kritrim* form in Mithila. The leading features of this adoption present such a striking contrast with the orthodox *Dattak* adoption in vogue in the rest of the country, that it is apt to be looked upon as no adoption at all, but a kind of affiliation which persists everywhere in spite of the law against it.

751. The first essential feature of a *Kritrim* adoption is that the Hindu widow may adopt a son to herself with or without the consent of her husband, but in either case, she can only adopt to herself and in no case does her adoptee succeed to any but her exclusive property. The consent of the husband does not make his wife's adoptee his own. Similarly, the husband may adopt a son to himself, and in that case he remains his own son, the relationship so created being in such case personal to the

(1) Datt Mim. 1-16 (Suth) 4.

(2) Mr. Sutherland questions the correctness of Mr. Colebrooke's statement. See Note 15 to his Datt. Mim. (Suth) pp 160, 161

(3) *Nund Ram v. Kashree Pande*, 8 Beng. S. R. 310; 6 I. D. (O. S.) 906

(4) 2 W. Maon H. L. case 26 pp. 173, 174 in which the pandits hold the *Kritrim*

adoption to be "in consonance to the doctrines of the learned Vachaspati Misra and others, whose works are current in Mithila."

(5) Suth. Note 5 to Datt. Mim. pp 156, 157.

(6) Sutherland's note 16 to Datt. Mim., p 161.

contracting parties: (1) the son so adopted will not be considered the grandson of his adopter's father nor will his own son be considered as the grandson of his adopter.

752. No relationship obtains between the *Kritrim* son and the father of Relationship per the adopter, from which it may be inferred that such sonal adopted son is not entitled to inherit to him and a *fortiori* to his adopter's collaterals. The adoptee is not considered a member of the adopter's family. He does not assume the surname of his adopter, or forfeit his claim to his own family. (-)

753. No ceremonies are necessary to complete this adoption which is completed on contract, the adopter agreeing to take the adoptee Adoption completed by contract. and the latter offering himself in adoption. (8) If he is a minor and cannot give himself away, then the consent of his parents is necessary. (4)

754. There is no restriction on account of age (5) or the previous marriage Age and relation ship immaterial. or relationship of the candidate for *Kritrim* adoption, the only condition necessary being that the adopter and the adoptee must belong to the same caste; otherwise, his previous marriage or the fact that he is the only son or the sister's (7) or daughter's son of the adopter is no obstacle in the way of his eligibility. In fact, according to the *Dvaita Parishusth* of Keshab Misra a man is free to adopt his own brother and even his own father (8) and this is not merely a pandit's hyperbole, for, he says "when a father, a brother, or the like has been adopted as a son, the invocation to the adopter at a solemn obsequies is by his new relation of father, not by that of son or brother." (9)

44. A *Kritrim* son becomes entitled to the following rights in consequence of his adoption:—

- (1) He succeeds both to his father and the adopter.
- (2) He acquires no relationship with his adopter's father.
- (3) He does not succeed to his adopter's collaterals.
- (4) If adopted by a wife or widow, he succeeds to her exclusive property having no right in her husband's estate.

Synopsis.

- (1) *Rights of inheritance* (755). (3) *Jain adoptions* (757-759).
 (2) *Kritrim adoption in the Punjab* (756). (4) *Burmese adoptions* (760).

(1) *Sreenarain v Lallut Narain*, 2 Beng S. R. 29; 6 I. D. (O.S.) 380 (381); *Collector of Tirhut v. Huopershad*, 7 W. R. 500; *Shiboo Koeree v. Jogun Singh*, 8 W. R. 155.

(2) *Ib.*, p. 158.

(3) 1 W. Maon. H. L., p. 83; *Luchman v. Mohanlal*, 16 W. R. 179 (180).

(4) 2 W. Maon. H. L. case 16, pp 173, 174.

(5) *Ooman Dut v Kunhia*, 3 Beng. S. R. 192; 6 I. D. (O.S.) 820; *Shibkree v. Joogun*, S. W. R. 155 (158).

(6) *Ooman Dut v. Kunhia*, 3 Beng. S. R. 192 (199); 6 I. D. (O.S.) 800 (825); 1 W. Maon. p. 64. The fact that a man may adopt his own father shows that age, relationship and

marriage are equally immaterial.

(7) *Purmessur v. Hunooman*, 6 Beng. S. R. 235; 7 I. D. (O.S.) 848.

(8) 1 W. Maon. H. L., p. 64; *Ooman Dut v Kunhia*, 3 Beng S. R. 192 (199); 6 I. D. (O.S.) 820 (825). In *Runjeet Singh v. Obhya Narain*, 2 Beng. S. R. 815; 6 I. D. (O.S.) 597, the Pandit in the Mithila case erroneously relying on Baudhayan opined against the adoption of an elder brother. The case being an adoption recognized by law and not merely an affiliation extant in spite of the law, a *Kritrim* adoption once completed is as irrevocable as any other adoption.

(9) Cited in *Ooman Dut v. Kunhia*, 3 Beng. S. R. 192 (199), 6 I. D. (O. S.) 820 (825).

755. Analogous Law.—A *Kritrim* like a Dvamushtyan is really a son of two fathers. While he contracts himself to be the son of his adopter, he does not cease to belong to his natural family in which he continues to enjoy his ordinary rights. And being the son of two fathers, he inherits to both and is entitled to perform the obsequies of both his natural and adoptive parents.

756. The simplified *Kritrim* which merely created a personal relationship between the adopter and adoptee has become customary **Kritrim in the Punjab and Burmah.** both in the Punjab (1) and Burmah (2) where its incidents are mainly those of the *Mithila Kritrim*, viz., the adoptee becomes the son of the adopter but can claim no relationship beyond him and cannot succeed to any one save his own adopter. He has no right of collateral succession. Similar adoptions are practised by the Gayawal (3) and the Nambudri Brahmins (4)

757. Jain adoption.—Occasional references have already been made to the law of adoption by Jains. But this important community though nominally Hindus, are dissenters from Hinduism and their law of adoption has consequently none of the religious associations of the orthodox faith. In their case adoption signifies nothing more than the appointment of an heir. (5) No ceremony beyond that of a gift and acceptance is essential to their adoption. (6) The Jain widow is entitled to adopt without any authority, express or implied, of her husband. (7) And as regards the adopted son, she is free to adopt one who is married and has children of his own. (8) The Jains are subject to no prohibition as regards the adoptee, (9) being free to adopt a sister's son (10) or a husband's brother. (11) A Jain retains this custom of adoption even upon his conversion to Vaishnavism (12) and the same custom applies equally to Jains of all sects whether Agarwala, Churiwal, Khandwal or Oswal. (13) But in Bombay, the Hindu rule that the husband's power of adoption cannot be delegated to any one else except his widow, holds good. (14) And the rule that as between two or more co-widows the right to adopt belongs to the senior widow applies equally everywhere to them. (15)

758. Members of the Jain community are to be found scattered all over India. As such, they have naturally assimilated local customs as regards the ceremonies and rituals of **Jain ceremony.**

(1) *Baijnath v. Shambhu*, (1908) P. W. R. 58; *Jwanmal v. Jamna Das*, (1913) P. W. R. 282; 10 I. C. 822.

(2) *Mashwe v. Mashwe*, (1910) 4 Bur. L. T. 158; 11 I. C. 776.

(3) *Lachman v. Kanhaya*, 22 C. 609 P. C.

(4) *Subramanyan v. Paramaswaram*, 11 M. 116 (124).

(5) *Bhagwan Das v. Rajmul*, 10 B. H. C. R. 241 (262); *Asharfi Kumwar v. Rupchand*, 30 A. 197 O. A. *Rupchand v. Jambu Prasad*, 32 A. 247 P. C.

(6) *Rupchand v. Jambu Parshad*, 32 A. 247 P. C.; *Lakhmichand v. Gatto Bai*, 8 A. 319.

(7) *Bhadrabahu Samhita* (J. L. Jain) p. 40, 41; *Gobindan v. Camahchand*, (1838), 8. D. A. B. 276; *Sheo Singh v. Dakho* 1. A. 688 P. C.; *Manik Chand v. Jagat Sattani* 17 C. 518.

(8) *Pudmacoomari v. Court of Wards*, 8 C.

302 P. C.; *Asharfi Kumwar v. Rupchand*, 30 A. 197 O. A. *Rupchand v. Jambu Parshad*, 32 A. 247 P. C.

(9) *Sheo Singh v. Dakho*, 1 A. 688 P. C.; *Hasan Ali v. Nagamal*, 1 A. 288; *Lakhmichand v. Gatto Bai*, 8 A. 319; *Asharfi Kuar v. Rupchand*, 30 A. 127; 6 A. *Rupchand v. Jambu Parshad*, 32 A. 247 P. C.

(10) *Hasan Ali v. Nagamal*, 1 A. 288.

(11) *Nawickchand v. Munnadal*, (1909) P. R. 95.

(12) *Manikchand v. Jagat Setani* 17 C. 518.

(13) *Harnabh Pershad v. Mandil Das* 27 C. 379; *Manik Chand v. Jagat Sattani*, 17 C. 518; *Sheo Singh v. Dakho*, 1 A. 688 P. C.; *Gopind Nath v. Gulal*, 5 Beng. S. R. 276.

(14) *Bhagwan Das v. Rajmul*, 10 B. H. C. R. 241; *Amawa v. Mohadgauda*, 22 B. 416.

(15) *Asharfi Kumwar v. Rupchand*, 30 A. 247 O. A. *Rupchand v. Jambu Parshad*, 32 A. 147 P. C.

adoption. But as a rule the two ceremonies which this community everywhere regards as essential are, the giving and taking and tying of the father's turban on to the son to be. This is intended to symbolize the transfer of paternal authority from one head to another. The ceremony of giving and taking is, of course, indispensable in all adoptions and these ceremonies are concluded with distribution of cocoanuts and the other tokens of rejoicing.

759. The Jains acknowledge the authority of a Digest of their laws contained in a work known as the "Bhadrabahu Samhita" stated to have been compiled in the third century B. C., from which the following description of the ceremonies of adoption is extracted.

Bhadrabahu on adoption. 39. Not having a son of their bodies, the parents should take a son in adoption. For the adopted son like a son of the body serves the parents affectionately.

40. A sonless man or woman takes a son in adoption. First take a writing (deed) before witnesses, (sakshi) from the mother and father of the son to be taken in adoption.

41-42. Having the writing attested by one's relations, and the people of brotherhood; having had it sealed by the King's officers with the royal seal, they invite the men and women of their family and have music, dancing and singing along with auspicious introductory prayer.

43. In a Jain temple they perform the auspicious ceremony of Dvarodghatan (opening the door) and other good deeds, (charity, etc) and place a pitcher of ghee, *Svastika* and instal the *(huru)* (preceptor) before the image of the god

44-45. Having given the upper garment (wrapping cloth) and lower garment (loin cloth) for use in worship in the temple and having rung the sacred bell, they return to their house and distribute betel leaves and cocoanuts to the assembled men. Women should be presented first with saffron (for decorating the head) and red paint (for decorating the feet) and a bodice should then be presented to them. Having feasted, all the ceremonies of birth should be performed.

46. The father of the boy should accept and keep the cap, ⁽¹⁾ cocoanut and one, two, three or four coins presented to him by the members of the brotherhood and others

47. When giving and taking has taken place according to these rites and ceremonies, then the boy is said to be son of this man (the adoptive father).

48. And it is then alone that in works of state and trade the son gets recognition, and becomes entitled to land, villages, houses and other things.

49. And then he (the adopted son) obtains ownership and respect in the world, on this *samsakara* (the birth ceremony being performed) and the mother and father are considered to be sonful.

760. Burmese adoption.—The Burmese Buddhist Law recognizes the institution of adoption and presents some points in common and many points of contrast with the orthodox Dattak adoption, although the *Kettima* adoption is akin to the *Kritrim* adoption from which it has borrowed the name. The Burmese Law permits of the adoption of a child of either sex ⁽²⁾ and with absolute or only a qualified right of inheritance. ⁽³⁾ A Burman may make such adoptions even though he may have children of his own ⁽⁴⁾ and the presence of his previously adopted children does not prevent him from making fresh adoptions. ⁽⁵⁾

No ceremonies are necessary to complete an adoption, but what is most insisted on is publicity. ⁽⁶⁾

The *Kettima* adoption however requires the consent of the child's parents and the taking him with the intention and on the footing that he shall inherit ⁽⁷⁾

(1) *Muhut*. Int. crown: here it means cap.

(2) *Ma Me Gale v. Ma Sayi*, 32 C. 119 P.C.

(3) *Tet Tun v. Ma Chan*, 5 L.B.R. 216; 8 I. C. 978.

(4) *Ma Burk v. Ma Yin*, (1872-92) L.B.R. 100.

(5) *Ma Shwe Yin v. Ma Shwe Ngun*, 11 I.C.

776

(6) *Ma Ywet v. Ma Me*, 86 C. 978 P.C.; *Ma Gyi v. Maung Tha*, 14 Bur L. R. 15; *Mein Gale v. Ma Kim*, (1872-86) U.B.R. Vol. II. 81.

(7) *Maung Thwe v. Maung Tun Pe*, 45 C. 1 (P.C.).

while the *apattiha* is merely a compassionate adoption of a foundling or a destitute orphan who possesses only a partial right of inheritance. ⁽¹⁾ But even an orphan may be made a *Keitima* son in which case his own consent is, of course, essential. ⁽²⁾

An adopted son in *Keitima* form has the same right of inheritance as a natural son ⁽³⁾ but may be disinherited under the Buddhist Law if he becomes an enemy of his adopter ⁽⁴⁾ a salutary provision the force of which is recognized both in Madras ⁽⁵⁾ and Bombay, and elsewhere. ⁽⁶⁾

Proof of adoption. **45.** (1) He who relies upon an adoption must prove it.

(2) Where an adoption has the effect of disinheriting the natural heirs, it must be proved by such cogent evidence as is sufficient to prove its *factum* and validity and not merely its probability, due regard being had to all the circumstances including

- (a) its antecedent and attendant probability,
- (b) the existence of a writing,
- (c) the conduct of the parties before and since the alleged adoption, and
- (d) its publicity; and where the adopter is an illiterate widow,
- (e) the assent, intention and inclination of her husband,
- (f) the receipt by her of independent advice, and
- (g) the effect of the adoption upon her rights.

(3) Provided that where an adoption has been acted upon for a considerable time without dispute, the court may, upon proof of its *factum* presume its validity

Illustration.

A a young illiterate *pardanashin* widow has for her adviser her husband's cousin B. She adopts his son C. C sues her for possession. The burden is on C to prove that A had not been unduly influenced by B to adopt him.

Synopsis.

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| (1) <i>Proof of adoption</i> (761). | (5) <i>Antecedent probabilities</i> (765-767). |
| (2) <i>Strict proof essential</i> (762). | (6) <i>Publicity</i> (768). |
| (3) <i>No presumption in favour of adoption</i> (763). | (7) <i>Admissions and conduct of the parties</i> (169-774). |
| (4) <i>Evidence in writing, value of</i> (764). | (8) <i>Independent advice where women adopts</i> (775). |

(1) Dhamma That Bk. 10 p. 305 :—Then sons and daughters of another person who shall be publicly taken and brought up in order or with the understanding that they should be made children to inherit, they are called '*keitima*,' that is notoriously adopted children. *Ma Me Gale v. Ma Say*, 32 C 219 P. C.

(2) *Tet Tin v. Ma Chai*, 5 L. B. R. 216 ;

8 I. C. 978.

(3) *Ma Tin Shive v. Maung Ka Gyi*, (1897-1901) L.B.R. Vol. II-142

(4) *Ma Ywet v. Ma Me*, 36 C 978 P. C.

(5) *Ma Mye Me v. Maung Ba Dun*, 11, Bur. L. R. 240.

(6) *Vedanayaya v Vedanmal*, 27 M. 591 ; *Vedanmal v. Vedanayaya*, 31 M. 100.

(7) *Gangu v. Chandrabhagabai*, 32 B. 275.

- (9) *Ancient adoptions, proof of, less difficult* (777-778).
 (10) *Estoppel by representation* (778-780).
 (11) *Estoppel by acquiescence* (781-782).
 †(12) *Limitation for challenging adoption* (784-785).
 (13) *Limitation for establishing adoption* (786).
 (14) *Burden of proof* (786).
 (15) *Adoption by fraud force, etc.* (789).
 (16) *Working rules on the subject* (790).
 (17) *Pleading regarding adoption* (791).

761. Analogous Law.—It has been seen that both marriage and legitimacy may be conclusively presumed (§§ 527-544) from certain facts and that they need not then be proved. Law recognizes these relationships as natural and the institutions of marriage and sonship as common to all mankind. And consequently it presumes what it regards as being in consonance with approved usage. But adoption stands on a different footing. It is a mere local relic of an old obsolete institution deriving its nourishment and support from tradition and usage. When asserted it has therefore to be proved like any other fact. There is no presumption in its favour, ⁽¹⁾ and on the other hand, in the case of a sonless man there is no presumption against it, though the degree of proof required to disinherit the natural heirs is naturally very high. ⁽²⁾

762. As adoption implies the introduction of a stranger into the family and requires no writing or registration to complete it, but the courts enjoin a very high degree of proof akin to that necessary to establish a nuncupative will. ⁽³⁾ So Lord Wynford delivering the judgment of the Privy Council regretted that an adoption could be proved by parol testimony of witnesses ⁽⁴⁾ and added: "But although neither written acknowledgments, nor the performance of any religious ceremonies are essential to the validity of adoption, such acknowledgments are usually given, such ceremonies observed and notices given of the time when adoptions are to take place, in all families of distinction, such as those of Zamindars and opulent Brahmins. Wherever those have been omitted. it behoves this court to regard with extreme suspicion the proof offered in support of an adoption. I would say that in no case, the rights of wives and daughters should be transferred to strangers or to more remote relations unless the fact of adoption, by which this transfer is effected be proved, by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth." ⁽⁵⁾

763. It is sometimes said that a childless Hindu anxious to be delivered from the torments of hell is naturally anxious to adopt a son to free him therefrom ⁽⁶⁾, and that therefore, there is a *prima facie* presumption in favour of an adoption. But these remarks occur with reference to a second adoption,

(1) *Kishorilal v. Chammilal*, 31 A. 116 (195) P. C.; *Lal Kunwar v. Churanilal*, 82 A. 104 (115) P. C.; *Raja Gopala v. Nattu*, 84 M. 929 (892); *Venkata v. Papayya*, (1918) M. W. N. 828; 22 I. C. 787.

(2) *Sutroogun v. Sabitra*, 5 W. R. 109 P. C. cited and followed in *Diwakar Rao v. Chandan Lal*, 44 C. 201 (210) P. C.

(3) *Imriti Koonwar v. Roop Narain*,

6 C. L. R. 76.

(4) *Sutroogun v. Sabitra*, 5 W. R. 109 P. C.

(5) *Sutroogun v. Sabitra*, 5 W. R. 109 P. C. cited and followed in *Diwakar Rao v. Chandan Lal*, 44 C. 201 (210) P. C.

(6) *Huradhan v. Muthorenanth*, 4 M. I. A. 414 (425, 426). To the same effect *Soondur Koomaree v. Gudadhur*, 7 M. I. A. 54 (54).

their Lordships holding that if a man felt a necessity for one adoption, there was a probability that on the death of the first adopted son, he would make another adoption, but this is very far from supporting a general presumption. As their Lordships observed in a later case : " Much has been said of the old presumption which arises from the religious duty which is upon every childless Hindu to adopt a son. Their Lordships do not deny the force of that presumption, but they cannot shut their eyes to the fact that childless Hindus die daily without having fulfilled this obligation, or made provision for its fulfilment after their death." (1) In a still later case their Lordships referred to the *dictum* of Mitter, J., (2) who had ascribed the institution of adoption to a religious instinct, holding that the subject of adoption was clearly inseparable from the Hindu religion itself, and that as stated by Manu that religion enjoined that a man destitute of a son must anxiously adopt one for the sake of the funeral-cake, water and solemn rites. Referring to this *dictum*, their Lordships observed : " There is no doubt that this judgment has exercised very great influence on the controversy ; and indeed, if the learned Judge's fundamental position were sound there could be no controversy at all. Let us assume for this purpose, though it is a matter of grave dispute, (3) that the learned Judge is right in saying that adoption originated in motives of religion and not in the ordinary human desire for perpetuation of family properties and name, still the question is whether certain precepts have a legal or only a religious bearing." (4) Whether adoption is traceable to religious awe, or to a secular longing, the fact remains that every sonless man does not adopt and if he has that desire he fulfils it in his own life-time, for even assuming that the primary purpose of an adoption is to provide for the due performance of one's obsequial rites, that purpose cannot be fully achieved by delegating that duty to the wife since the most important of obsequial rites commence with one's death and last for 10 days thereafter. Moreover in the written authorities that have come under the notice of courts, the reason usually assigned for an adoption is the perpetuation of the lineage and name and not the propitiation of the forces of darkness in the next regions. The fact that adoptions are still common and customary shows that adoptions are prized and made ; the fact that they are not made by all or most sonless men shows that they are not so common as to raise any presumption in their favour. Much must, moreover, depend upon the education and views of the person concerned. The advancement of Western learning has rudely shaken many an old time belief and even those who nominally remain within the fold of Hinduism must not be too readily assumed to subscribe to its expiring dogmas or be impressed by the hopes and fears addressed to a primitive people.

764. The first thing the court will require where an adoption in a family of any importance is alleged, is the evidence in writing of the adoption deed, or at least of the accounts relating to the transaction, of the statements contemporaneously or almost contemporaneously made to the authorities for mutation of names, the invitations issued to kinsmen and castemen, their replies thereto, and the numerous other occasions which such an

(1) *Nilmadhav v. Bishumber*, 18 M. I. A. 85 (100).

(2) *Upendra Lal v. Prasannamayi*, 1 B. L. R. (A. C.) 241

(3) See General Introduction § 14 where the history of adoption is traced. This reli-

gious element was of course, only a later graft on the old secular institution common to most of the ancient Indo-Aryan races.

(4) *Sri Balusu v. Sri Balusu*, 21 A. 460 (477) P. C. S. C. 22 M. 898 (414) P. C.

event presents for the coming into existence of writings which are the best evidence of the transaction.

765. But though a writing furnishes valuable evidence, its value would be greatly enhanced by the presence of antecedent probabilities. The facts that the alleged adopter was sixty-seven years old, and that he had two wives to whom he had long been married, by neither of them he had ever issue, and both of them were past a child-bearing age, all add to the probability of an adoption (1) as the fact that he was young and had recently married tells against it. (2) But it often happens that when a person is moribund, scheming counselors hurry to his bedside, prepare deeds and go through a mock-adoption when his mind is inert, if not unconscious and when he has not the bodily strength to resist such officious importunities. Such was the adoption made to "a dying man, almost continually insensible, though occasionally roused to consciousness by loud tones, or by pungent applications to his nostrils, but almost immediately afterwards relapsing into a state of insensibility, and when momentarily conscious, with his mind quite inert and instantly fatigued on the slightest exertion." (3)

766. How is it possible (their Lordships continued) "that a person in such a condition could be capable of any act requiring judgment and reflection, especially one to which no antecedent circumstances appear to have led and for which the enfeebled and scarcely conscious mind was unprepared. In such a state as that described, even if the mind were passively awake to the suggestions made to it, it would naturally cling to repose, and yield for the sake of it, to any external suggestion. Viewing the adoption and the will together, they present every appearance of a concerted family arrangement. As an adopted child passes into a new family his natural relations become, as it were, strangers, and the association of the boy's natural uncle with the father of the adopting mother, must be regarded as a contemporaneous and concurrent act with the adoption. If the law were to countenance acts of this description, performed at such a time and under such circumstances without the clearest and most cogent evidence to establish their validity, relations and managers would be encouraged to advance their own private notions of what might be advisable to be done for the good of the family, and ascribe acts to a dying man in which he would have been merely passive instrument to prolong their own gain and authority." (4)

767. These words spoken with reference to a dying man, apply equally to young pardanashin women (5) who being illiterate are too often surrounded by such selfish advisers, and who as too often fall a victim to their interested counsels. In their case, no less than in the case of a dying adopter it devolves on the court to scrutinize all such evidence with jealous care and if it finds that the adopter was swayed by advice more than by his convictions it should not be slow to set aside an adoption which appears to it improvident and involuntary (6)

(1) *Huradhum v. Muthoranath*, 4 M. I. A. 414 (425)

(2) *Saradasomulery v. Tincowry*, 1 Hyde, 228 (250); *Sootrugun v. Sakitra*, 5 W. R. 109 P. C.; *Dinakar Rao v. Chandan Lal*, 44 C. 201 (205) P. C.

(3) *Tajammal v. Sashachalla*, 10 M. I. A. 429 (434).

(4) *Ib.*, pp. 434, 435

(5) *Kishorilal v. Chunilal*, 31 A. 116 (121, 122) P. C.

(6) *Bayabai v. Bala*, 7 B. H. C. R. (App.) 1 followed in *Somasekharaja v. Subhadramaji*, 6 B. 524; *Ravananayakamma v. Alwar*, 13 M. 214 (221); *Kishorilal v. Chunilal*, 31 A. 116 (P. C.)

though the case might be different if the adoption were admitted, or afterwards acted upon. (1)

768. Publicity or notoriety is another element for consideration. Where for instance, a person was adopted and the fact noted by the **Publicity** *Panchayat* who prepared a pedigree in which the adopted son was mentioned, the court held it to amount to sufficient proof of adoption. (2) In one of these cases the question was whether one Sujan had been duly adopted by Fateh. In connection with another dispute in the family, Panchayat was appointed who drew up a report in 1819 which was filed in the collectorate. It contained a reference to Sujan's adoption but the words were smudged over with ink which the court suspected had been done fraudulently to destroy the force of the finding. The Privy Council considered this a sufficient evidence to establish Sujan's adoption as proved by the family pedigree prepared so far back as 1819. (3) In another case instituted in 1891 the same high tribunal had to find on the question of one Azmat Singh's adoption alleged to have taken place about 1681, and the evidence adduced was a copy of a village *Wajibularz* to which was attached a pedigree in which Azmat was described as an adopted son, added to which, the same fact was mentioned in the *Oudh Gazetteer*. There was no other evidence. Their Lordships observed: "At this distance of time it is, of course, impossible to prove that all the requisite ceremonies were duly and regularly performed. On the one hand, it is not disputed that Azmat and his descendants, successors in the Raj remained Bisains, though the adoption, if it took place, was an adoption into the *Bandhalgoti* clan, a clan much inferior in social position to the Bisains. It appears that on the death of a member of the *Manakpur* family, the ceremonies usual on the death of a member are observed amongst the Bisains of *Birwa Mehnor*, a circumstance unusual in the case of an adoption out of the family, though it is said, not unprecedented. On the other hand, there is a body of tradition strong and persistent in favour of the adoption, and there is a story still current which may possibly serve to throw some light on the transaction." (4) Their Lordships then detailed the story of a prophecy made that Azmat would become a Raja and within 8 days the prophecy was fulfilled by his adoption as heir to the *Manakpur* Raj. (5)

The fact that upon an adoption, the adoptee's name was mutated in the Collector's books is of importance, but the fact that his name was mentioned in the income-tax receipts, a power of attorney, bonds or other private instruments is of little value as these documents do not afford sufficient publicity of the fact, being only available to those who are directly interested in them. (6)

769. The evidence furnished by conduct is often an invaluable guide in arriving at the truth. The facts the court has to examine in this connection are how far they are consistent or inconsistent with the adoption alleged. If they are continuously consistent only with adoption and inconsistent with non-adoption then they add to its probability which would be material in

(1) *Chandra Kunwar v Narpat Singh*, 29 A 184 (195) P C. following *Statterie v Pooley*, 6 M. & W. 664 (669); *Heane v Rogers*, 9 B.&C 577 (586); *Newton v Luddiard*, 12 Q. B 926; *In re Simpson*, 2 Ch D 72 (89); *Trinidad Asphalt Co. v. Coryat*, (1896) A. C. 587.
(2) *Ajab Singh v. Nanabhan*, 8 C.W.N. 180 P. C.

(3) *Achal Ram v Hazim Husain*, 27 A. 271 P C.

(4) *Achal Ram v. Hazim Husain*, 27 A. 271 (290, 291) P C.

(5) *Ib.*, p 291.

(6) *Pudum Singh v Coday Singh*, 12 M.I A. 350 (357-359).

deciding an issue in the conflict of evidence. If, on the other hand, they are only at times consistent with the *factum* of adoption being on other occasions equally opposed to it, then the court would not be right in laying undue stress upon any one set without considering the counteracting effect of the other. (1) Such facts as the change of name usually made by the adoptee, (2) the mutation of names in the Collector's books in respect of property which the adoptive mother resigns in favour of her adopted son (3) are not the least important. If the adoptions are not followed up by the mutation of names, the mere fact that the adoptee was occasionally described as the son of his adoptive father in a private document such as a power of attorney or in the income-tax receipts or other private instruments is of little value. (4) The acts and declarations of the widow who is alleged to have made the adoption are important. (5) So is also the conduct of the adopted son in suffering his adoptive mother to retain possession of the property after he came of age (6) or permitting her name to remain on the revenue records conjointly with his own. (7)

The court held an adoption proved where, soon after the alleged adoption, the adoptive father's name was entered in the school register under the heading "parent or guardian" against the boy's name and in a partition suit between his natural father and brothers, his rights were ignored and his name was mentioned in the genealogical tree with a bare mention of the adoption. (8) So where the adoptee renounced his rights in his natural family and commenced participating in the rents and profits of the *Valan* lands of his adoptive family the court held the adoption proved. (9)

770. The adopter's conduct towards the adoptee is very relevant in this connection. If the adoption was through "affection" as Manu enjoins, how was the adoptee treated by the adopter, before and since adoption. His relationship to the adopter, the natural affections felt towards him, are all facts which cannot be ignored. Indeed, where a person has for many years lived with his adopter and has been treated by her as her son, the court will not permit her afterwards to turn round and deny the adoption. (10) But the conduct must be unequivocal and only consistent with adoption. It must be naturally prolonged and continuous to give rise to such inference. Moreover in the case of illiterate *pardanashin* women, such circumstances might be easily faked as they were in a case which puzzled the Privy Council, but who eventually threw out the suit holding that the plaintiff had not been adopted by the defendant. The facts of this case are instructive. One Dwarkadas died in 1854 leaving his two widows Mts. Jasoda and Lacho surviving him. Jasoda died in 1863. Lacho was married in 1852. During the life-time of Dwarkadas and on his death his estate was managed by his first cousin Maya Ram who sometimes lived and dined with him. He had three sons—the youngest of whom by name Chunnilal was said to have been adopted by Lacho to her husband in 1877. Chunnilal lived with Lacho and managed her business for 8 years from 1891 to 1899 during which period he described himself as the son of Lacho in several documents purporting to have been executed by Lacho who bore the expenses of his investiture and marriage and

(1) *Nilmadhab, v Bishumber*, 18 M. I. A. 85 (97, 98).

(2) *Diwakar v. Chandan*, 41 C. 201 P. C.

(3) *Pudum Singh v Oodey Singh*, 12 M.L. A. 350 (357, 358).

(4) *Ib.*, pp. 358, 359.

(5) *Ib.*, p. 361.

(6) *Ib.*, p. 364.

(7) *Ib.* p. 360.

(8) *Soankoro v. Soankoro*, 6 M.L.T. 267

(9) *Ram Krishna v. Hari* (1888) B.P.J. 88.

(10) *Ganga Prasad v. Budh Sen*, 11 I. C. (A) 27.

executed a general power in 1891 appointing him her manager. A large number of witnesses swore to the *factum* of his adoption. The High Court held the evidence and the cumulative circumstances too overwhelming to resist the conclusion in favour of his adoption. The Privy Council reversed them on the ground that the plaintiff who knew best about his adoption had not pledged his oath in favour of his adoption, though the ceremony was stated to be a pompous function and no account books traced to plaintiff's possession had been produced. As for the numerous witnesses, their statements were so similarly worded as to suggest that they either possessed supernatural memory or had memorized their evidence. If the plaintiff had been adopted in 1877 then on coming to age in 1883 he did not take possession of the estate and in no way asserted his title thereto. The documents imputed to Lacho were really prepared by her managers who were the plaintiff's father and brother and it was suspicious that while they all mentioned the adoption, they omitted to mention its date. In any case Mt. Lacho could not be held bound by such collateral recitals even though they were registered and acted upon. ⁽¹⁾

771. In another case their Lordships had to find on the question of a husband's alleged adoption in a suit of the alleged adoptee against his widow. The adoption was said to have taken place in April 1889 some 10 months before the husband's death. The plaintiff was aged 5 at the time of adoption and 20 when he instituted the suit. Their Lordships again animadverted upon the plaintiff's absence from the witness-box and the absence of any writing. Several applications were filed purporting to be on behalf of the plaintiff through his guardian and mother, the defendant, which their Lordships rejected as made under the supervision of his own father on purpose to support the adoption. In the result they reversed the High Court and held that the plaintiff had not made out his case of adoption holding that his absence from the witness-box had covered his case with suspicion which was strengthened by the non-production of any account books showing the expenses of the alleged adoption. ⁽²⁾

772. In another case of adoption to a wealthy Zemindar, the same Board even more emphatically commented on the absence of any writing which they regarded as a matter of great suspicion added to which they commented on the fact that the ceremonies were of the briefest character, that the child's name was not changed and that he was never taken to live with his adoptive father or recognized by him in any way. They rejected the evidence of the natural father despite his high position on the ground of its improbability and concurred with the court below in holding the alleged adoption not proved. ⁽³⁾ Another case decided by the same high tribunal supports the same view, namely, that the court should be guided not so much by the spoken word as by the inherent probabilities and when these are evenly balanced, the safest course is to rely upon an undoubted admission.

773. Such admission may be contained in a registered adoption deed, or be the sworn statement in a mutation proceeding, but whatever its form, it is sufficient to shift the burden of proof. So their Lordships held citing Baron Parke ⁽⁴⁾ "what a party himself admits to be true may be presumed to be so." In this case Makund Singh was alleged to have adopted Kishan Singh.

**Admission shifts
burden.**

(1) *Kishorilal v. Channilal* 81 A 116 J. C.
(2) *Lal Kumar v. Chironji Lal* 82 A. 104
(115) P. C. followed in *Dwakar Rao v. Chandan Lal*, 44 C. 201 (208) P. C.
(8) *Dwakar Rao v. Chandan Lal*, 44 C.

201 P. C.
(4) *Slatterie v. Pooley*, 6 M & W. 664 (669)
followed in *Chandra Kumar v. Nupat Singh*,
29 A 184 (194, 195) P. C.

Deeds were filed in which Makund Singh and his father had admitted the fact, as to which the Privy Council said that while a party remains free to explain his own admission, if they remained unexplained, the court could not but use them as proving the fact against the party.

774. Proof of adoption by a widow.—Where the adoption is alleged to have been made by a wife or widow, the proof of adoption must not only comprise proof of its *factum* but also of its validity. (1) In that case it is not only the authority, whenever necessary, but its exact terms must be strictly proved, since the validity of an adoption made in pursuance of an authority from the husband depends upon its terms which must be strictly followed. (2) Even where the widow is possessed of such authority it may still be a question how far she was inclined to carry it. If she has, for instance, waited for a considerable period without adoption, the court will require some explanation of the delay or doubt the authority. Even where, as in the case of a departed husband in Bombay, the widow has the power to adopt without her husband's authority, evidence of his intention and inclination should afford strong proof of the probability of an adoption, while on the other hand, his disinclination or refusal to adopt should equally tend the other way. So it has been held that where there is a permission to adopt the court will exact slight proof of the performance of ceremonies. (3)

775. The court looks askance at the adoption by young widows of their manager's relative or even strangers at their suggestion. As Westropp, J., observed: (4) "The appellant (was) a Hindu female, whom the law only barely recognized as *sur jure*—so careful does it require that the court should be in ascertaining that she has full knowledge of the nature and consequences of any acts affecting her legal rights, which she has been induced to perform—but she was only seventeen years of age at the time of the alleged adoption, and she could have had little more experience or knowledge of the word than a mere child. Looking at the effect of adoption upon the rights of a Hindu woman who succeeds to the property of her husband, we should expect clear evidence that she was fully informed of those rights, and of the effect of the act of adoption upon them—an act which reduces her from the position of complete and absolute mistress of her husband's moveable property and tenant for life at least, of his immoveable property, to a mere right of maintenance."

776. The fact that the adopter was an illiterate pardanashin adds to the burden of those upon whom lies the duty of supporting her adoption. (5) It is sometimes said that an adoption once completed must not be viewed with undue severity. But the question of severity does not arise till the adoption is proved and is a part of the *res gestae* of the widow in which the court seeks for the exercise of that discretion and reflection, without which the form and ceremony are but a tinkling cymbal. (6)

It must also be remembered that an adoption is enjoined by law to be made for the benefit of the husband by redeeming his soul and preserving his

(1) *Pudum Singh v. Oodley Singh*, 12 M. I. A. 350 (356, 357).

(2) *Ib.*, p. 356.

(3) *Nadhamadhab v. Radhaballab*, 1 Hay 311, *Mohendro v. Doohany*, 1 Croyton, 42 (45, 46).

(4) *Bayabai v. Balu*, 7 B. H. C. R. (App.) 1

(20).

(5) *Bayabai v. Balu*, 7 B. H. C. R. (App.) 1 (20, 21); *Sowdur v. Kishoree Lal*, 5 W. R. 246.

(6) *Kishenilal v. Chammilal*, 31 A. 116 (121, 122) P. C.

estate. It is not intended for the benefit of the adoptee. If, therefore, the former purpose had become too remote and no extraneous assistance could achieve the latter purpose, it devolves on the court to enquire why an adoption long delayed had become suddenly so urgent.

777. Ancient adoptions.—The rule stated in the proviso is supported by ample authority ⁽¹⁾ and is based on the impossibility of proving it by any living witness. The same principle runs through S. 90 of the Evidence Act which in the cases therein mentioned dispenses with their formal proof. Any other rule would penalize an adoption, however old, and howmuchsoever it may have been acquiesced in, or acted upon by those very persons, who might have been most interested in challenging it. But since there is a danger of inventing an adoption and placing it past challenge by investing it with imaginary antiquity, law requires that the adoption should have been acted upon without dispute by those who would be most interested in challenging its authenticity. It would then presume that they had either admitted or acquiesced in it.

From these facts the courts may hold its *factum* proved, and it may then presume its validity. In other words, the question whether an adoption did or did not take place is a pure question of fact which may be proved by evidence either direct or circumstantial. Where the direct evidence is unobtainable the court may hold it proved upon a consideration of circumstantial evidence. Such evidence may consist of the admissions and conduct of the parties, some old pedigree ⁽²⁾ or even only a strong and persistent tradition. ⁽³⁾ The *factum* being thus proved, the court will presume its validity holding that if the adoption was in fact made, it must have been attended by the performance of all the requisite ceremonies. ⁽⁴⁾

778. Adoption by estoppel.—A party relying upon an adoption may hold his adversary estopped from denying it. This plea is, however, only available to a party, if it is shown that by reason of the adoption the position of the adopted son has been affected owing to some act or omission on the part of his alleged adopter. If the latter is a man, the adoptee stands on firm ground, but if she be a woman or a minor, then the court is slow to apply it when it finds her conduct involuntary, or swayed by other influences.

779. But where a Mitakshara widow, one Dharam Kunwar, took a boy in **Estoppel by representation.** adoption declaring that she had her husband's authority to adopt, and about 18 months afterwards her reversioner sued for a declaration of the invalidity of the adoption, the court held that inasmuch as the boy was given in adoption on Dharam Kunwar's declaration of her husband's authority and married on that footing, she was estopped from disputing the adoption, but the estoppel was held personal to her and did not bind the reversioners. ⁽⁵⁾ In another case a young widow aged 19 had adopted the plaintiff alleging husband's authority and had his Upanayan performed.

(1) *Anand Rao v. Ganesh*, 7 B. H. C. R. (App.) 33 (85); *Kishori Moneo v. Kashee Somduree*, W. R. (F. B.) 106; *Rajendra Nath v. Jogendranath*, 14 M. I. A. 67 (76, 77); *Jagadamba v. Dakshina*, 18 C. 308 (321) P. C. *Rupnarain v. Gopal*, 36 C. 7207 (95) P. C.; *Rethi v. Lakpati*, 20 C. W. N. 19; *Mullangi v. Venkatasubbanmah*, 25 M. L. J. 373; 19 I. C. 740.

(2) *Ajab Singh v. Nasubhan*, 25 B. 1 P. C.

(3) *Rajendra Nath v. Jogendra Nath*, 14 M. I. A. 67

(4) *Har Sanhar v. Lal Baghurat Singh*, 29 A. 513 P. C.; *Anandray v. Ganesh*, 7 B. H. C. R. (App.) 33

(5) *Dharam Kumar v. Balwant Singh*, 30 A. 549; *Kannammal v. Virasami*, 15 M. 456; *Parrakibayamma v. Ramakrishna*, 18 M. 145.

She professed to manage the property for him for 18 months after which she repudiated his adoption, and the court held that since the adoption was in fact, invalid, its invalidity could not be cured by any misrepresentation of the widow and that even she was not estopped from impeaching it on that ground. (1) But this case was distinguished in a later case on the ground that there the repudiation followed the adoption. If, however, it had been acquiesced in for say 20 or 25 years, then the case would have been quite different. (2) It would thus appear that the court allows an adopter a certain degree of *locus penitentie*.

780. Time has a curative effect upon all adoptions, a principle recognized in the law of limitation (§ 484) which permits "only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute." (3) It is sometimes said that no lapse of time can make an invalid adoption valid. This is true. But after a lapse of time the door of inquiry is closed. And where there has been acquiescence, the court presumes that the adoption must be invalid, otherwise the party interested in challenging it would not have suffered it to stand so long. Of course, no estoppel can prevent an enquiry into the truth where an adoption is tainted by fraud, misrepresentation, corruption or collusion.

781. But excepting such cases and taking only a normal case, the law is clear and it was so stated by the Privy Council, that **Estoppel by acquiescence.** although the adopted son is bound to prove his title as a fact, if challenged, still where it had been acquiesced in for a long period, say 27 years every allowance for the absence of evidence to prove such fact was to be favourably entertained, and that the case was analogous to that in which the legitimacy of a person in possession had been acquiesced in for a considerable time and afterwards impeached by a party, who had a right to question the legitimacy, where the defendant in order to defend his *status* is allowed to invoke against the claimant every presumption which arises from long recognition of his legitimacy by members of his family; and that the case of a Hindu, long recognized as an adopted son, raised even a stronger presumption in favour of the validity of his adoption, arising from the possibility of the loss of his rights in his own family by being adopted into another family. (4) So as regards the adoption of the plaintiff which took place twenty years back, the defendant's father was shown to have been present at the ceremony and afterwards joined with the plaintiff *qua* adopted son in recovering the land from the Patel, obtaining a decree in execution of which the plaintiff was on the security of the defendant's father put in possession, the court held the defendant estopped from disputing the adoption by his father's conduct and acquiescence in the plaintiff's title. (5)

782. So as regards the adopter, where it is admitted or proved that the plaintiff was adopted by the defendant who pleaded her own incapacity as an untowered widow to invalidate the plaintiff's adoption, the court held her estopped from denying the validity of her own act after having adopted and acknowledged the plaintiff as her own son and when the latter might have lost

(1) *Parvatibayamma v. Rama Krishna*, 18 M. 145.

(2) *Santappayya v. Rangappayya*, 18 M. 397 (399).

(3) *Jagadamba v. Dakhana*, 18 C. 308 (321) P. C. followed in *Mohesh Narani v. Taruck Nath*, 20 C. 487 (495) P. C.; *Ravji v.*

Lakshmi Bai, 11 B. 381 (396); *Kanmammal v. Virozami*, 15 M. 486; *Parvatibayamma v. Ramakrishna*, 18 M. 145 (152).

(4) *Rajendro Nath v. Jogendro Nath*, 14 M. 1. A. (67 (76, 77)).

(5) *Chintu v. Dhondu*, 11 B. H. C. R. 192 notes; *Sadashiv v. Hari*, *Ib.*, 190.

all right in his natural family: "It may be, that an adoption is not effectual to confer all spiritual benefit upon the manes of the deceased husband, and yet it is effectual to give the boy the civil status of son to the adopting widow, a status which like the status of the impotent party to a marriage, voidable on that ground, the widow is by her act estopped from denying."⁽¹⁾ The same view was taken in another case in which the plaintiff's adoption had been acknowledged and acted upon by his adoptive mother for twenty years, which was held to create an estoppel against her who could not challenge it on the ground of its invalidity.⁽²⁾ Where the adoptee has his Upanayan performed or was married in his adopter's family, it involves a definite change of status in law upon which the adopter may be estopped.⁽³⁾ So where third parties advance money upon the faith of his adoption. But it is not necessary to formulate a precise plea on the altered position of the adoptee.

For as their Lordships observed: "It is no slight matter for a boy to be passed from one family to another. Even in England, such a thing cannot be done without a serious effect, for good or ill, on the boy's welfare. In India the ties of family life are far stricter, and if a boy has been transplanted from his own family into another by a *de facto* adoption and then the adoption turn out to be invalid in law, and he is rejected out of his adopted family, his relations to his natural mother must be seriously disturbed. Whether his previously existing legal status would be taken away is a point not calling for any opinion. Assuming that the plaintiff could return after an absence of five years, and so resume his legal position, it is impossible that his personal position should be the same as if the tie to his family had never been broken."⁽⁴⁾

783. There can be no estoppel unless a party acts with the knowledge of his right and in a manner inconsistent with them. He does not impair his right by merely consenting to a deed which, with or without his consent, was invalid.⁽⁵⁾

Limits of the rule

Estoppel merely creates a personal disqualification affecting only one and one's legal representatives. It does not affect the validity of the adoption which may yet be challenged by others.⁽⁶⁾

784. Limitation.—Closely associated with the question of acquiescence is the subject of limitation which limits a party suing for declaring an adoption valid or non-existent and invalid, to six years, calculated in the former case from the time "when the rights of the adopted son, as such, are interfered with" and in the latter case from which the adoption becomes known to the plaintiff.⁽⁷⁾ In the first place it should be added that these articles merely prescribe a period for obtaining a declaration, a relief which is optional to those whose rights are infringed. Consequently, the mere omission to obtain such declaration does not preclude a party from challenging or supporting an adoption in a suit for possession of property.⁽⁸⁾

(1) *Ravji v. Lakshmidasi*, 11 B 381 (396)

(2) *Santappayya v. Rangappayya*, 18 M. 897; *Parvatibayamma v. Ram Krishna*, 18 M 115; *Dharam Kunwar v. Bahadur Singh*, 31 A. 549 (P. C.)

(3) *Santappayya v. Rangappayya*, 18 M. 897 (400); *Dharam Kunwar v. Bahadur Singh*, 31 A. 549 (P. C.)

(4) Cited in *Parvatibayamma v. Rama Krishna*, 18 M 145 (147).

(5) *Rup Narain v. Gopal*, 36 C. 780 (796, 797) P. C.

(6) *Parvatibayamma v. Rama Krishna*, 18 M. 145 (146).

(7) *Lim. Act.* (IX of 1908) Art. 119.

(8) *Ib.*, art. 118.

785. Assuming however, that a person resorts to the optional remedy here contemplated, and taking first only the case of those who challenge the *factum* of the validity of an adoption, it will be seen that the starting point for limitation is the knowledge of adoption. It is also the starting point for estoppel and acquiescence. Such knowledge must not necessarily be at first hand, though it must be of necessity something more than a floating rumour. The question is one of fact ⁽¹⁾ which he who wishes to bring his suit within limitation has to prove. The persons who are interested in maintaining such suits are the adopter and his heirs, and where the adoption is by a widow, her reversioners. Third parties who have become interested in the estate, such as transferees from the alleged adopter may equally maintain such a suit. ⁽²⁾

786. The question of the burden of proof in such suits is one of some nicety and one upon which the courts are not agreed. The **Burden of proof.** Allahabad Court holds that the plaintiff who seeks a declaration must establish the invalidity of the defendant's adoption, ⁽³⁾ while the Madras High Court maintains the contrary, holding that if the estate had fallen into possession and the plaintiff had to sue for its recovery and the defendant resisted his claim on the ground of his adoption, the burden would unquestionably be on him. Why should then the rule be different if he merely sues for a declaration? ⁽⁴⁾ But it is submitted that the two cases are distinguishable, since when the reversioner sues for possession the title has already become vested in him by law which the defendant has to displace, but till then his interest is merely a *spes successionis* and he must follow the ordinary rule, and would not be entitled to a decree as a matter of course, if the defendant refused to give any evidence.

787. The person primarily entitled to obtain a declaration as to the validity **For supporting an adoption.** of a person's adoption is the adoptee himself, though others, such as his heirs, and transferees may equally maintain such a suit. The right to sue commences as soon the adoptee's rights are interfered with, and not merely denied. ⁽⁵⁾ Again, such a suit, to quote the language of Art. 119 may be brought only "to obtain a declaration that an adoption is valid," that is to say, it must not be a suit to establish the *factum* but merely its validity. ⁽⁶⁾

788. The subject of limitation for possession will be dealt with in the sequel.

(1) *Tirbhuvan v. Rameshor*, 28 A. 727 P. C.; *Muhammad Umar Khan v. Muhammad Naizuddin*, 39 C. 418 (1892) F. C.; *Velaga v. Bandlunadi*, 30 M. 308. There was at one time a conflict between the High Courts on the effect of these articles on a suit for possession, the Bombay and Madras High Courts holding that it became barred. *Parvathi v. Saminathan*, 20 M. 40; *Ratnajasora v. Aikalandammal*, 26 M. 291; *Srinivas v. Bahwant*, 37 B. 513; *Ramchandra v. Narayan*, 27 B. 614; *Barot v. Barot*, 25 B. 22; *Srinivas v. Hanmant*, 24 B. 260 overruling *contra* in *Hari Lal v. Bai Rewa*, 21 B. 376; *Fannyamma v. Manjaya*, 21 B. 159; *Padofirar v. Ramrai*, 13 B. 160; also *Inda v. Jehanpura*, (1890) A.W.N. 241.

But the Calcutta and Allahabad High Courts held *contra* in *Ramchandra v. Ranjit Singh* 27

C. 242 (253-255): *Perbhu Lal v. Mylne*, 14 C. 401; *Baikanta v. Kali Chakr*, 9 C.W.N. 222; *Basudeo v. Gopal*, 8 A. 644; *Ganga Sahai v. Lekhraj*, 9 A. 253 (267 269); *Nathu Singh v. Gulab Singh*, 17 A. 167; *Lali v. Murlidhar*, 24 A. 195. The latter view is (it is submitted) correct, though the Bombay High Court still maintains its previous view (*Srinivas v. Bahwant*, 37 B. 513) a view upon grounds sufficiently met even by the language of the article.

(2) *Yamunabai v. Balshet*, 5 Bom L. R. 584 (587).

(3) S. 8. Lim. Act. (IX of 1908); *Ayyadorai v. Solai Ammal*, 24 M. 405.

(4) *Asharfi v. Rupchand*, 30 A. 197.

(5) *Raja gopala v. Nattu*, 24 M. 829.

(6) *Ningawa v. Ramappa*, 28 B. 94.

789. Again, no estoppel can shut out an enquiry into an adoption, if it was brought about by fraud, corruption, etc., mentioned in **Adoption by fraud, S. 33. (1)** No person is estopped for merely expressing an opinion which may or may not be correct. An erroneous opinion given by a person as to the law of adoption or even that an adoption was valid in law, does not estop him from afterwards disputing its validity. **(2)** It is only a misrepresentation on a matter of fact that creates an estoppel, though such misrepresentation may have been made innocently under a mistake or misrepresentation. **(3)** There is no estoppel unless one person causes or permits another to believe in an adoption. If therefore *A* claimed as an adopted son of *B* and *B*'s true heir *C* did nothing to oppose him, but on the other hand, supported him, *A* could not hold *C* estopped, because *C* had done nothing to alter *A*'s position to his prejudice. **(4)** The facts might be relied upon as an admission, but where *C* had admitted or denied *A*'s adoption as it suited him, the Privy Council were not prepared to attach any value to them, apart from creating an estoppel which they did not create. **(5)** Such act may also amount to an acquiescence, but mere acquiescence does not create an estoppel **(6)** though it sets limitation in motion, **(7)** and may, apart from limitation, let in the rule stated in the proviso.

790. Working rules.—From the foregoing discussion it will be observed that the highest judicial minds are agreed upon the following working rules in determining the question of adoption:—

(1) First and foremost, they require and look for documentary evidence. If it is wanting, they demand to know why? Its absence leaves a serious hiatus in the case.

(2) Next to writing, the court pays regard to the admitted facts and circumstances.

(3) An admission of adoption is very strong evidence of it against the person admitting it; but it may be explained away.

(4) In the fourth place, they consider the trend of antecedent probabilities:

(5) Believing or disbelieving oral evidence according as it is supported by facts mentioned in the preceding paragraphs:

(6) Failing which, they require clear, cogent, and consistent evidence in support of a right which disappoints the natural heirs.

(7) Where, however, an adoption has been acted upon for a length of time, say at least for twenty or thirty years, without any opposition, it considers it a sufficient proof of adoption, presuming its validity from its long continuance, and the impossibility of proving its details.

(1) *Sukhbasi Lal v. Guman Singh*, 2 A. 366; *Dharam Kumar v. Balwant Singh*, 31 A. 398; *Chintu v. Dhondu*, 11 B. H. C. R. 192 note; *Chitko v. Jonaki*, 11 B. H. C. R. 199; *Ravi v. Lakshmi Bai*, 11 B. 381 (896).

(2) *Gopee Lall v. Chandrabee*, 19 W. R. 12 (18); *Raj Narain v. Universal Life Assurance Co.* 7 C. 594; *Kaverji v. Babai*, 19 B. 374 (890, 891).

(3) *Sarat Chunder v. Gopal Chunder*, 20 C. 296 (810) P. O. overruling *contra* in *Ganga Sahai v. Hira Singh*, 2 A. 809; *Vishnu v. Krishnan*, 7 M. 8.

(4) *Har Shankar v. Lal Rajhura Singh*, 29 A. 519 (538, 534) P. C.

(5) *Ib.* p. 584.

Peddammululaty v. Timma ib. 2 M. H. C. R. 270 (278); *Rajan v. Basava ib.* p. 428; *Uda v. Imamuddin*, 1 A. 82; *Taruck Chunder v. Harro Sunker*, 22 W. R. 267.

(6) *Papamma v. Appa Rao*, 16 M. 884 (891); *Gurulingaswami v. Ramalakshammam*, 18 M. 58 (60); *Vasthilingam v. Murugan*, 37 M. 529.

(7) *Ram Rau v. Raja Rau*, 2 M. H. C. R. 114.

(8) In appraising oral evidence, while regard must necessarily be had to the education, position and character of the witness, his testimony must be judged in the light of probability.

791. Pleading on adoption.—It is, of course, an ordinary rule of pleading that no party can be permitted to spring upon his adversary a new plea at the close of the evidence. Where a party generally denied an adoption and it was put in issue and tried, he could not at the close of the evidence be permitted to raise a new plea that the adoption was invalid in law, on the ground that under Hindu Law there could be no valid adoption of a daughter's son. This is not a pure question of law, for though the prohibition is the general rule, it may be varied by custom, and it was therefore held, that a party challenging an adoption could not raise such a mixed plea at a late stage. (1) So following this case the Madras Court declined to entertain a plea on appeal impeaching an adoption on the ground that the adoptee was the younger brother of the adopter. (2)

46. (1) A person whose adoption is for any reason void, acquires no right as an adopted son.

(2) And where a gift is made to such person, described as an adopted son, the adoption failing, the gift also fails unless it was intended as a gift to a *persona designata* and was not a condition of the gift.

Illustrations.

(a) A bequeathes a legacy "to B whom I have adopted." A directs his wife C to perform the ceremonies and bring up B. C fails to perform the ceremonies and the adoption is invalid. A's bequest takes effect for he had intended to benefit B as a *persona designata*.

(b) But if in the last case, A bequeathes a legacy to B by virtue of B being his adopted son, then on the failure of B's adoption, A's bequest would also fail as A intended to benefit B *qua* his adopted son.

Synopsis.

(1) *Effect of invalid adoption* (793). (3) *Persona designata* (794-795).

(2) *Construction of bequest* (794-795).

792. Analogous Law :—The first clause of this section declares the general rule, (3) while the second clause is really a rule of construction. The question whether a gift is intended to benefit a person irrespective of or on account of his adoption is a question of intention to be collected from the wording of the instrument. In this respect the rule follows the English Law.

793. Effect of invalid adoption.—Where an adoption is for any reason invalid, the adoptee acquires no right in the family of his adopter. He is as good as if he had never been adopted. His natural rights remain. If there be no adoption nothing can have been acquired and nothing lost. He has not even the right of maintenance in the family of his adopter. (4) So much is clear.

(1) *Rup Narain v. Gopal*, 36 C. 780 (795)
P. C.

(2) *Sindigi v. Sindigi*, 32 M. L. J. 47; 38
I. C. 164.

(3) *Bawani v. Ambabay*, 1 M.H.C.R. 363.

(4) *Bawani v. Ambabay*, 1 M. H. C. R. 363
(367, 368) followed in *Lakshmappa v. Ramava*,
12 B. H. C. R. 364 (395); *Rajcoomaree v.*
Nobocoomar, 2 Borr. 137.

794. Construction of bequest.—But where a gift or a bequest is made to an adoptee whose adoption fails, the question whether the gift or bequest will nevertheless hold good depends upon the donor's intention, the question in such cases being whether the donor intended to benefit the adoptee by reason of his adoption or even independently of it. So where the testator declared in his will that he had loved and brought up one Ardha as his son, who was very much attached to him and his wife, and that he had a mind to give him a share of his estate, but that he had taken him in adoption, and as such bequeathed to him his property, but the adoption failed as there had been no ceremony of giving and taking, the Privy Council held the gift nevertheless valid as made to a *persona designata*, whom the donor intended to take for reasons independent of adoption. (1) Such was also held to be the case where a will was to the following effect: "I declare that I give my property to K, whom I have adopted" followed by the direction, "my wives shall perform the ceremonies according to the Shastras, and bring him up." (2) This case was distinguished by the same Board in a case where the testator declared that he had secretly adopted one Jagadindra whom he authorized to offer oblations of water and pinda, "to me and my ancestors after my death by virtue of your being my adopted son." The adoption being held invalid, their Lordships held the gift also failed as the testator had made his gift *by virtue* of the adoption and not independently of it. (3) Their Lordships followed this case in another case in which the testator had similarly declared that he had adopted his sister's son seven years ago, adding,—"He is my heir and successor or (*malik*). If, after this agreement, a son is born to me, half the property would be received by him and half by the adopted son." The adoption of a sister's son being held invalid, the Privy Council construed the gift as dependent upon the adoption, since it was declared liable to variation on the birth of a legitimate son. (4) The result would, of course, have been different if the gift had not been liable to variation. (5)

795. These are comparatively easy cases. But their Lordships were not quite so sure as to what was intended by a will in which the testator had directed the widow of his deceased son to adopt the son of his nephew, to whom he had bequeathed his residuary estate in the following words: "My property which may remain as a residue after all the things in my will have been done, I give to this lad as his inheritance." The controversy centred on the construction of the words, "after all things mentioned in my will have been done," whether they were to be read as qualifying the preceding word "residue" or the following words, "I give," in which case the gift would be conditional on the adoption which was one of the things mentioned in the will, which was the construction placed on them by the High Court, and which their Lordships affirmed, holding the words "very obscure" and the other construction not so clear as to justify disturbance of the decree appealed against. (6) This case illustrates the truth of what was said in another case: "The distinction between what is description only, and what is the reason or motive of a gift or bequest, may often be very fine, but it is a distinction which must be drawn from the consideration of the language and the surrounding

(1) *Biraswar v. Ardha Chander*, 19 C. 452 (461) P. C.

(2) *Nidhoomoni v. Saroda Pershad*, 26 W. R. 91 P. C.

(3) *Faminudra v. Rajeswar*, 11 C. 468 (485) P. C.

(4) *Lali v. Mulidhar*, 28 A. 488 (495, 496) P. C.

(5) *Murari Lal v. Kunutan Lal*, 31 A. 889.

(6) *Karamsi v. Karsandas*, 23 B. 271 (277-279) P. C.

circumstances." (1) A party may implement a construction by his own conduct. Such was the case where a Zamindar *A* with the consent of his wife adopted a son *B*, and appointed him his heir, after which he married a second wife and made another adoption *C* when his first adopted son *B* was still alive. He divided the estate between them and *B* managed *C*'s estate during his minority. On the adopter's death, *B* however laid claim to the entire estate, alleging that *A* could not have legally alienated his estate in favour of *C* or legally adopted him. The Privy Council held *C*'s adoption during *B*'s life-time invalid. They also held *B*'s acquiescence in *A*'s partition and in *C*'s possession and his own management of his estate for him during *A*'s life in no way prejudiced his claim, but inasmuch as *A* could have given a portion of his estate to *C* during his life-time without *B*'s consent, *B* was bound to deliver to *C* that portion of *A*'s estate which *A* could have given to *C* if the gift had been *inter vivos*. (2)

47. (1) The adoption of a person has, from the date of his adoption, the effect of determining all his rights and liabilities in the natural family, but not so as to divest him of any property which may have already vested in him prior to that date.

(2) But no adoption severs the natural relationship of the adopted son with his natural family so as to exempt him from the prohibition which would otherwise bind him as regards marriage and adoption.

Synopsis.

- (1) *Results of adoption* (796). (3) *Prohibited degrees for marriage and adoption in natural family* (798).
(2) *Position in the natural family* (797).

796. Analogous Law.—The two rules here stated are the outcome of the view partially embodied in the following text:—

Manu.—A given son must never claim the family and estate of his natural father: the funeral cake follows the family and estate; but of him, who has given away his son, the funeral oblation is extinct.. (3)

Vrihat Manu—Sons given, purchased and the rest, retain relation of Sapinda to the natural father as extending to the fifth and seventh degrees; like this, their general family, which is also that of their adopter. (4)

The rule that an adopted son cannot be divested of the estate which had already vested in him follows the general rule that an estate once vested cannot be divested. (5) Nor does it disqualify one for adoption. (6)

(1) *Pamindra v. Rajeswar*, 11 O. 468 (484) P. C. cited in *Lali v. Murlidhar*, 28 A. (495) P. C.

(2) *Rungama v. Atchama*, 4 M. I. A. 1 (108).

(3) IX-142; cited in Mit. 1 82; Mayukh IV-V-21 (Mandlik) 59; Datt. Mim. VI-§ 6: Datt. Ch. II-18 (Suth), 72, 119.

(4) Cited in Datt. Mim. VI-9 (Suth) 73.

(5) *Moniram v. Kerikulitani*, 50 776 (788);

Amamah v. Mabbu, 8 M.H. C. R. 108; *Venkata v. Rangayya*, 29 M. 437 (447-451) (Mitakshara cases). In *Venkata v. Rangayya*, 29 M. 437 (451) the rule here stated and the texts bearing thereon have been fully discussed. *Behari Lal v. Kailas Chunder*, 1 C.W. N. 121 (Dayabag case).

(6) *Papamma v. Appa Rau*, 16 M. 884 (396, 397).

797. Adoptee's position in the natural family.—An adoption effects a complete severance of the adopted son from his natural family. His adoption is said to operate as a civil death of the adoptee in the natural family and his re-birth in the family of his adopter. But this is scarcely correct. For although adopted into another family the adoptee still retains the property which had vested in him prior to his adoption, which of course, he could not be permitted to do if he were civilly dead. By his adoption he merely loses all future interest he may acquire in his own family and *vice versa*.⁽¹⁾ His severance from his natural family is so complete that no mutual rights as to succession to property can arise between them, so that while he cannot inherit to any of his natural relations, the latter equally cannot inherit to him. His heirs are his new Sapindas of the adoptive family, his own relations of his natural family being placed in the catena of his heirs as such.⁽²⁾

An adopted son on adoption ceases to be liable for the debts or other obligations for which he would have been liable as a member of his natural family, except, of course, such debts and obligations for which he may be liable by reason of the property which he may have inherited or acquired before his adoption.⁽³⁾

798. Marriage and adoption.—The adopted son is a mere substitute for a real son, and as such, he has by usage acquired a filial status and rights in his adoptive family. The creation of such a jural relation does not sever the tie of blood which binds him to his natural family. He cannot, therefore, marry in his natural family within the prohibited degrees, nor can he adopt from that family a boy whom he would not have adopted if he had remained in that family.⁽⁴⁾ But on this question usage may have something to say.

48. In the absence of a natural son, an adopted son possesses all the rights and is subject to all the liabilities of a natural son in the family of his adoptive father, including the right of lineal and collateral inheritance.

Synopsis.

- (1) *Rights of adopted son* (799-800). (3) *Rights commence with adoption.*
(2) *Rights of inheritance* (801-802). (803).

799. Analogous Law.—The theory of adoption implies a complete change of paternity, and an adopted son must, in all respects, be considered as having been begotten by his adoptive father.⁽⁵⁾ It is now settled that the adopted son possesses in the family of his adopter the same status and rights as an *Auras* (or lawfully begotten) son,⁽⁶⁾ being as such entitled to enforce a partition against his adoptive father or his co-parceners, and to inherit both lineally and collaterally to his adoptive relations,⁽⁷⁾ except in a few instances to be presently considered. As Mitter, J. observed: "According to Hindu Law, an adopted son

(1) *Duttanarain v. Ajeet Singh*, 1 Beng. S.R. 26; 6 I.D. (O.S.) 20; *Srinivasa v. Kuppan*, 1 M. H.C.R. 130; *Muthayya v. Minakshi*, 25 M. 394.

(2) *Muthayya v. Minakshi*, 25 M. 394.

(3) *Pronvullabh v. Dookristu*, (1824) Ben. S. R. 4; *Kashee Pershad v. Bunseedhur*, 4 N.W.P. S.D.A. 348.

(4) *Mootia v. Uppen* (1858) M.S.D.A. 117.

(5) *Narasannal v. Balaramachariu*, 1 M.H. C.R. 420.

(9) *Sumboo Chundar v. Narain*, 3 Knapp

55; *Paulmacomari v. Court of Wards*, 8 C. 302 P.C.; *Kali Komul v. Uma Shunker*, 6 C. 256 (259, 220) F.B.O.A. *Uma Shunker v. Kali Komul*, 10 C. 282 P.C.; *Naginidas v. Bachoo*, 40 B. 270 (287, 288) P.C. reversing *Bachoo v. Naginidas*, 16 Bom. L.R. 268.

(7) *Sumboo Chunder v. Narain*, 8 C. 302 P.C.; *Uma Shunker v. Kali Komul*, 6 C. 256 (259, 260) F.B.O.A. *Kali Komul v. Uma Shunker*, 10 C. 282 P.C.; *Naginidas v. Bachoo*, 40 B. 270 (287, 288) P.C. reversing *Bachoo v. Naginidas*, 16 Bom. L.R. 268.

occupies the same position, and has the same rights and privileges in the family of the adopter as the legitimate son, except in a few, specified, instances, which have been clearly and carefully noted and defined by writers on the subject of adoption. The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family, as if he were born in it." (1)

800. The property inherited by the adoptive son from his adoptive father would be ancestral or self-acquired according to the nature of the property inherited by him. It is not in the nature of a gift to the son but is his inheritance. (2)

He is the adopted son of both his adoptive father and of his wife whether she consented to his adoption or not. Consequently, he succeeds both to him and to her. (3) So when one S, a Hindu governed by the Mitakshara school married four wives in succession, and in conjunction with his first wife by whom he had no issue he adopted a son H, after which he had a son G by his second wife, S predeceased his fourth wife M having had no issue by her. On M dying intestate, both H and G were held equally entitled to inherit M's stridhan as the sapindas of S. (4)

801. Adoptee's rights in his adopter's family.—It has now been settled by a series of rulings of the Privy Council, that except in the cases and to the extent expressly limited by the texts, the rights and liabilities of an adopted son are exactly identical with those of a natural born son, that is to say, so far as regards rights, he is entitled to inherit to his adoptive father, and the latter's natural or adoptive father, grandfather and his other more distant lineal ancestors. He is equally entitled to inherit to his father's wife who is treated as his adoptive mother whether she took part in his adoption or not and to her relations, such as her father and brothers. And conversely both the adoptive father and mother and their relations are entitled to inherit to him. (5)

802. Similarly, he is entitled to inherit to their relations collaterally, such as their sons, brothers, uncles, and other collateral relations. (6) So where a legitimate and adopted son survive a father and the legitimate son afterwards dies, the adopted son takes the whole property by survivorship. (7) So he is entitled to succeed to his father's daughter's son, (8) his father's brother's son, (9) paternal uncle, (10) father's first (11) or third cousin (12) and grandfather's first cousin. (13)

(1) *Uma Shunker v Kali Komul*, 6 C. 256 (259, 260) F. B. affirmed O A. *Kali Komul v Uma Shunker*, 10 C. 232 P. C. approved in *Nagindas v. Bachoo*, 40 B. 270 (288) P. C.

(2) *Heera Singh, v. Duryar Singh* 1 Agra. 256.

(3) *Sham Kuar v Gaya Din*, 1 A. 255 F. B.; *Gunga Mya v. Kishen Kishore* 3 Beng. S. R. 128; *Gunga Pershad v. Brjessures* (1859) S. D. A. B. 1091; *Puddo Kumara v. Juggut Kishore*, 5 C. 615; *Uma Shunker v. Kali Komul*, 6 C. 256 (263) F. B. O. A. *Kali Komul v. Uma Shunker* 10 C. 232 P. C., approved in *Nagindas v. Bachoo* 40 B. 270 (288) P. C. overruling contra in *Morun Mose v. Bejoy W. R.* (1. N) 121; *Chinarama Krishna v. Minatchi* 7 M. F. C. R. 245.

(4) *Gangadhar v. Hiralal* 43 C. 944; *Joy Kishore v. Panchoon*, 4 C. L. R. 581; *Surjo-*

kant v. Mohesh, 9 C. 70.

(5) *Kali Komal v. Uma Shunker* 10 C. 232 P. C.; *Radha Prasad v. Itanoo Mani*, 38 C. 947.

(6) *Padma Kumari v. Court of Wards*, 8 C. 302 P. C.

(7) *Ranganuma v. Aichamma*, 4 M. I. A. 1 (108); *Sudarund v. Bonomallee*, March 817.

(8) *Padma Kumari v. Court of Wards*, 8 C. 302 P. C.

(9) *Banundoss v. Tarinee*, 7 M. I. A. 169; *Harekchand v. Bejoy Chand*, 9 C. W. N. 795.

(10) *Lokenath v. Shamasoondares*, (1858) S. D. A. B. 1863.

(11) *Sumbhoochunder v. Narain*, 5 W. R. 100 P. C.

(12) *Dino Nath v. Gopaul*, 6 C. L. R. 379.

(13) *Mokundo v. Bykunt*, 6 C. 289.

So an adopted son of one daughter will share equally with the natural son of another daughter in the inheritance left by his natural grandfather. (1)

And so an adopted son by one wife is entitled to inherit the stridhan of another wife equally with the legitimate son of a third wife as their predeceased father's sapindas. (2) So an adopted son of the maternal grandfather of a deceased man, though the *gotra* into which he was adopted was not the same as the latter's was an heir nearer to him than such maternal grandfather's grand nephew. (3)

803. Such rights, however, only arise on adoption. Even in the case of an adoption by the widow, though the adoption by her is to her husband, still the adoptee's rights do not relate back to the death of the husband (4) except, it is said, in the case of a trading partnership where the adopted son takes the place of the deceased as from the date of his death (5) thus preventing its automatic dissolution. (6)

**Adopted son's rights
in the adopted
family.**

49. (1) Save as otherwise provided in clause (3), the rights of an adopted son arise at adoption.

(2) An adopted son cannot dispute an alienation made by the adopted father before his adoption; and on his adoption he would be bound by an alienation made by his adoptive father or any other manager of the family to the same extent as a natural son.

(3) The rights of a son adopted by a widow do not relate back to the death of her husband, except in the following cases and to the following extent, namely:—

- (a) His adoption relates back to the death of her husband for the purpose of continuing a partnership of which he was a member.
- (b) He divests the co-parcenary interest of the husband which has become vested in another by survivorship.
- (c) He may set aside an antecedent gift of her husband's property made by his widow, and in the case of other alienations, he may dispute their propriety if unsupported by legal necessity.

Synopsis.

- (1) *Rights of adopted son* (805).
- (2) *Effect of adoption on alienations made by widow* (806).
- (3) *Share of adopted son on partition* (807).
- (4) *Adopted son's rights against his father* (808).

(1) *Tara Mohan v. Kripa Moyce*, 9 W. R. 428.

(2) *Surjokant v. Mohesh Chunder*, 9 C. 70; *Raja v. Subharaya*, 7 M. 253.

(3) *Joy Kishore v. Panchoo*, 4 C. L. R. 533; *Gangadhar v. Hirulal*, 43 C. 944.

(4) *Pudma Kumari v. Court of Wards*, 8 C. 802 P. C.

(5) *Bamundoss v. Tarinee*, 7 M. I. A. 169; *Harekchand v. Bejoychand*, 9 C. W. N. 795.

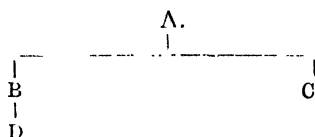
(6) S. 253 (10) Contract Act (IX of 1872); *Kapurchand v. Narinjainall*, 1897 P. R. 20.

804. Analogous Law.—The rules here stated are really illustrative of the general rule declaratory of the rights of an adopted son. (1) As he is the image of the natural son his rights and liabilities are also identical. This is so as regards clause (1) which is amply supported by authorities. (2)

805. As regards clause (2) his rights are retrospective and in a measure opposed to the rule which declared the contrary. But they could not be otherwise, since a widow's estate is limited and controlled by the reversioners and she could not be permitted to make an adoption to defeat her reversioners' expectancy while remaining irresponsible for her waste and improper alienation to her adopted son. If the law were otherwise, adoption would be an effective camouflage to mask her misdeeds.

806. The rule was admitted as far back as 1858 by the Privy Council who observed: "The son when adopted became the undoubted heir; and it was of course correct doctrine that no sale made by a widow, who possesses only a very restricted life interest in the estate could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under certain circumstances of strict necessity." (3)

807. From what has been stated above it is clear that the rule only applies to a case where the adopted son is in competition with the after born son of the same father. If therefore, of two brothers, one adopts a son and another has a natural son, the two being the sons of two brothers will share equally on partition. (4) The same rule of equality would extend to their sons, son's sons, and son's son's sons, that is to say it will extend to all and every relation except a natural son of the adopter. So in a competition between an adopted son *D* of a naturally born son *B* and the latter's brother *C*, that is to say the adopted son *D* and his uncle by adoption *C*, the two share equally both on partition and inheritance, because since the adopted son's father *B* was a natural son of his father *A* and so was his uncle *C* the two would take equally and so would the adopted son *D* as representing his father *B*. But if his father *B* was himself an adopted son, then since *B* could not have taken a share equal to *C*'s, it follows that his adopted son *D* cannot take more than



his father *B*. In other words in such a competition, *D*'s share is only liable to reduction if his father was himself an adopted son, but not otherwise. (5)

(1) S. 45.

(2) *Collector of Madura v. Mootoo Ramalinga*, 12 M. I. A. 397 (413); *Bamundoss v. Tarinee*, 7 M. I. A. 169 (180); *Girdharilall v. Kantoo Lal*, 22 W. R. 56 P. C.; *Raghunadha (Sri) v. Brozo Kishore*, 1 M. 69 P. C.; *Krishnarav v. Rangrav*, 4 B. H. C. R. (A. C.) 1, (4); *Kustur Bhavani v. Appa*, 5 B. 621 (628, 629); *Rambhot v. Lakshman*, 5 B. 630 (687); *Goura v. Chummun*, W. R. (S. N.) 340; *Lakshman v. Radhabai*, 11 B. 609; *Moro Narayan v. Balaji*, 19 B. 809 (815); *Ramakrishna v. Tripurabai*, 33 B. 88 (92).

(3) *Bamundoss v. Tarinee*, 7 M. I. A. 169 (180); *Lakshman v. Radhabai*, 11 B. 609; *Moro v. Balaji*, 19 B. 809; *Ramakrishna v. Tripurabai*, 33 B. 88 (95) dissenting from *contra* in *Sreeramulu v. Kristamma*, 26 M. 148.

(4) *Nagindas v. Bachoo*, 40 B. 270 P. C.; overruling *Raghubanund v. Sadhu Churn*, 4 C. 425 and following *Tara Mohan v. Kripa Mouee*, 9 W. R. 423; *Dinonath v. Gopal Churn*, 8 C. L. R. 57.

(5) *Nagindass v. Bachoo*, 40 B. 270 (284, 285) P. C.

Since the rights of an adopted son are settled to be those of a natural son, it follows that like a natural son, the adopted son becomes a member of the joint family taking therein a vested interest as if he had been born therein from the moment of his adoption.

808. What those rights are must depend upon the personal law to which the family is subject. For instance, since there is no distinction between ancestral and self-acquired property in Bengal where the father possesses the absolute right of disposal and since the same right is possessed by the Mitakshara father in respect of his self-acquired property, it follows that an adoptive father may dispose of all such property by a gift *inter vivos* (1) or by a will (2) even if it should have the effect of completely disinheriting his adopted son with whom he makes no implied contract that he will not make a will (3) or refrain from exercising his legal right of disposing of his property at his pleasure. (4) But if there has been a previous express agreement restricting his right made in consideration of the adoption with the parent of the adopted son, he would be bound by it. But he is then bound because of the contract and not because of the adoption. In this view it is, of course clear that an adopted son in a Mitakshara family becomes a co-parcener in the joint family property of his adoptive father from the moment of his adoption. (5) And if the property be his father's ancestral property it becomes his ancestral property in which he takes the same vested interest from his adoption as a natural son would from his birth. (6) In a joint Mitakshara family an adoption by the widow has necessarily the effect of divesting the co-parceners of her husband's interest which had devolved on them by survivorship. (7) So where an impartible Zemindari had devolved on the undivided brother of the deceased holder, an adoption by the latter's widow was held to divest the brother in favour of the adopted son. (8)

Adoptee's rights limited by auras son.

50. (1) Except in the case of a Shudra the rights of an adopted son are, on the birth of an auras son, limited as follows :—

(2) He loses all rights to the performance of religious ceremonies.

(3) He is not entitled to succeed to an impartible estate in preference to the auras son.

(4) His right of inheritance in other cases is reduced to one-fifth share of the natural son.

Synopsis.

(1) *Texts on adopted son's rights as against auras son* (809-819).

(2) *Reasons for divergent views* (811).

- (1) *Rungama v. Atchama*, 4 M. I. A. 1.
 (2) *Sadanund v. Benomalee*, 2 Hay. 205;
Purshotam v. Vasudev, 8 B. H. C. R. (O. C.) 198.
 (3) *Venkata v. Court of Wards*, 22 M. 383 P. C.
 (4) *Surendra v. Kala*, 12 C. W. N. 668.
 (5) *Sumboo Chunder v. Naraini*, 5 W. R. 100 P. C.; followed in *Pudma Coomari v.*

- Court of Wards*, 8 C. 302 P. C.; *Kali Komul v. Umo Shunder*, 10 C. 232 P. C.; *Nagindas v. Bachoo*, 40 B. 270 (287) P. C.; *Gangadhar v. Hiralal*, 43 C. 944.
 (6) *Rambhai v. Lakshman*, 5 B. 680 (685).
 (7) *Chandra v. Gojara*, 14 B. 468.
 (8) *Sri Virada v. Sri Brojo*, 1 M. 60 P. C.; *Bachoo v. Markorebai*, 29 B. 5 I. O. A. 31 B. 373 P. C.

809. Analogous Law.—The reduction of the rights of an adopted son in competition with an after-born legitimate son is based on the following textual authority :—

Vashisth :— When a son has been adopted, if a legitimate son is afterwards born, the son given shares a fourth part. ⁽¹⁾

Devala :— Those twelve are pronounced sons for the sake of issue : some are sprung from himself, some from another also. Some acquired by an overt act of adoption ; and others filially related independent thereof. Of these, the first six are kinsmen and heirs to collaterals, the rest are so merely to the father ; and a special rule obtains according to the priority in rank of the sons ; all these sons are considered as heirs to one having no real legitimate son, but should a son be subsequently born no right of primogeniture attaches to them. Of these those who are equal in class take a third share, but those inferior in rank should live in subjection to one of equal rank receiving maintenance. ⁽²⁾

Katyayan :— If a legitimate son be born, the rest are pronounced sharers of a third part, provided they belong to the same tribe, but if they be of a different class they are entitled to food and raiment only. ⁽³⁾

810. Dattak Chandrika contains a long disquisition on the share of the adopted son in competition with the auras son ⁽⁴⁾ concluding it by a reference to the Shudras who are excluded from the special rule, citing the following text in support of the exception :

Vridhdha Gautam :—A son being thus adopted, if by any chance a legitimate son should be born, let them be equal partakers of the father's estate ⁽⁵⁾

Therefore, by the same relationship of brother, and so forth, in virtue of which the real legitimate son would succeed to the estate, of a brother or other kinsmen, where such son may not exist, the adopted son takes the whole estate even.

Since it is a restrictive rule, that a grandson succeed to the appropriate share of his own father, the son given, whose adopter is the real legitimate son of the paternal grandfather is entitled, to an equal share even, with a paternal uncle, who is also such description of son : therefore, a grandson, who is an adopted son, may [in all cases], inherit an equal share even with an uncle. This must not be alleged, [as a general rule.] For there would be this discrepancy : where, the father of the grandson, is an adopted son, he would receive a fourth share : but the grandson, if he were such son, [of him] would receive an equal share [with an uncle in the heritage of the grandfather]. And accordingly, whatever share, may be established by law, for a father of the same description as himself ; to such appropriate share of his father, does the individual in question, [viz. the adopted son of one adopted], succeed. Thus, what had been advanced, only is correct. The same rule is to be applied by inference to the great-grandson also.

The difference between the Bengal and the Benares schools on the share of the adopted son arises from a difference in the reading of the text of Vashisth's. ⁽⁶⁾

811. All the schools proceed upon the text of Vashisth's before quoted. The difference of opinion between them arises from the different readings of the same text and the meaning of the ambiguous expression " shares a fourth part " which may mean either (a) a fourth of the whole or (b) a fourth part of what he would

(1) XV-9 : 14 S. B. E. 76 ; quoted in Mit. 1-XI-24 with the following comment on a "Son given." "Here the mention of a son given is intended for an indication of others also, as the son bought, son made by adoption, and son self-given and the rest ; for they are equally adopted as sons." Vashisth's verse is cited without comment in Datt. Mim. X-1 (Suth) 106 ; Datt. Ch. ii-11 (Suth) 118.

(2) Quoted in Datt. Ch. 5-15 (Suth) 198, 199.

(3) Quoted in Datt. Ch. V-16 (Suth) 189 ; in some copies the reading is "are pronounced sharers of a fourth part" Suth. p. 199.

(4) V-19-29.

(5) Quoted in Datt. Ch. V-32 (Suth) 148 ; followed in *Raja v. Subbaraya*, 7 M. 258.

(6) "Shares a fourth part" being read as "shares of third part" in *Daya Bhag.* X-18 ; The other text is followed in *Madan Parijat*, *Vir Mitrodaya* and others—*Cole-Note* to Mit. 1—XI-25.

have received if he were a natural son, or (c) a fourth part of the natural son's share. According to the first view the dattak gets one-fourth of the whole estate leaving the remainder to be appropriated by the natural son or if there be more than one son, to be divided amongst them. According to the second view the dattak takes one-fourth of what he would have taken if a legitimate son, i.e., $\frac{1}{4}$ of $\frac{1}{2} = \frac{1}{8}$; while according to the last view he takes $\frac{1}{4}$ of a son's share, i.e., if the latter gets 4 the former gets 1 or $\frac{1}{5}$ of the whole. Thus if the property be valued at 40 the dattak's share according to each view will be 10, 5 or 8 respectively. Each of these views has found its supporters. Sir Thomas Strange and the early writers favoured the first view ⁽¹⁾ while Nanda Pandit argues in favour of the second view ⁽²⁾ but recent opinion ⁽³⁾ inclines to the third view. It is contended that the first view cannot be correct because in that case the adopted son would get a fourth of the estate while the remaining three-fourths may have to be divided amongst as many or more natural sons which would be inconsistent with the spirit of Hindu Law which places the secondary son in a lower position than the auras son. Both the Bombay and the Calcutta Courts, therefore, agree in rejecting the first interpretation. ⁽⁴⁾ They equally reject the second interpretation as strained and unnatural; but now agree on the third which is also supported by some cases of the other courts. ⁽⁵⁾ The same rule applies where the adopted son sues for partition an adopted son of a deceased natural son of the proprietor and there being no text to curtail his right, he would take the full share of his father. ⁽⁶⁾

812. So again where a person was a member of a partnership at the time of his death such partnership is not dissolved by reason of his death if his widow makes a valid adoption in which case his adoption would relate back to the death of her husband. ⁽⁷⁾

51. No suit lies for the specific performance of an agreement to adopt, the breach of which may, however, be redressed by damages.

813. Analogous Law.—There can be no suit for the specific performance of a contract to marry or to adopt, ⁽⁸⁾ as both depend upon the volition of the parties, and its breach may be otherwise redressed. ⁽⁹⁾

In one case the parties had agreed not to adopt against which agreement the defendant was about to make an adoption. The plaintiff sued her for an injunction restraining her from making an adoption and prayed for an *interim* injunction as the adoption was to take place the next day. The court, however,

(1) 1 Str. H.L. 99; Wilson's works, V 52: 1 Wm. Maon. 70; 2 Wm. Maon. 184; F. Maon. 187; Madhaviya Dayavibhag (Burnell's Tr.) 48; Taramohan v. Kripa Moyee, 9 W R 428; Rukhal v. Chunilal, 16 B. 347; Preag Singh v. Ajoodya, 4 M. S. R. 96; 1 Mor. Dig. 306.

(2) Datt. Mim. V. 40.

(3) *Birbhadra v. Kalpataru*, 1 C. L. J. 898 (392, 898) following *Giriapa v. Ningapa*, 17 B. 100; *Ayyavu v. Niladatchi*, 1 M. H. C. R. 45.

(4) *Birbhadra v. Kalpataru*, 1 C. L. J. 898 (892); *Giriapa v. Ningapa*, 17 B. 100 dissenting from *Raghunand v. Sadhu Churn*, 4 C. 425 since overruled in *Nagindas v. Bachoo*, 40 B. 270 P. C.

(5) *Dhondo v. Appaji*, (1898) B. P. J. 398;

Giriapa v. Ningapa, 17 B. 100 without reference to the earlier decisions in *Hanmant v. Bhimacharya*, 12 B. 105; *Rukhal v. Chunilal*, 16 B. 347 in which the court allotted him one-third of the share of a natural son *Ayyavu v. Niladatchi*, 1 M. H. C. R. 45.

(6) *Raja v. Subaraya*, 7 M. 253 followed in *Baramanund v. Krishna Charan*, in 14 C. L. J. 138 (187) doubting *contra* in *Raghunand v. Sadhu Churn*, 4 C. 425.

(7) *Kapur Chand v. Narainjan Lal*, (1897) P. R. 20.

(8) S. 21 (b) Sep. Rel. Act (I of 1877)

(9) The contrary stated in *Sreenarayan v. Kishen Soondery*, (1873) 11 B. L. R. 171 (188) P. C., must be taken as overruled by the statute law.

refused it holding that the court should be cautious in restraining an adoption the result of which might be serious to the party restrained. (1) The fact that the breach of such contract is redressable in pecuniary compensation is sufficient to prevent a party from obtaining an injunction. (2)

52. (1) An invalid adoption cannot be validated by a subsequent consent, though the person so consenting may be estopped from denying it; but there can be no estoppel unless there is such a course of acquiescence in treating the adopted boy as a member of the adopted family that it will be impossible to restore him to his original position in the natural family.

(2) Mere acquiescence or even presence at the adoption does not necessarily amount to an estoppel.

Synopsis.

- (1) *Effect of consent on invalid adoption* (815). (2) *Acquiescence, no bar* (816).
(3) *Estoppel* (817).

814. Analogous Law.—This section involves three propositions: (i) that the invalidity of an adoption cannot be cured by the subsequent consent of those whose consent was pre-requisite to its validity, (3) (ii) that no acquiescence in an invalid adoption can make an invalid adoption valid, (iii) and no acquiescence short of estoppel, precludes one from disputing it. (4)

815. Effect of consent on adoption.—It is an established rule that consent cannot cure the invalidity of an adoption. So where the consent of the husband's kinsmen is necessary to empower the widow to adopt, an adoption made by her without such consent cannot be validated by their subsequent ratification. Even if the kinsmen whose consent was a pre-requisite were present at the adoption it does not amount to either consent or acquiescence. (5) Even where the acquiescence has continued for even as long as 50 years it would not validate the adoption though it may estop the party if his acquiescence had led the adoptee to abandon his rights to the property in his natural family and render his service in that of his quasi adoptive father. (6)

The equitable doctrine of laches and acquiescence does not apply to suits for which the Legislature has prescribed a limitation. (7) A legal title cannot be displaced by mere acquiescence, laches or delay. The fact that a person did not protest does not prove his acquiescence. (8)

(1) *Assur v. Ratan Bai*, 13 M. 56.

(2) S. 54 (c) Specific Relief Act (I of 1877).

(3) *Konvidi v. Venkataswami*, 32 M. L. J. 119; *Adivi v. Nidamarty*, 38 M. 228.

(4) *Vaithilingam v. Murugaian*, 37 M. 529.

(5) *Papamma v. Appa Rau*, 16 M. 388 391; *Gurulingaswami v. Ramalakshamma* 14 M. 53 (58); *Parvatibayamma v. Rama-*

krishna Rau, *ib.*, p. 145.

(6) *Gopalayyan v. Raghupatiayyan*, 7 M. H. C. R., 250; *Parvatibayamma v. Ramakrishna Rau*, 18 M. 145 (151, 152).

(7) *Rama Rau v. Raja Rau* 2 M. H. C. R. 114; *Peddamuthulaty v. Timma Reddy*, *ib.* p. 270 (273); *Baruck Chunder v. Huro Sunkur*, 22 W.R. 267; *Rahmatullah v. Secretary of State*, (1918) P. R. 63; 18 I. C. 799.

(8) *Rajan v. Basuwa*, 2 M. H. C. R. 428.

816. In any case, acquiescence is never a ground for depriving a person of his legal rights unless the acquiescence amounts to estoppel. **Acquiescence no bar.** Silence is not acquiescence, unless one was under a legal duty to speak. ⁽¹⁾ There is a difference between acquiescence before the act and after it is completed. In the first case it affords evidence of consent, ⁽²⁾ but in the other case it may amount to waiver of a right, but a waiver must be an intentional act done with the knowledge of one's right.⁽³⁾ Mere delay is not waiver and apart from limitation, it does not deprive one of his rights. ⁽⁴⁾

There can be no acquiescence unless one is cognizant of one's right to dispute it ⁽⁵⁾ and where both parties equally knew the facts, there is neither estoppel nor acquiescence. ⁽⁶⁾

817. Estoppel.—But where for a long series of years a person has acquiesced in the adoption of another and the latter has in consequence lost all rights in his natural family it may then be a case in which, while the adoption remains invalid, the court may hold a party estopped from showing its invalidity on the ground that it would be inequitable to permit him to show the contrary when he has by his own conduct induced another to alter his position to his disadvantage to which he can no longer be restored. ⁽⁷⁾ Such a case must be brought within the principle stated in S. 115 of the Evidence Act.

(1) *Chadwick v. Manning*, (1896) A.C. 231 (298); *Bindu v. Bugli*, (1909) P.R. 73; 2 I. C. 814; *Shyama Charan v. Prafulla*, 19 C. W. N. 882.

(2) *Duke of Leeds v. Amherst*, 2 Phillips, 117; 78 R. R. 47.

(3) *Darnby v. L. C. & D. Ry. Co.* 11. R. 2 H. L. 43 (60); *Shyama Charan v. Prafulla*, 19 C. W. N. 882 (886).

(4) *Shyama Charan v. Prafulla*, 19 C. W. N. 882 (886).

(5) *Papamma v. Appa Rao*, 16 M. 384 (391); *Shyama Charan v. Prafulla*, 19 C. W. N. 882 (886).

(6) *Proscenna Kumar v. Srikantha*, 40 C. 173.

(7) *Varthalingam v. Murugaiyan*, 37 M. 529.

CHAPTER VI.

MINORITY AND GUARDIANSHIP.

818. Topical Introduction.—The law of guardianship is based on the principle that infants being of immature intellect and imperfect discretion, are incapable of exercising any civil right or performing civil duties and their interests consequently require to be protected by the recognition and appointment of a guardian to their person or property or both.

819. All laws recognize this incapacity and the necessity for protection. And all laws accept the parents as the natural guardians of their offspring. Of these however, the father has an almost absolute right to the guardianship of his children of both sexes. This is the relic of his old *patria potestas* which enabled him to own, sell, or kill his own offspring. But this can only be by analogy for when the father exercised his *patria potestas* his minor children had no individual rights or property. They were merely his chattels. Their individual rights are of later growth. Consequently, the Hindu Law-givers do not recognize any absolute rights of guardianship in any one, the sovereign being entrusted with the guardianship of all minors ⁽¹⁾ and entitled to appoint any person as their guardian. ⁽²⁾ But nevertheless the parental power and authority was a fact which the courts could not ignore and following the broad analogy of their pristine rights, their claim to guardianship of their children was never contested. And as between them, the father as the head of the family and its bread winner, was held to possess an absolute right. But his present power, though nominally absolute, is limited by his capacity of which the court as representative of the sovereign is the sole judge. Next to the father stands the mother. Other things being equal, she has a preferable claim and according to a decision, even a better claim for the guardianship of her minor daughter than the father. ⁽³⁾ But as will be presently seen, this was the exceptional case of a Kulin father with his numerous wives. In normal cases the courts recognize the father's right as stronger than that of any other relation and in a competition between the father and the mother, the former starts with a clear advantage which the latter has to meet. Apart from the parents no other relation has any right in the same degree. Hindu Law no doubt favours the paternal over the maternal relations and this is never left out of account. But the welfare and wishes of the minor are then accounted as of a greater moment.

820. The law of guardianship is now codified in the Act ⁽⁴⁾ which however does not affect the personal law of the Hindus so far as it relates to the power to appoint a guardian but otherwise it controls his appointment.

OF MINORITY.

53. (1) In matters relating to marriage, dower, and adoption, a person attains the age of majority on completion of the sixteenth year : otherwise

Age of majority.

(1) Manu, VIII 27 : 2 Dig., 574, 575 ; *Ram Bunsee v. Soobh Koonwaree*, 7 W. R. 321 (325); *Runseedhur v. Bindeseree*, 10 M. I. A. 454; *Besant v. Narayaniah*, 38 M. 807 (819) F. C.; *Jago v. Oodal*, 4 N. L. R. 20.

(2) *Muthu Vicerappa v. Ponnuswami*, (1911) M. W. N. 561; 18 I. C. 16.

(3) *Modhoooodun v. Jadub Chunder*, 8 W. R. 194.

(4) VII of 1890.

except in the cases herein after provided, he attains it on completion of the eighteenth year.

(2) Every minor of whose person or property a guardian has been appointed or declared under the Guardians and Wards Act, and every minor whose property is under the superintendence of a Court of Wards, attains his majority on completion of his twenty-first year.

Synopsis.

(1) *Hindu Law of majority* (822). (3) *Mode of calculation* (824).

(2) *Age of majority for Hindus* (823).

821. Analogous Law. -- This section is a summary of the Hindu Law modifying and as modified by the Indian Majority Act. Clause 1 reproduces the saving clause 2 of the Act ⁽¹⁾ and states what is now regarded as the age of majority under Hindu Law.

822 The saving clause in the Indian Majority Act was, of course, inserted **Hindu Law of majority** out of respect to the personal laws of Hindus and Mahomedans which it has been the policy of the Government to leave unmolested. The only textual rule to be found on the subject of Hindu majority is the following :--

Manu :--The property of a student and of an infant, whether by descent or otherwise, let the King hold in his custody, until the owner shall have ended his studentship, or until his infancy shall have ceased in his sixteenth year. (2)

According to this rule the infancy of a minor "ceases in his sixteenth year." But the phrase is vague and might mean either upon entering the sixteenth year ⁽³⁾ or upon its completion ⁽⁴⁾ and there is authority for either view. When Manu enacted the rule, women were incapable of holding property or entering upon a course of studentship.

No doubt a period has been prescribed for the termination of the age of studentship and infancy but as has been pointed out before, that period is strictly speaking inapplicable to women who have been declared ineligible for religious studies and whose perpetual dependence upon men is consistently insisted upon.

These are the inherent defects of the Hindu system and failing a direct rule, some limitation had to be fixed which the courts have, in several cases, fixed as stated in clause (1).

823. Clause (1) of this section is taken from S. 2 and clause (2) **Hindu age of majority.** abstracted from S. 3 of the Majority Act which prescribes a uniform age of majority applicable to all minors including Hindus who are however declared exempt

(1) IX of 1875

(2) Manu, VIII. 27 ; IX—146, 190, 191.

(3) 1 Dig 298 ; 1 Dig 115 : Dayabag iii. 1. 17 Note. Datt. Mim. IV. 47 ; 1 W. Maon 103 ; 2 W. Maon ; 220, 288. N. Lachman v. Rupchand, (1881) 5 B. S. D. R. 136 : Luckheeraram v. Mudhoosoodun (1853) B. S. D. A. 505 ; Shaebunker v. Manakchunder, (1859) B. S. D. A. 885 ; Dehomoyee v.

Juggessur. 1 W. R. 75 ; Monsoor Ali v. Ramdayal, 3 W. R. 50 ; Callychurn v. Bunggobutty, 19 W. R. 110 ; Mothoor v. Surendra. 1 C. 108.

(4) 1 W. Maon H. L. 108 1 Str. H. L. 72 ; Str. H. L. 76, 77, 80 ; Lachman v. Rupchand 5 S. D. A. B. 136 : Govind Nath v. Gulalchand, 5 B. S. R. 322 ; Shirji v. Datu, 12 B. H. C. R. 281 (290).

from that Act, thereby impliedly reserving to them their own personal law of majority, if any. Now since the Majority Act applies to other cases including guardianship, it follows that a person may be still a minor under the Majority Act and yet a major under his personal law and therefore, free to enter into the three excepted transactions, *viz.*, marriage, dower and adoption. Since the saving clause does not exempt guardianship and wills, it follows that a minor under the Act can neither make a will nor can he act as a guardian. Under S. 3 of the Majority Act the normal age of majority for every person irrespective of nationality or religion is reached on completion of the eighteenth year, except (a) where before completion of that age a guardian is appointed or declared under the Guardians and Wards Act; or (b) the management of his estate is assumed by the Court of Wards, in which cases the age of majority is extended by another three years. It will be seen that this extended non-age does not continue where a guardian is appointed otherwise than by a court of justice. Consequently, where a guardian is appointed by the will of the father it does not extend that period, nor, of course, is it extended by the existence of a natural guardian. This may sometimes lead to awkward results. Since a guardian may be younger than his ward, and while the former may be a major, the latter may still be a minor. It has been held that if the guardian is "appointed" or "declared by the court," the period of majority is postponed even if the guardian should resign or cease to act. (1) Such appointment or declaration must be under S. 7 (1) of the Guardians and Wards Act. (2) Where therefore, the court merely granted letters of administration to the *de facto* guardian of a minor in respect of an estate under S. 13 of the Probate and Administration Act (3) or appoints merely a guardian *ad litem* for the purpose of a suit, the period of majority is not postponed.

824. In calculating the age of a minor, the day on which a person is born and the day on which he completes his eighteenth year or twenty-first year are both counted in computing his age of majority. So if A be born a minute before midnight of 1st January 1900 and die a minute after the 31st December 1918 he would have died a major, for he had attained eighteen years of age at midnight of the 31st December, although really 48 hours short of two minutes will be wanting from the instant of his birth. This is in accordance with the rule that law generally ignores fractions of a day.

54. Guardian means a person having the care of the person of another or of his property or of both.

"Guardian" defined.

825. Analogous Law.—This definition is adapted from S. 4 (2) of the Guardians and Wards Act (4) where it is limited to a minor. But since a Hindu husband is the natural guardian of his wife, the definition here has been enlarged to include such guardianship.

Three classes of guardians.

55. (1) A guardian may be natural, testamentary, or one appointed by the court.

(1) *Sadholal v. Murlidhar*, 29 A 672 F.

B. (3) V of 1881; *Ganeshilal v. Surajmal*, (1906) P.R. 89.

(2) VIII of 1890.

(4) VIII of 1890.

(2) A natural guardian is one who is entitled under the personal law to which he is subject to act as the guardian by virtue of his relationship to the minor. Such guardian is also called a *de facto* guardian.

(3) A testamentary guardian is one so appointed by the father in his will for his children.

(4) The court may appoint or declare a guardian in accordance with the provisions of the Guardians and Wards Act ⁽¹⁾ or the High Court might do so in the exercise of its inherent power. The guardian so appointed may be called the *certificated* guardian. He is also called a *de jure* guardian.

Synopsis.

- (1) *Different classes of guardians* (2) *Certificated guardian* (823). (822).

826. Analogous Law.—A natural guardian is one who derives his *status* from the fact of his relationship to the minor. Till he is declared appointed or superseded by an order of the court, he remains both the *de facto* and the *de jure*, guardian of the minor. As such, the father, in his absence the mother, and in the absence of both, the elder brother is recognized as the natural guardian. But where these are not available the same office devolves on his nearest paternal relative and after him on his nearest maternal relatives. But except in the case of the parents, the rule as to guardianship is not inflexible and any relation interested in the welfare of the minor may assume his guardianship and till his status is questioned, he remains his lawful guardian and is entitled to exercise all the rights and subject to all the liabilities of guardianship.

827. It is also lawful for an adult father to appoint a guardian for his children by his will. In that case the testamentary guardian acquires the sole right in supersession of all other guardians to guardianship of the minor. Any one disputing his right must then move the court for his removal. Such appointment must, however, be only made by the father, and as his testamentary capacity is subject to the age prescribed in the Indian Majority Act it follows that no father who has not completed his eighteenth year is competent to make a will ⁽²⁾ or by his will appoint a guardian of his children after his death. Where moreover, the father was himself subject to the Guardians and Wards Act then his incapacity to make a will or appoint a guardian for his children would be further prolonged till he has completed his 21st year. ⁽³⁾

828. Both natural and appointed guardians are however, liable to be superseded by a guardian appointed by the court in accordance with the provisions of the Guardians and Wards Act ⁽⁴⁾ which however, does not entitle the court to wholly ignore them (§ 842). Since such appointment or declaration is by a certificate issued in favour of the guardian ⁽⁵⁾ the latter is ordinarily called "certificated guardian."

(1) VIII of 1890.

(2) *Harduani Lal v. Gomi*, 8 A.L.J. 885
followed in *Gulab v. Thakore Lal*, 16 B. 622.

(3) *Harduani Lal v. Gomi*, 8 A.L.J. 885

(888).

(4) VIII of 1890.

(5) *Rambhaji v. Harnarain*, (1889) P.R. 105.

OF NATURAL GUARDIANS.

56. The following relations are the natural guardians of the person and property of a minor in the order mentioned below, namely :—

Natural guardians

- | | |
|-----------------|-----------------------------|
| (a) The father. | (c) The paternal relations. |
| (b) The mother. | (d) The maternal relations. |

Synopsis.

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|---|---|
| (1) <i>Natural guardians</i> (829). | (9) <i>Stepmother, competency of</i> (838). |
| (2) <i>Their position under the Guardians and Wards Act</i> (830-831). | (10) <i>Claim of paternal relations</i> (839-841). |
| (3) <i>Father's right</i> (832). | (11) <i>Appointment of guardian by court</i> (842). |
| (4) <i>Competition between adopted father and natural father</i> (833). | (12) <i>Grounds of unfitness</i> (843). |
| (5) <i>Guardianship of illegitimate children</i> (834). | (13) <i>Parents' claims</i> (844-845). |
| (6) <i>Guardianship of converts</i> (835). | (14) <i>Comparison between English and Hindu Law</i> (846). |
| (7) <i>Father's right to appoint guardian</i> (836). | (15) <i>Mother as guardian</i> (847). |
| (8) <i>Mother's right of guardianship</i> (837). | (16) <i>Claims of other relations</i> (848). |
| | (17) <i>Natural claims when subordinated to welfare of the minor</i> (849). |

829. Analogous Law.—Both the English and Hindu Law declare the sovereign as the guardian of all infants. (1) The authority of the sovereign is now exercised by the courts whose authority being *quasi* parental (2) must be used in the best interest of the minor, whose welfare should be its paramount concern subject only to the legal rights of persons whom the law acknowledges as the natural or preferential guardians. (3) But in this respect the Guardians and Wards Act is stated to have modified the pre-existing rule of Hindu Law which recognized an absolute right in the father and the mother. The law now qualifies this absolute right by subordinating it to the minor's welfare. (4) But nevertheless it cannot ignore their claim. Their predominant right still remains though if they be unfit, the court is free to supersede them for a sufficient reason. But this is in view of the statutory enactment, merely reduced to a rule of practice.

830. The act merely saves the personal law so far as it relates to an appointment by the father (5) and recognizes the predominant claims of the father and the husband whom it is bound to appoint unless they are declared to be unfit. (6) Clause 1 is based on S. 8; clause 2 on Ss. 6 and 7 (3), clause 3 partially on S. 19 and the rest on case-law; clauses 4 and 5 on S. 17 and clause 6 on a recent Bombay case. (7)

831. The Guardians and Wards Act saves from its operation the Hindu personal law so far as it relates to any power to appoint a guardian of a minor's person or property or both. It does not save any rule which, apart from appointment, vests the right of guardianship of one person over another. Consequently it is competent to the court to remove a natural guardian, even though the father, and appoint another in his place (8) the result

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| (1) <i>Manu VIII-27.</i> | 191. |
| (2) <i>Skinner v Orde</i> , 14 M. I. A. 309 | (5) S. 6, Act VIII of 1890. |
| (329) | (6) <i>Ib.</i> S. 19. |
| (3) <i>Basanta v. Chedilal</i> , 40 C. 241; | (7) <i>Achrat Lal v. Chimanlal</i> , 40 B. 600 |
| <i>In re Joshy tasam</i> 23 C. 290. | (605). |
| (4) <i>Bhikno v. Chamelakoer</i> , 2 C. W. N. | (8) <i>Bindo v. Shamal</i> , 29 A. 210. |

being that a guardian may be appointed under the personal law independently of the Act or under the Act ; but unless there has been such appointment, any party may have recourse to the provisions of the Act for such appointment. Now since the right to appoint a guardian apart from the Act, is held only to reside in the father when making a will, it follows that his right to appoint a guardian is only then absolute: otherwise the guardian whoever he be, is always liable to be superseded by an appointment by court under the Act.

832. With these necessary qualifications the father may be said to possess

(1) **Father's right.** the best claim for his appointment as guardian of his minor children.⁽¹⁾ And without such appointment he is their guardian both of his natural children and adopted son. ⁽²⁾ And he does not lose that right even by his conversion to Christianity ⁽³⁾ though the court has the power to remove him from his guardianship if it finds it prejudicial to the welfare of the minor. Such was the case of the daughter aged 10 whom the court refused to withdraw from the custody of her maternal grandmother to be made over to the father who had re-married and thereby place her under the control of her stepmother, a stranger to her. There was nothing against the father but the court based its decision solely upon what it considered to be for the welfare of the minor. ⁽⁴⁾ But this case was dissented from in Madras where it was pointed out that it did not discriminate sufficiently between the case of parents and other relations, since the parents have a legal right to be appointed guardians of their children and unless they are shown to be wholly unfit, they cannot be superseded in favour of a more distant relative. The mere fact that he had re-married is no ground for rendering him ineligible ⁽⁵⁾ though the fact that the father was not during the mother's life-time on good terms with her, had re-married and had practically deserted both the child and its mother, was possessed of no means to maintain it and was living beyond the jurisdiction of the court, would be sufficient to neutralize his legal right in favour of the grandmother with whom the child was living and who was treating it as her own. ⁽⁶⁾ Such was also the case of the Kulin Brahmin with his numerous wives whom he visited after lengthened absence whom the court did not regard as such natural guardian as the mother of their daughter. ⁽⁷⁾ It seems that under the Mitthila Law the mother is the acknowledged guardian of all her children whether male or female. ⁽⁸⁾

833. As already stated, a boy on adoption completely passed into the

family of his adopted father who is then his natural pre-ferential guardian even against his natural father, who with the adoption resigns all his parental connection, control and authority but where in the absence of the adopted father the natural father acted for his son and effected a compromise on his

(1) S. 19 (b) Guardian and Wards Act (VIII of 1890); *Lachmi Narayan v. Balaram*, 2 Pat. L. J. 190; 39 I. C. 652; *Appan v. Srinivasa*, 40 M. 1122; *Subramania v. Ammayee*, (1915) M. W. N. 414; 29 I. C. 740; same under Buddhist Law. *Mathlin v. Maung Po*, 8 Bur. L.T. 73; 29 I. C. 890.

(2) *Iakshmibai v. Shridhar*, 3 B. 1; *Sree Narain v. Kishen Soondery*, 11 B. L. R. 171 (191) P. C. S. C.; *Nugendo v. Kishensoondery*, 19 W. R. 183 (189) P. C.

(3) *Mehera v. Arzon* 5 W. R. 285.

(4) *Bindo v. Sham Lal* 29 A. 210.

(5) *Subramania v. Ammayee*, (1915) M. W. N. 414; 29 I. C. 740; *Andiappa v. Nallendran*, 22 M. L. J. 443.

(6) *Muthuveerappa v. Ponnuswami*, 22 M. L. J. 68; 13 I. C. 16; *Ganga Narain v. Kaunsilla*, 11 A. L. J. 209; 19 I. C. 65.

(7) *Modhuosordun v. Jadub Chunder*, 3 W. R. 194.

(8) *Jussoda v. Lallah Netiya Lal* 5 C. 43.

behalf and for his benefit, the court held the compromise good as the natural father was a proper guardian to assert the right of his son as adopted heir against a rival claimant. (1)

In another case, the claim of the natural father, was on the death of the adopted father, sustained in preference to the latter's relations and even daughters, on the ground of his natural affection for his child. (2)

834. An illegitimate child, is in the eye of the law, nobody's child and the natural guardian of such children is their mother (3)
Illegitimate child. unless the child was born in continuous concubinage, when, probably, the ordinary rule would apply. But as observed by Lord Herschell, "it is no longer important to enquire what are the rights of the mother in relation to an illegitimate child at common law. All the courts are now governed by equitable rules, and empowered to exercise equitable jurisdiction." (4) In other words, the question in such cases is not whether the mother should possess the child, but what would be for the benefit of the child. Consequently, though the mother is the guardian of her illegitimate children, the court would not consign them to her care if she is leading an immoral life and is likely to corrupt their morals. (5) On the other hand where the child is too young to be removed from her care the court would tolerate her guardianship till it can safely place it in better hands.

835. Neither the conversion of the father (6) nor that of his children to Christianity (7) deprives the one of his natural right of guardianship over the other. No doubt, where the child has obtained sufficient maturity of intellect and discretion, he should be consulted and due regard paid to his wishes; but it has been held that a child below 14 is not one who, in the eye of the law, has acquired the requisite intelligence and discretion to elect for himself whether or not he will return to his parent. (8)

836. The father has moreover, the right of appointing a guardian for his children after his death. As already remarked, in this respect his power is absolute (§ 831). He may exclude even the mother from the guardianship. (9) But this power of appointment can only be made by a will and it must be confined to a guardian as distinguished from a trustee whose appointment stands on a different footing. (10) But as the Privy Council observed, his guardianship is in the nature of a sacred trust, and he cannot, therefore, during his life-time substitute another person to be guardian in his place. He may entrust their custody and education to another person, and the

(1) *Nirvanaya v Nirvanaya*, 9 B. 365 (867).

(2) *Ganga Prasad v. Nara Kanta*, 15 C. W. N. 558; 7 I. C. 284.

(3) *Venkanma v. Savitramma*, 12 M. 67 (68, 69); *Saithri In re*, 16 B. 307 (317); *Maneya v. Felix Slyn*, 5 Bur. L. T. 164; 17 I. C. 986.

(4) *Barnado v Mc Hugh*, (1891) A. C. 888 (898).

(5) *Venkanma v. Savitramma*, 12 M. 671; *In re G (Infants)* (1889) 1 Ch. 719.

(6) *Kuchoo v. Arsoo*, 5 W. R. 235.

(7) *Himnath Bose, In re* 1 Hyde. 111; *Q. v. Nesbitt Perry's*, C. 108 (108); *Q. v. Fletcher*, 1b, p. 109; *Reade v. Krishna*, 9 M. 391; *Sarat Chandra v. Forman*, 12 A. 213, *Saithri in re* 16 B. 307.

(8) *Saithri in re* 16 B. 307 (318).

(9) *Raj Lakhee v. Gokool Chunder*, 18 M. I. A. 909; *Soobah Pirthe Lal v. Soobah Doorga Lal*, 7 W. R. 78; *Mahabeswar v. Ramachandra*, 15 Bom. L. 882 (889); in *Budhlal, v. Morarji*, 31 B. 418 (418) the point was not decided.

(10) *Harilal v. Bai Mani*, 29 B. 351.

authority he thus confers is a revocable authority, and if the welfare of his children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If, however the authority has been acted upon in such a way as, in the opinion of the court exercising the jurisdiction of the crown over infants, to create associations or give rise to expectations on the part of the infants which would be undesirable in their interest to disturb or disappoint, such court will interfere to prevent its revocation. (1)

The father's right to appoint only extends to his own children and not to any other relation such as a nephew. (2)

837. Next to the father, the mother (3) is entitled to the guardianship of her minor children, but unlike the father she does not possess the power of appointment. Her remarriage does not deprive her of the guardianship of her son (4) though the court may apply a different rule if she has young daughters and a strange stepfather, or if she was leading an immoral life. (5)

The fact that the mother is a *pardanashin* is no objection to her eligibility (6) unless it will interfere with her duties, as if she is a young widow, or only a stepmother, and the estate is large which will have to be managed by her father,—who is himself in embarrassed circumstances, and there is a reasonable fear of the estate being squandered. (7)

838. As to the stepmother's right of guardianship, Manu declares: "If among all the wives of the same husband, one bring forth a male child, Manu has declared them all, by means of that son to be mothers of male issue." (8) Following the verse it was held in some old cases that a stepmother is the legal guardian of her stepson in preference to the paternal uncle (9) though in a Bengal case her right was generally doubted and denied in preference to the paternal grandmother. (10) But it has since been held that a stepmother is a competent guardian. (11)

839. Next to the parents, the right of guardianship is said to vest in the paternal relations of the minor in preference to his maternal relations (12) but neither has any paramount right, and the court is free to appoint any one it considers competent to take the place of the child's parent. (13) So it was observed, "The mere legal rights to be appointed a guardian, the preference of the minors, and the existing or previous relations, are very

(1) *Besant v Narayaniah*, 88 M. 807 (819) P. C. following *Lyons v Blain*, Jac. 245.

(2) *Dhanpat Ram v. Premsingh*, (1911) P. L. R. 220; 12 I. C. 452.

(3) *Jogo v. Codal*, 4 N. L. R. 20; *Ganga; Prasad v. Jais*, 15 C. W. N. 379; 10 I. C. 69; *Fatma v. Rani*, (1915) P. L. R. 110; 28 I. C. 587.

(4) *Bindo v Shamlal* 29 A. 210.

(5) *Venkamma v. Savitramma* 12 M. 67 (68,69); following *R. v. Clarke* 7 E. and B. 18; *Skinner v. Orde* 14 M. I. A. 309; *Harmar v. Partalu*, (1911) P. L. R. 67.

(6) *Jaiwanti v. Gajadhar*, 38 C. 783.

(7) *Sundarmani v. Gokulanand*, 18 C.W. N. 160; 16 I. C. 900.

(8) *Manu* 1X-188.

(9) *Jukmee v. Umar Chund*, 2 B. S. D. R. 14; *Nunko Lal v. Sohodra*, 1827 S. D. A. N. W. P. 115; *Vyastha Darpan*, p. 563; W. Mac H. L. 105 following the first case.

(10) *Ram Bunsee v. Sooth Kconwaree*, 7 W. R. 321 (325).

(11) *Sundarmani v. Gokulanand* 18 C. W. N. 160 (169); *Muthu Veerappa v. Ponnuswami*, 22 M. L. J. 68; 13 I. C. 16.

(12) *Gulbai (Re)*, 32 B. 50.

(13) *Kristo Kissors Neoghy v. Kadermoye*, 2 C. L. R. 583.

minor considerations as compared with the main question, what order would be for the welfare of the minor? In making orders appointing guardians for the persons of minors, the most paramount consideration for the judge ought to be, what order under the circumstances of the case, would be best for securing the welfare and happiness of the minors? With whom will they be happy and who is most likely to contribute to their well being and look after their health and comfort? Who is likely to bring up and educate the minors in the manner in which they would have been brought up by the parents if they had been alive? In fact the main question for the court to consider in the case of the unfortunate minors who have lost their natural guardians is, who amongst the relations, or for the matter of that, friends of the minors, can you select who will supply as nearly as possible the place of their lost parent or parents." (1) But the nearness of relationship of the guardian to the minor is always germane to the discussion, because near relations feel natural love and affection for the minor which insures his welfare. (2)

As such the minor's elder brother ranks next in affection after the parents and he is placed in a class apart from the rest of his paternal relations. (3)

840. After the brother the paternal lineal relations and after them, the maternal lineal relations are held qualified to act as guardians. But their claim is so slender that the court does not weigh it in golden scales, placing before it the broad question, which amongst the several claimants would treat the minor kindly and study his welfare, in short, who will be his best appointed parent.

841. Consequently, the courts have preferred a maternal grandmother to a paternal grandfather (4) and a father's mother to a paternal granduncle, (5), a maternal uncle to a paternal uncle, (6) a maternal grandmother to a paternal grandfather's brother, (7) a mother's sister to a father's brother, (8) in all of which the court regarded welfare of the minor as more important than the propinquity of the claimants. It was also pointed out that except the parents of the minor, no other relation had the same legal right to be a guardian of the minor whose welfare must be the paramount consideration for the court, though due regard will always be paid to the rights of blood relations and failing them, to other relations who by reason of their kinship are likely to take more care of the minor than mere strangers who, however, are not wholly disqualified on that account.

842. Appointment of a guardian by court.—The law of guardians is now consolidated in the Guardian and Wards Act which supersedes Hindu Law so far as it is not expressly or by necessary implication saved by it. The limits of this saving clause are set out in the last paragraph.

(1) *Kulbai (Re)* 92 B 50 (54) following *Bindo v. Sham Lal* 29 A 210

(2) *Kristo Kissors Neoghy v. Kadermoye*, 2 C. L. R. 588 (586); *Bhikno v. Chamela*, 2 C. W. N. 191

(3) 1 Mac. H. L. 103, 104; 1 Str. H. L. 71; *Kristo Kissors Neoghy v. Kadermoye*, 2 C. L. R. 583; *Bhikno v. Chamela*, 2 C. W. N. 191; *Thayammal v. Kuppamma*, 38 M. 1125.

(4) *Ambo v. Ganga Sahai*, (1913) P. L. R.

193 18 I C 141.

(5) *Venkatasan v. Ethirajammah*, 5 M. L. T. 208; 4 I. C. 1117.

(6) *Bairjnath v. Emp.* 1 O. L. J. 416; 25 I. C. 840

(7) *Buta v. Bhagan*, (1918) P. W. R. 45; 19 I C. 609.

(8) *Fulkumari v. Buañ Singh*, 18 C. W. N 1198; 25 I. C. 112.

Apart from those express exemptions, S. 17 enacts that "in appointing or declaring a guardian of a minor the court shall, subject to the provisions of this section be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor." In other words, while the court has to pay due regard to the welfare of the minor it must do so "consistently with the law to which the minor is subject," which means that its order must not ignore the claims of the minor's legal guardians, though it is not bound to treat them as sacrosanct.

843. A person otherwise eligible cannot be condemned as unfit on the ground of his extreme youth⁽¹⁾ or old age. The unfitness must be found by proving specific acts of mismanagement. ⁽²⁾

844. But both under the Hindu as well as under the English law, the claims of the parents to guardianship of their children are regarded as absolute. Consequently, where they are alive, their legal claims must be considered, and though they may be rejected for sufficient reason they cannot be ignored. As between the parents the father has undoubtedly an absolute right and the Act recognizes this fact in enacting that he must be appointed the guardian unless he is found to be unfit. The Act does not define this term, but it is apparent that his unfitness must be relative to his duties as the guardian of his minor son.

845. Such has been held to be the case where the father had practically deserted his religion and his object was to get his child converted to Christianity⁽³⁾ or where the father had got the child converted to Christianity and the mother after three years, applied with the object of getting her to renounce Christianity.⁽⁴⁾

846. The English and Hindu laws of guardianship to a large extent coincide. Both under the Hindu Law and the English Law, the father is the guardian by nature of his minor children and at common law he is entitled to the custody of them against all the world, even including the mother.⁽⁵⁾ And so under both laws, on the death of the father the mother is the natural guardian of her children, but at law she has no right to interfere with them against a testamentary guardian appointed by the father.⁽⁶⁾ Equally under both laws the mother is *prima facie* the natural guardian of her illegitimate children, and therefore under ordinary circumstances entitled to their custody,⁽⁷⁾ and thus her right must be recognized unless there are strong grounds for displacing her.⁽⁸⁾ But it is not an absolute right; nor can she transfer her right to another person.⁽⁹⁾ It is not the practice of the court in either country to appoint or declare a guardian of a minor who has no separate property of his own.⁽¹⁰⁾ In England the Guardianship and Infants Act,

(1) *Rangubai v. Gopal*, 5 Bom. L. R. 542.

(2) *Rindabai v. Giridharlal*, 4 Bom. L. R.

799.

(3) *Mokoondal v. Nobodip*, 25 C. 881.

(4) *Albrecht v. Bathee*, 22 M. L. J. 247;

18 I. C. 458

(5) *Wellesley v. Duke of Beaufort*, (1827
2 Russ. 21 : 38 E. R. 296.

(6) *Eyre v. Countess of Shaftesbury* (1722)
2 P. Wms. 103 (115); 24 E. R. 659.

(7) *Larcys (In re)* 1860 11 Ir. R. 298.

(8) *R. v. Nash, Barnardo v. McHugh*,
(1891) A. C. 399

(9) *Ullee In re*, 53 L.T. 711

(10) *Humphreys v. Polak* (1891) 2 K. B.
385.

1886 ⁽¹⁾ now regulates the appointment of guardians as the Guardians and Wards Act ⁽²⁾ regulates their appointment here. In both countries the common law has been brought under the control of the statute and the leading principles of English Law will be found to have crept into the rules which the courts now enforce as the acknowledged rules of Hindu Law. And this was to be expected, since Hindu Law has no developed system of guardianship and English Law naturally fills in the void as embodying the rules of justice, equity and good conscience.

847. The right of the mother to the guardianship of her children is inferior only to the father, and though it cannot be compared in point of strength to his right, it is nevertheless a legal right which for obvious reason may prevail even against him in the case of an infant in arms but as the child is weaned and old enough to be independent of her nursing, she must submit to the father's will as regard its management and care. But in his absence, her legal right can neither be ignored nor passed over in favour of another person on the ground of his superior fitness. Even if she is 18 years old, it is no ground for superseding her. ⁽³⁾ In certain matters, *e.g.*, the selection of a suitable husband for her daughter she is entitled to and obtains a determining voice ⁽⁴⁾ and in the Mithila country, she is entitled to the guardianship of her children adversely to her husband. ⁽⁵⁾ So also is the guardian in respect of her illegitimate children, though, as already stated, this is a right which may be overborne by a consideration of the minor's welfare (§ 834). Her conversion or remarriage is not a disqualification for guardianship ⁽⁶⁾ but the court may regard it as a circumstance detracting from the minor's welfare. ⁽⁷⁾

848. Claim of other relations.—After the parents, Hindu Law places the paternal and then the maternal relations preferring lineal to collateral relations. But in practice, the elder brother stands next only to the parents, and after him the court regards no one's claim more paramount than the welfare of the minor which determines its choice and in a choice between fitness and propinquity, the former prevails. ⁽⁸⁾ As Sir Richard Garth, C. J. said "The child belongs to the parents, but does not belong to its relatives. The affection of the parents is generally so strong, that kind treatment may safely be presumed, until special circumstances leading to a contrary presumption are proved. The kind treatment of another person's child by a relative, however near, cannot be so certainly relied upon as in the case of a parent. On the other hand, there are often, in the case of relations claiming to be guardians of children, conflicting considerations which it is impossible to overlook. The nearer relations are generally those who would succeed to the child's share of the property, if the child died; and to ignore this consideration altogether, would be contrary to the Hindu Law." ⁽⁹⁾

The sons of the paternal grandmother by another husband are no relations of the minor qualified to be his guardian. ⁽¹⁰⁾

(1) 49 & 50 Vict. C. 27 S. 3 (1).

(2) Act VIII of 1890.

(3) *Rangubai v. Gopal*, 5 Bom. L. R. 542.

(4) *Acha v. Acha*, 21 M. L. J. 600; 11 C. 570.

(5) *Jusoda v. Lalla Nettiylall*, 5 C. 48.

(6) *Ganga Pershad v. Jhalo*, 38 C. 862.

(7) *Skinner v. Orde*, 14 M. I. A., 309 (328).

(8) *Akima v. Azeem*, 9 W. R. 334; *Sohna v. Khalak Singh*, 13 A. 78; *Birode v. Bholanath*, 26 I. C. (C.) 300; *Mashin v. Maunqchil Pan*, 2 L. B. B., 408.

(9) *Kristo Kissor v. Kadermoye*, 2 C.L. J. 588 (587) followed in *Nirode v. Bholanath*, 26 I. C. (C.) 302 (302).

(10) *Sita Ram v. Inkla* 6 C.P.L.R. 15.

849. The adoptive father is the natural guardian of his adopted son and is entitled to preference over the natural father, and on his death his own relations are naturally entitled to guardianship. But the courts do not regard this artificial relationship as a sufficient assurance of the minor's welfare, and on death of the adoptive father they prefer to appoint the son's natural father as his guardian. ⁽¹⁾ On the same ground the court preferred to appoint the father as the guardian of his widowed daughter, though her natural guardian would have been her husband's relations. ⁽²⁾

Where natural claims subordinated to welfare.

57. (1) Neither remarriage, conversion nor loss of caste is any disqualification to act as a guardian.

(2) Where a Hindu child becomes converted to an alien faith it is for the court to consider whether it would for the welfare of the child that it should be restored to its parents.

Synopsis.

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|---|---|
| (1) <i>Disqualification for guardianship</i> (850). | <i>sion</i> (854). |
| (2) <i>Remarriage of father</i> (851). | (5) <i>Guardian of minor co-parcener of a joint Hindu family</i> (855). |
| (3) <i>Conversion of father</i> (852). | (6) <i>Guardianship of converted child</i> (856-857). |
| (4) <i>Mother's remarriage and conver-</i> | |

850. Analogous Law.—All the facts mentioned in the section would have been insuperable obstacles to guardianship under Hindu Law, but they have all been removed by the Caste Disabilities Removal Act, 1850, which has abrogated any law or usage in force in British India which inflicts on any person forfeiture of rights or property by reason of his or her renouncing or having been excluded from the communion of any religion or being deprived of caste. ⁽⁸⁾

851. The effect of the parents' conversion has already been incidentally considered in the foregoing discussion (§ 832). It has been there seen that the father has the inherent right to the guardianship of his children, both male and female, and that that right cannot be ignored merely because he has remarried or has forsaken his religion. This is undoubtedly the law. ⁽⁴⁾ But the fact that the father has been remarried or become a convert to an alien faith cannot be altogether ignored, if his right to guardianship is challenged in Court. The question would be solved not with reference to its legality but with reference to its propriety in a given case.

If, for instance, the child is a daughter and the father had practically abandoned it, having lived apart from its mother whose relations had brought her up, the court though conceding the father's legal right may yet deem it

(1) *Ganga Prasad v. Hora Janta*, 15 C. W. N. 558; 7 I. C. 284.

(2) *Tota Ram v. Ram Charan*, 7 A. L. J. 1149.

(3) XXI of 1850; *Muchoo v. Arsoon*, 5 W. R. 285; *Kanhai Ram v. Biddya*, 1 A. 549;

Kubera v. Jirai, 28 A. 233; *Gul Mohamed v. Wajirugam*, (1901) P. L. R. (167)

(4) *Narayan v. Luxmeebae* (1850-1) Morris S.R. 61; *Sham Singh v. Santa Bai*, 25 B. 551 (555); *Muchoo v. Arsoon*, 5 W. R. 285.

expedient that his daughter should not be torn away from her familiar surroundings to be placed in the strange company of a stepmother (§ 845).

852. So again where the father becomes a convert to Mahomedanism or Christianity, he does not forfeit his paternal right of guardianship of which he can be deprived only if the court is satisfied "not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shown himself, to be a person of such a description, or is placed in such a position as to render it, not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended." (1) So where the daughter of a Chinaman was delivered by the father to a Mrs. Allen whose husband was a Chinese Christian and who herself was a Christian, the court on the application of the father for the custody of his child, refused to accede to his prayer holding that though as father he was the natural guardian of the child, her moral and intellectual well being required that she should not leave the family in which she was treated as a daughter of the house. (2) In another case the plaintiff originally a Hindu, abandoned his family residence and left his minor son in the custody of his grandfather, a Hindu, on whose death he began to live with his maternal uncle. He applied for custody and his application was refused by his paternal and maternal uncles. It appeared that the father was not well off, being dependent upon a Mission for his support, that he had practically abandoned the son, who being aged 12 or 13 expressed a desire against his conversion to Christianity which appeared to be the father's ulterior motive for getting himself appointed as his guardian which the court refused holding "that the father must be regarded as having abdicated his strict legal parental rights and that it would be a capricious, if not a cruel resumption of his paternal authority, if he could now compel his child to be brought up henceforth as a Christian which admittedly would be the result of handing over the child to the custody of his father". (3)

853. Two questions determine the course the court would take in such cases. If the child is old enough to make an election as to the custody in which it should like to be, then it is delivered into that custody; otherwise, the court has to decide as to what would be to its best advantage. (4)

In following this rule the court does not contravene any rule of Hindu Law for there is no rule on the subject in that law which remains unrepealed by the Caste Disabilities Removal Act (5) but follows the rule of equity taking its guidance from the English law which is on this subject based upon the natural principles of justice and right. (6)

854. The analogies furnished by the father apply with even greater force to the case of the mother, whose right to the guardianship of her children is not equal to that of the father. But **Mother's remarriage and conversion.** her remarriage is equally no insuperable obstacle to the assumption of her duties as the natural guardian of her children. But it cannot be forgotten that by her remarriage she herself passes into another control and the question is how far her own subjection to

(1) *Per Knight-Bruce V C in Flynn, In re* cited with approval in *Joshy Assam*, 28 C. 290 (297, 298).

(2) *Joshy Assam*, 28 C. 290 (297, 298).

(3) *Mookond v. Nobodip* 25 C. 881 (886).

(4) *Saithri (In re)* 16 B* 807; *Sarat*

Chandra v. Forman 12 A. 218; *Rende v. Krishna* 9. M. 391; *Besant v. Narayaniah*, 88 M. 807 P.C.

(5) Act XXI of 1850.

(6) *Saithri (In re)* 16 B. 807 (828). *Besant v. Narayaniah*, 88 M. 807 (819) P.C.

marital control will affect the performance of her obligations towards the children of her former husband. If, for instance, her children are of the female sex and are already in the safe keeping of other relations, the court will not order the removal as a matter of course merely on assertion of the legal right of the mother to their lawful guardianship unless it is convinced that the removal would be for their good.

The same rule applies to where she is converted to another religion. That fact does not in the slightest degree impair her right but if the court apprehends that she is demanding their custody with a view to convert them, the court may demand a satisfactory assurance that she would not get her minor children converted and otherwise place her on terms. (1)

855. Minor co-parcener.—In a joint Mitakshara family, the father and in his absence, the senior member is the manager and as such guardian of the interests of its several co-parceners. On the death of the father the mother becomes entitled to the guardianship of her children, but she is not entitled to the guardianship in respect of their proprietary interest in the joint family.

A guardian can only be appointed in respect of the minor's separate property. Where therefore, he possesses only a co-parcenary interest in the property of a joint Mitakshara family, no guardian is possible "on the plain ground that the interest of a member of such family is not individual property at all, and that therefore a guardian, if appointed, would have nothing to do with the family property." (2) In this view it is possible to appoint a guardian of all the joint property when all the co-parceners are minors (3) or the minor's property is *prima facie* separate though his separation be disputed. (4) In the former case as soon as any co-parcener comes of age the guardian must be removed and all the joint property handed over to him, notwithstanding the fact that other co-parceners are minors. (5) In the latter case the procedure of the Guardian and Wards Act being only temporary, it is competent to the party aggrieved by the order to show that the property in respect of which the court has appointed a guardian, is still joint and recover it as such. (6)

856. The religion which a child is presumed to follow is the religion of its father. If he was a Christian then the child must be brought up a Christian. So the Privy Council said: "A child in India under ordinary circumstances, must be presumed to have his father's religion and his corresponding civil and social status, and it is, therefore, ordinarily, and in the absence of controlling circumstances, the duty of a guardian to train his infant ward in such religion." (7)

Converted child.

(1) *Dwijapada v. Bailean*, 20 C.W.N. 608.
 (2) *Ghurbullah v. Khalaksingh* (1903) 25 A 407 (416) P. C. *Alkajikar v. Noru* 85 M. L. J. 504; 34 I. C. 766; *Kajikar Lakshmi v. Maru Devi* 32 M. 189; *Ramkishan v. Bali Ram*, (1910) P. F. 28; 5 I. C. 887; *Murlidhar v. Harilal*, (1906) P. L. B. 165; *Kuri Mal v. Bhanma Mal* (1909) P. R. 43; 1 I. C. 745; *Virupakshappa v. Nilganga* 19 B. 309 F.B. *Govind v. More* (1875) B.P. J. 261; *Sakararam v. Motiram* (1881) B.P.J. 24; *Vyankatray v. Mahadev* (1882) B.P.J. 226; *Samatsang v. Babaji* (1882) B.P.J. 404; *Chhagan v. Ramchandra* (1886) B. P. J. 275; *Salikram v. Janaka* 40 C. 269; *Gurja Mohersingh* 16 A W. N. 31; *Gourah v. Gujadhur* P. C. 259; *Shankhar v. Mahanada* 19 C. 801; contra

in *Babaji v. Sheshgiri*, 6 B 593; *Manlal. In re* 25 B 553 must be regarded as overruled by the Privy Council.

(3) *Sandau v. Kamalakant*, 15 I. C. (C) 434

(4) *Gurappa v. Tayawa* 40 B. 513.

(5) *Virupakshappa v. Nilganga* 16 B. 309 F. B. *Bindaji v. Mathurabai* 30 B. 150 (156); *Ramachandra v. Krishnarao* 32 B. 252

(6) *Gurappa v. Tayawa* 40 B. 513.

(7) *Skinner v. Orde* 14 M.I.A. 809 (823); but this is only the ordinary rule—*In re Clarke*, 21 Ch. D. 817. *In re Naven* (1891) 2 Ch. 299; *In re McElrath*, (1893) 1 Ch. 143 (142, 149) and the Court may depart from it for sufficient reason. *In re McElrath*, (1893) 1 Ch. 143 (149).

In this case one George Skinner was the illegitimate son of a native woman by a European father. He professed the Christian religion and was married to the appellant in a Christian Church according to the Christian rites. He was killed in the Mutiny in 1857. The appellant thereupon became a mistress of one John who was a Mahomedan convert from Christianity and herself became a convert to Mahomedanism.

In 1869 John withdrew Skinner's daughter then aged 13 from the Meerut school where she was being trained and treated as a Christian. On her removal from the school she was thrown into *pardah* and converted to Mahomedanism. On being questioned by the judge, the girl (then aged 14) said that she had become converted to Mahomedanism from choice and that she wanted to live with her mother. But the Privy Council held that it was very easy for a mother under such circumstances to procure from a young daughter the expression of a wish to remain with her and to become a Mahomedan like her, rather than continue a Christian and go to a strange school, that children *prima facie* follow the religion of the father and that as the child's father was a Christian it was the duty of the guardian to bring up all his children in that religion and in the result they affirmed the order placing her under a Christian guardian but recommended that she, the minor, should again be consulted and such orders might be passed as might be the best for her. (1)

The religion of the father here does not mean the religion which he might have newly adopted (2) but a religion which was his established religion.

857. So where the Hindu father had entrusted his minor daughter to a missionary by whom she was baptized at his instance and brought up for three years, after which the father died and the mother applied for her guardianship, the Court in rejecting the mother's application held that it was for the father to say in what religion his children should be brought up and that it would not be for the minor's welfare to accede to the mother's prayer for the guardianship of her daughter who had for three years been in charge of a Christian missionary and had been educated and brought up as a Christian. (3) A converse case was presented to a Calcutta Bench in which the father having become a convert to Christianity applied for the guardianship of his minor son aged 12 or 13 years who expressed a preference to remain a Hindu and with his maternal uncle whereupon the Court refused the father's application for guardianship. (4)

58. Where the minor is a member of a joint family governed by the Mitakshara Law the father, or in his absence, the elder brother or other senior male member of the family is entitled to the management of the whole co-parcenary property including the minor's interest.

**Karta or guardian of
co parcenary.**

Synopsis.

(1) *Guardianship of property of minor co-parcener* (858).

858. Analogous Law.—It has been stated in S. 53 that a guardian can be appointed only of the separate property of a minor. As a member of a

(1) *Ib.*, pp. 327 328

(2) *Radhi Bai v. Vessanmal*, 11 S.L.R. 17;
41 I.C. 571.

(3) *Albrecht v. Bathee*, 22 M.L.J. 247; 18 I. C. 453.

(4) *Mokoond v. Nobodip*, 26 C. 891 (886).

Mitakshara joint family, a minor co-parcener has no separate property of his own for which a guardian could be appointed. Being a member of the joint family his property is subject to the law of management of co-parcenary property. So long as he remains joint he is bound to submit to its joint management. Even if the property be mismanaged, the remedy is a suit for partition ⁽¹⁾ and not the appointment of a guardian of his interest. As the Privy Council observed: "It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family. And in their Lordships' opinion those decisions are clearly right, on the plain ground that the interest of a member of such a family is not individual property at all and that, therefore, a guardian, if appointed, would have nothing to do with the family property." ⁽²⁾ But, of course, there is nothing in law to prevent the court from appointing a guardian of the person of a minor ⁽³⁾ although he may continue to be a member of the joint family.

As to the rights and liabilities of a manager see post under "Joint Property."

59. (1) A Hindu father may by his will, made orally

**Father's power to
appoint guardian
by will.**

or in writing, appoint one or more persons to act as a guardian or guardians of his children after his death; and in doing so he may exclude even the mother from her natural guardianship. The mother, however, has not a similar power to appoint a guardian by will, though the court may pay regard to her wishes so expressed.

(2) Where more than one person are appointed guardians, unless the contrary is expressed or necessarily implied, it is competent to any one to accept the office though the others may disclaim or die.

(3) Any guardian accepting office cannot resign at will.

Synopsis.

(1) *Testamentary guardian* (859).

(2) *Power of father to appoint* (860).

859. Analogous Law.—The law of wills is novel to Hindu Law and has arisen out of the law of gifts. The father's power to appoint a guardian by will is consequently based, on no textual authority, but is one corollary of his acknowledged parental power over his own children established by a long series of cases. ⁽⁴⁾ It is equally established that this power is only inherent in

(1) *Mahadev v. Loshman*, 19 B. 99.

(2) *Gharibullah v. Khalak Singh*, 25 A. 407 (416) P. C.; *Jhabhu Singh v. Ganga Bishan*, 17 A. 529; *Bandhu Prasad v. Dhurai*, 20 A. 400; *Gurja v. Moher Singh*, (1896) A. W. N. 80; *Sham Kuar v. Mohanunda*, 13 C. 301; *Virupakshappa v. Nilgangava*, 19 B. 809 (where all the previous cases on the point are referred to.); *Bindajee v. Mahurabai*, 30 B. 152; *Ramachandra v. Krishnarao*, 32 B. 259; *Kajigar v. Maru*, 32 M. 139;

Murudhar, v. Harilal, (1906) P. L. R. 165; *contra Manulal (In re)* 25 B. 353 which must now be deemed to be overruled by the Privy Council.

(3) *Virupakshappa v. Nilgangava*, 19 B. 309.

(4) *Piriheela v. Doorgalal*, 7 W. R. 73 (75); *Budhilal v. Murarji*, 31 B. 413; *Mahableshwar v. Ramachandra*, 15 Bom. L. R. 882.

the father. It is not possessed by the mother ⁽¹⁾ and even as to the father it is a power of nomination which he can only exercise in his will to take effect after his death. He cannot substitute another person to be a guardian in his place during his life-time. ⁽²⁾ A person cannot appoint a guardian for any other relation, *e.g.*, a nephew. ⁽⁸⁾ And since as regards his capacity to make a will he is subject to the Indian Majority Act it follows that he must be an adult within the meaning of that Act before he is competent to give such testamentary directions.

860. A father may, it is apprehended, appoint a guardian not only in respect of every child born, but *en ventre sa mere* at his death, whether born or conceived before or after the date of appointment ⁽⁴⁾ and the guardianship may be limited for any period before the minor attains his majority. But if the minor be a female her guardianship will ordinarily cease on her marriage when her guardianship is naturally transferred to her husband.

Clauses 2 ⁽⁵⁾ and (3) ⁽⁶⁾ are taken from the English law, being equally applicable to Hindus.

60. (1) The husband is the lawful guardian of his minor wife and is entitled to require her to live with him irrespective of her infancy.

Husband his wife's
guardian.

(2) After the husband's death the guardianship of her person devolves on the husband's relations in preference to her paternal relations.

Synopsis.

- (1) *Husband, lawful guardian of wife* (2) *Appointment of guardian by court*
(861-864). (865-866).

861. Analogous Law.—The following texts support the rule :—

Manu :—2 Day and night must women be held by their protectors in a state of dependence; but in lawful and innocent recreations, though rather addicted to them, they may be left at their own disposal.

3. Their fathers protect them in childhood; their husbands protect them in youth; their sons protect them in age; a woman is never fit for independence. ⁽⁷⁾

Narad :—28. After the death of her lord, the relations of her husband shall be the guardians of a woman who has no son. They shall have full authority to control her, to regulate her mode of life, and to maintain her

29. When the husband's family is extinct, or contains no male, or when it is reduced to poverty, or when no one related to it within the degree of a Sapinda is left, the father's relations shall be the guardians of a woman. ⁽⁸⁾

862. The husband's right to guardianship of his wife was recognized by the early text writers ⁽⁹⁾ and cases. ⁽¹⁰⁾ Even in one later case the High Court reversed the District Judge's appointment of the widow's brother and appointed her husband's sister's son as her guardian in consonance with Hindu Law. ⁽¹¹⁾

(1) *Venkayya v. Venkata*, 21 M. 401.

(2) *Besant v. Narayaniah*, 38 M. 807

(8) *Dhanpat Ram v. Prem Singh*, (1911) P. L. R. 220; 12 I. C. 452.

(4) 17 *Halsbury's L. E.* 124.

(5) *Eyre v. Shaftsbury*, (Countess) 2 P. Wms. 102 (107).

(6) *Spencer v. Chasterfield*, (Earl) Amb. 146; *Re Grays, Minors* (1891) 27 L. R. 1r. 609. A

guardian may, however, disclaim before acceptance *Ex parte Champney* 1 Diok. 350; *O'Keefe v. Casey* 1 Sch. & Lef. 106.

(7) IX-2, 8.

(8) XIII 28, 29; 38 S. B. E. 196, cited in *Daya Bhag XI* 1-64.

(9) *Mac. H. I.* ii 208.

(10) *Kishen Mohan v. Khettler Moni*, 2 May 196; *Kisar v. Gunga*, 20 W. R. 207.

(11) *Khudi Ram v. Bonwarilal*, 16 C. 584.

But the court now is not likely to yield to a *priori* legal right without reference to the welfare of the minor.

863. The husband even if he be a minor ⁽¹⁾ is the lawful guardian of his minor wife in preference to her parents and other relations, unless he is precluded by the usage of his caste from such a custody until his wife attains puberty. ⁽²⁾ This is the established rule of Hindu Law ⁽³⁾ and is recognized in the Guardians and Wards Act. ⁽⁴⁾

864. Clause 2 is consequential on her renouncing her father's *gotra* and becoming affiliated as a member of her husband's family. ⁽⁵⁾ The subject has already been considered on the preceding pages to which the discussion here must be regarded as merely supplementary

865. Though the husband has naturally the right of guardianship over his wife, it is a right which might at any moment be challenged by an application made under the Guardian and Wards Act, when the question of his unfitness must be considered by the court. Where the husband has failed to obtain the custody of his wife by a civil suit he should not be appointed a guardian as it would then give the husband relief in a summary proceeding which he had failed to obtain in a regular suit. ⁽⁶⁾

866. In this case the wife aged 16 who had become a convert to Mahomedanism refused to return to her Hindu husband who failed in a suit to obtain restitution of conjugal rights. He thereupon resorted to an application under the Guardian and Wards Act but the court refused to assist him in evading the consequence of a decree by appointing him the guardian of his wife's person, which it held, would be otherwise not in the interests of either party and would on the other hand lead to mutual unhappiness, since the wife would be treated as an outcaste in her husband's home and the husband was not likely to extend to her the affection which as a wife she had the right to expect. ⁽⁷⁾

61. (1) Any relations or friend of a minor, or the Collector of the District in which the minor resides or has any property, may apply to the court for the appointment or declaration of a guardian and the court may, on being satisfied that it would be for the welfare of the minor, subject to the rules herein stated, appoint or declare a guardian.

(2) Where a guardian has been validly appointed by the father by his will, the court may not appoint or declare any other person as a guardian until he has been removed for any of the reasons stated in S. 39 of the Guardians and Wards Act.

(1) S. 21, Guardians and Wards Act (VIII of 1890).

(2) Such is the practice in the Madras Presidency, *Armuga v Vwaraghava*, 24 M. 758.

(3) *Suntosh v. Gera Pattuck* 28 W.R. 22; *Kateeram v. Gendhenee*, *ib.* p. 178; *Boochand v. Janokee* 24 W. R. 228; S. C. 25 W.R. 386; *Surjyamonni v. Kali Kanta* 28 C. 37 (45). • •

(4) S. 19 (a), Guardians and Wards Act

(VIII of 1890).

(5) Mac. H. L. Vol. 1 Ch VII; Vol. II, Ch VII; *Kesar v Ganga*, 8 B. H. C. R. (Ac) 31; *Khaler Monee v. Kishen Mohun* 2 Hay 196; *Khudi Ram v Bonwarilal* 18 C. 584.

(6) *Bhagwan v. Ramchand*, (1911) P. L. R. 231; 11 I. C. 145.

(7) *ib.*

(3) Where any parent and in the case of a married female, her husband, is available, the court may not appoint any other guardian unless it finds that the parent or the husband is unfit to discharge the obligations of that office.

(4) Provided that in the case of other relations the Court will pay due regard to their natural claims to guardianship and may appoint any of them or some other person found best fitted to promote the minor's welfare.

(5) Provided further that where the minor has attained sufficient maturity of intelligence and discretion, it will consult him and pay due regard to his choice of a guardian but will not be bound to appoint his nominee if it finds any other person better fitted to promote his welfare.

(6) Any order passed by the Court acting under the Guardians and Wards Act may be set aside in a suit for the custody of the minor.

Synopsis.

- (1) *Appointment of guardian by Court* (867). (2) *Unfitness of father* (867).
(3) *Welfare of the child* (868).

867. The unfitness of the father to be the guardian of his minor children

Father's unfitness. must not be judged by the fact that some other person was better able to maintain and educate them. The question in his case is not whether the child would be better taken care of by another, but only in what way and to what extent the father had neglected his children. If he has habitually ill-treated, neglected or deserted them, waived his right or abdicated his office by consigning them to another person for their maintenance or education, then the court will not assist the father in enforcing his parental right of custody and control if it will be to the detriment of the child or interfere with his education or be averse to its expressed wishes. ⁽¹⁾ But the fact that the father, a goldsmith by caste, was keeping a concubine in his house is no ground for refusing him the guardianship of his children as that circumstance, though an objection, was not so serious and gave as to justify the supersession of the father's legal right. ⁽²⁾ In one case after anxious consideration, an Allahabad Bench upheld the father's right to the guardianship of his daughter 11 years old whom he was about to marry to an old impotent man of seventy years. ⁽³⁾ But this case should not be regarded as a precedent.

868. Then again on the rule that a right once vested cannot be divested, the Madras High Court negatived the right of the father who had renounced the world by becoming a *Sanyasi* returning to his household to claim the

(1) *Joshy Assam* 23 C. 290 (296); *Mokoond Lal v. Nobodip*, 25 C. 881; *Besant v. Narayaniah*, 38 M. 807 P. C.

(2) *Kalidas v. Subbamma*, 7 M. 2.

(3) *Kanhai Ram, v. Biddya Ram*, 1 A. 552

custody of his daughters aged 14 and 16 with a view to prevent their early marriages. (1)

869. The term "welfare" is used in this connection in its larger sense as implying a child's intellectual, physical, moral and religious well being (2) But the ties of affection should not be disregarded as they are generally conducive to his well being. (3)

62. One person may be appointed guardian of the person and another of the property : and two or more persons may be so appointed joint guardians of the person or of the property or of both.

870. Analogous Law.—This rule is abstracted from S. 15 of the Guardians and Wards Act. (4)

63. It is not competent to the court to appoint a guardian in respect of the property of a minor of which he has no present separate possession.

Court's jurisdiction when limited.

Synopsis.

(1) *Guardian of property of minor* (2) *Court's jurisdiction to appoint, when limited* (871).

871. Analogous Law.—This section lays down a general principle of which S. 55 furnishes an illustration, that there cannot be a guardian of a minor's estate when it is not in his possession. As Sir G. Jessel, M. R., observed, "I doubt whether the court has any power of its own to appoint a guardian of the estate of an infant whose estate is not in possession, the jurisdiction existing for the sole purpose of taking care of an infant's present property." (5) Following this case it has been held by the Allahabad High Court that the Court had no jurisdiction to appoint a guardian of the estate of a minor where it was in the actual possession of trustees on his behalf, and the minor had no interest in the property beyond that of a beneficiary until he came of age. In that case the grandfather had in his will appointed certain persons as trustees for the management of his estate on his death for the benefit of the son of his predeceased son. The predeceased son's widow applied to the court under S. 10 of the Guardians and Wards Act for the appointment of a guardian to the minor's property. But both the District Judge and the High court refused her application holding that as the minor's property was in the hands of the trustees there was no property in possession for which a guardian could be legally appointed, and that if the trustees misbehaved, it was open to the minor to obtain redress in a regular suit. (6) The same view has been followed in Calcutta in a case in which the minor's estate had become vested in the executor of his father's will, whereupon the court held that no guardian of the property of the minor could be appointed so long as the executorship continued. (7)

(1) *Muthusawmy v. Narayana*, 21 M.L.J. 202; 8 I.C. 898 (897).

(2) *In re McGrath*, (1898) 1 Ch. 143 (148)

(3) VIII of 1890.

(4) *Ib.*

(5) *In re Marquis of Salisbury*, L.R. 20

Eq. 527 (528).

(6) *Ashrafi Kuar v. Jai Narain*, 6 I.C., (A) 861.

(7) *Ganga Prasad v. Hara Kanta*, 15 C.W.N. 558.

64. (1) The natural guardian of a minor's property possesses the power to transfer any portion of the minor's property in case of necessity or for the benefit of the estate.

(2) Provided that where the property comprises a family trade, the guardian has the power to transfer or pledge the property and credit of the firm for the ordinary purposes of that trade.

Synopsis.

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|--|---|
| (1) Powers of natural guardian of minor's property (872) | (5) <i>De facto</i> guardian's powers (876). |
| (2) Powers in respect of minor's trading business (873). | (6) Guardian and trustee (877). |
| (3) Powers of certificated guardian (874). | (7) Guardian not to enter on speculative enterprises (878). |
| (4) Power to compromise on behalf of | (8) Necessity or benefit to minor (879) |
| | (9) Liability of trading firm (880). |

872. Analogous Law.—The powers of the legal guardian of a minor's estate are closely comparable to those of the manager (other than the father) of a joint Mitakshara family. In the one case the guardian, as in the other the manager, is entitled to mortgage or sell the estate if justified by necessity, or benefit. (1) Whether manager or not, the father is, however, further entitled by reason of a text to alienate the joint property for the payment of his antecedent debts. (2)

873. Clause (2) is an exception, and is justified by the nature of the business which brings the minor in trade relations with the world at large, who in their ordinary commercial dealings cannot be expected to investigate the status of the family and its requirements on each occasion. This was clearly pointed out by Sausse, C. J. of Bombay in a case (3) which is now considered a leading case on the subject, and as such has been continuously since followed. (4)

874. The powers of a certificated guardian are thus not the same, but very much less as enacted in S. 29 of the Guardians and Wards Act. (5) He cannot without the previous permission of the court transfer any part of the property of the ward or lease it for a term exceeding five years, or for any term extending more than one year beyond the date on which the ward will cease to be a minor. (6) In a case in which the manager of a joint Mitakshara

(1) *Hunooman Pershad Panday v. Babooec*, 6 M. L. A. 393; *Nandan v. Harikishan*, 3 A. 535; *Bhimsingh v. Lachlu*, (1882) A. W. N. 70; *Gharibullah v. Khalaksingh*, 25 A. 407; *P. C. Hurry Mohan v. Gonesh Chander*, 10 C. 828 F.B.; *Mohanund v. Nafur Mondul*, 25 C. 820; *Nanti Chundor v. Bisheshwar*, 25 C. 506; *Rash Mona v. Soorjakanda*, 82 C. 882. There is no distinction in principle between a mortgage or a sale *Mohanund v. Nafur Mondul*, 25 C. 840 (825).

(2) See post "Joint family."

(3) *Ram Lal v. Lakhmichand*, 1 B. H. C.

R. (App.) 51.

(4) *Jaykasho v. Nityanund* 3 C. 738; *Morrison v. Verchozele*, 6 C. W. N. 429; *Sanka v. Bank of Burma* 21 M. L. J. 620, 11 I. C. 79 (and cases cited therein); *Bishamber v. Fatchlul*, 29 A. 176; *Raghnathji v. Bank of Bombay* 34 B. 72; *Ram Pertab v. Foola Bai*, 20 B. 767.

(5) VIII of 1890.

(6) *Ib.* In *Adhar Chanda v. Kirtibash* 6 I. C. 638 the *obiter* to the contrary overlooks this distinction.

family was also the certificated guardian, the court held that his appointment by the court could not detract from his legal powers as manager, and that if he alienated the minor's property without leave of the court the alienation would not be invalid because it was made without leave since by agreeing to become a certificated guardian he did not cease to be the manager of the joint property. ⁽¹⁾ But such a case is not likely to occur now since it is no longer competent to the court to appoint a guardian in respect of a mere co-parcenary interest. The question what constitutes a legal necessity is one which must depend upon the facts of each case. The performance of the father's funeral rites, ⁽²⁾ the payments of the father's debts, ⁽³⁾ the marriage expenses of the minor and the purchase of jewels for bridal presents, ⁽⁴⁾ the repairs to his property, ⁽⁵⁾ and maintenance of the minor, ⁽⁶⁾ are all instances of such necessity, to which many more could be added. So the guardian may alienate property for the benefit of the estate. ⁽⁷⁾ Where the mother entered into a contract for the sale of her minor son's immoveable property and the son having subsequently died, the mother succeeded to him as his heir whereupon the other party sued her for specific performance of her contract of sale the court threw out the suit holding that as the mother had no right to sell except for a legal necessity—and it was found against the plaintiff—and as she did not purport to sell the property as her own, the principle underlying S. 43 of the Transfer of Property Act was inapplicable, and the plaintiff had no equity which he could enforce against her in respect of a contract made by her for her minor son. ⁽⁸⁾

875. Moreover, the rule here stated is subject to the provisions of other laws; e.g., S. 38 of the Transfer of Property Act. ⁽⁹⁾

S 38, T. P. A
Compromise.

The guardian is equally entitled to make a compromise on behalf of his ward. ⁽¹⁰⁾

876. De facto guardian's power.—The powers of a natural or a *de facto* guardian are the same as those of a legal guardian. ⁽¹¹⁾ Any act done by a *de facto* guardian would be equally binding on the minor if it is supported by necessity or benefit to the minor. ⁽¹²⁾ Such for instance, would be an alienation made by the guardian for repairs of the minor's property or other case of proved necessity.

877. Guardian and trustee.—A guardianship is sometimes spoken of as a sacred trust, but this is only so as regards the nature of the obligations necessary for the discharge of the two offices, but the powers of the guardian and the trustee are not co-extensive, those of the guardian being more limited than

⁽¹⁾ *Ram Autar Singh v. Chowdhuri*, *Nursingh* 3 C. L. J. 12.

⁽²⁾ *Nathu Ram v. Shilagan*, 14 B. 562

⁽³⁾ *Murari v. Tayana*, 20 B. 286.

⁽⁴⁾ *Kankipati v. Racherla*, (1911) 2 M. W. N. 477.

⁽⁵⁾ *Adhar Chandra v. Kirtibash*, 12 C. L. J. 586; 6 I. C. 638; *Hurry Mohun v. Gonesh Chunder*, 10 C. 828 (829) F. B.

⁽⁶⁾ *Soonder Narain v. Benud Ram*, 4 C. 76.

⁽⁷⁾ *Mohanund v. Nafur Mondul*, 26 C. 820 (822); *Rajani Kanta v. Abinash Chandra*, 2 I. C. (C.) 866.

⁽⁸⁾ *Rashmoni v. Surjakanla*, 32 C. 832 (836).

⁽⁹⁾ *Rajani Kanta v. Abinash Chandra*, 2 I. C. 866.

⁽¹⁰⁾ *Sarabjit v. Indarjit*, 27 A. 203 (250); *Nirvanaya v. Nirvanaya*, 9 B. 365; *Natesa v. Rama* (1911) 2 M. W. N. 145, 10 I. C. (M) 221.

⁽¹¹⁾ *Adhar Chandra v. Kirtibash*, 12 C. L. J. 586 (588); 6 I. C. 638, *Sham Chandra v. Indradhar*, 13 C. L. J. 277; *Mahomedan Law* different—*Mata Devi v. Ahmad Ali* 34 A. 213 (222) P. C.

⁽¹²⁾ *Amrit v. Manik*, 12 B. H. C. R. 79; *Keshav v. Doulut Khan*, (1891) B. P. J. 147; *Arunachala v. Chidambara*, 13 M. L. J. 223; *Adhar Chandra v. Kirtibash*, 12 C. L. J. 586; 6 I. C. 638.

of the latter. A guardian can alienate only in cases of necessity or for an evident advantage of his ward, while the trustee is empowered to deal with the property in any case he considers reasonable and proper. (1)

878. The natural guardian of a minor must not enter into speculative or hazardous enterprises on behalf of his ward. And though he is entitled to continue the business of his ward, he must carry it on as a man of ordinary prudence avoiding obvious risks and probable losses. The minor's father in a case was a money lender. His guardian continued the business lending money to insolvent persons without security and subscribing to the capital of a new company. It appeared that in the course of the money lending business he had to lend money to persons who failed but there was no proof of any misconduct or want of care or prudence. It was held that in as much as the guardian had acted to the best of his ability, the minor could not hold him liable for losses suffered by him by reason of his guardian's failure to recover the debts advanced, but as regards his subscription to the capital of a new Mill company the success of which was a mere matter of speculation, he had acted beyond the scope of his authority and the minor was entitled to recover Rs. 10,000 which he had subscribed to the capital in exchange for the shares which were made over to the guardian. (2)

879. The minor is bound whether the transfer made on his behalf was either necessary or beneficial to him. A transfer may be necessary though it may not be beneficial to the minor as where his estate is sold to pay off an antecedent debt of the father or other debts incurred for purposes which the law regards as creating a just charge on the estate. (3) So a transfer may be beneficial to the minor though it may not be necessary. As was observed in a case, "Necessity seems to connote the idea of warding off an evil or the doing of something that cannot be avoided or of something which it is one's legal duty to do. To avoid the sale of a minor's property for a debt would be warding off an evil; conducting necessary repairs would also be an act of the same class. The maintenance of the minor would be a necessity, as something which cannot be avoided. Performing his father's funerals would be a necessity as an act which it is his duty to perform. But over and above all these acts that are necessary, there may be acts which are positively beneficial to the minor, and an alienation which would conduce positively to the benefit of the minor would be upheld apart from any necessity, unless, of course it is accompanied by other evil." (4)

880. Liability of a trading firm.—The general rules and restrictions applicable to persons dealing with a minor or with his property do not apply to a case where the minor inherits an interest in a trading partnership. In such cases the rule first laid down by Sausse C. J. (5) and consistently since followed (6) defines the

(1) *Subbiah v. Rangiah* 7 M. L. J. 191; Trusts Act (11 of 1882), S. 36.

(2) *Bansidhar v. Ganpatlal* 8 C. P. L. R. 95.

(3) *Kaishur Singh v. Roop Singh* 8 N. W. P. H. C. R. 4; *Hanuman Persaud Pandey v. Babooee*, 6 M. J. A. 898; *Babaji v. Krishnajeo*, 2 B. 666; *Sucaram v. Kalidas*, 18 B. 681; *Arunachala v. Chidambara*, 18 M. L. J. 223.

(4) *Vembu Iyer v. Srinivasa*, 17 I. C. 609.

(5) *Ram Lal v. Lakmichand*, 1 B.H. C. R. (App.) 51 (71, 72).

(6) *Jyokisto v. Niljanund*, 8 C. 788; *Morrison v. Verchoyele*, 6 C.W.N. 429; *Sanka v. Bank of Burma* 21 M. L. J. 620; 11 I. C. 79 (and cases cited therein); *Ram Purtab v. Fooli Bai* 20 B. 767; *Raghunathji v. Bank of Bombay* 34 B. 72; *Bishambhar v. Fateh Lal*, 29 A., 176; *Jhiti Bai v. Jejniah* 18 N. L. R. 109.

exact powers of the guardian or manager of such minor's property in the following terms :—

“Ancestral trade, like other Hindu property, will descend upon the members of a Hindu undivided family ; and we think that such a family can, by its manager or its adult members acting as managers, enter into co-partnership with a stranger.

“In carrying on such a trade, infant members of the undivided family will be bound by all acts of the manager, or the adult members acting as managers, which are necessarily incident to and flowing out of the carrying on of that trade, whether it be singly or with a co-partner.

“The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade. Third parties, in the ordinary course of *bona fide* trade dealings, should not be held bound to investigate the status of the family represented by the manager whilst dealing with him on the credit of the family property.

“Were such a power not implied, property in a family trade, which is recognized by Hindu Law to be a valuable inheritance, would become practically valueless to the other members of an undivided family wherever an infant was concerned, for no one would deal with a manager, if the minor were to be at liberty on coming of age to challenge as against third parties the trade transactions which took place during his minority.

“The general benefit of the undivided family is considered by Hindu Law to be paramount to any individual interest, and the recognition of a trade, as inheritable property, renders it necessary for the general benefit of the family that the protection, which the Hindu Law generally extends to the interests of a minor, should be so far trampled upon as to bind him by acts of the family manager necessary for the carrying on and consequent preservation of that family property ; but that infringement is not to be carried beyond the actual necessity of the case.”

881. It has been however pointed in later cases that in such cases the liability of the minor must be confined to the extent of his interest in the firm and that his liability should not be extended to himself personally or to his other property unconnected with the firm. (1)

The subject will be found more fully set out in the sequel.

65. The natural guardian of a minor may enter into a contract or compromise on behalf of his ward and do all other acts which are reasonable and proper for the protection of his property and for his benefit.

Natural guardian may contract or compromise.

Synopsis.

- (1) *Powers of natural guardian* (882). *dian* (882).
 (2) *Contract or compromise by guar-* (3) *Acknowledgment of liability* (883).

882. Analogous Law.—A *de facto* or natural guardian possesses far larger powers than the legal or appointed guardian whose powers are defined by S. 27

(1) *Sanka v. Bank of Burma*, 21 M. L. J. 620 ; 11 I C. 79.

and limited by S. 29 of the Guardians and Wards Act. But for the special limitation, the two would possess the same powers. He is entitled to make any contract or compromise on behalf of his ward provided it is done in the *bona fide* interest of the ward. As was observed by Sir Richard Garth, C. J.: "It is now settled law that a Hindu widow fully represents the estate, and when the estate is pretty large it becomes necessary to enter into various contracts or transactions with third parties in the course of its management. Circumstances may be imagined where it would be manifestly unjust to hold that a particular contract which a Hindu widow found it necessary to make with a third party for the benefit of the estate was not binding upon the next heir after her death. Suppose the estate consists of sunderbund tracts in which periodical embankments are required to be constructed for their preservation. Suppose a Hindu widow in possession of such an estate engages workmen to construct an embankment on the condition of paying for the work after it was finished and suppose the death of the widow takes place just after the work was completed. It seems to me that it would be manifestly unjust to hold that the next heir succeeding to the estate would not be bound to pay for the work done out of that estate. On the other hand, cases may be supposed where it would be unjust to the next heir after the widow's death, to make him liable under a particular contract, though made by a Hindu widow in the course of the management of the estate. Suppose a Hindu widow engages a builder to make sundry improvements in the family dwelling-house while there is no necessity for such improvement, and dies after the work is finished. It seems to me that it would be unjust to hold that the next heir is liable to pay for the work done out of the estate though it is to a certain extent benefited thereby. It follows therefore, that in order to bind the next heir, it is not sufficient to show that the contract has conferred a benefit upon the estate; but it must be further established that the contract is of such a nature that a prudent owner in managing his estate would find such a contract necessary for the due preservation of the estate. A contract, therefore, which not only confers a benefit upon the estate, but is necessary for its good management, though made by a Hindu widow, is, in my opinion, binding upon the next heir after her death." (1)

883. In this view the guardian is entitled to execute a promissory note on behalf of his ward, and acknowledge any liability not barred by limitation. (2) He is also held to be the "agent duly authorized" for the purpose of S. 20 of the Limitation Act (3) but on this point the contrary has been laid down in some cases of the Calcutta (4) and Allahabad High Courts. (5)

What acts bind minor.

66. The guardian may bind the minor in the following cases :—

(1) *Hurry Mohun v. Gonesh Chunder*, 10 C. 828 (829, 830) F. B.

(2) *Sobhanadri v. Sriramulu*, 17 M. 221. *Kailasa v. Ponnukamm*, 18 M. 456. *Chinnaya v. Gurusultham*, 5 M. 169 F. B. : *Subramaniam v. Arumuga*, 26 M. 390. *Nathuram v. Shonu*, 14 B. 562. *Amrit v. Manik*, 10 B. 512 ; *Annapagauda v.*

Sangadigayappa, 26 B. 221 ; *Bati Maharemi v. Collector*, 17 A. 198

(3) *Annapagauda v. Sangadigayappa*, 26 B. 221 (234).

(4) *Chhatto, Ram v. Billo*, 26 C. 51 ; *Azuddin v. Lloyd* 13 C. L. R. 112 ; *Wajibun v. Kadir Bakh* 13 C. 292.

(5) *Tilak Singh v. Chhutta* 26 A. 598.

(1) By entering into a contract charging the minor's estate.

(2) By acknowledging his debt before it is barred by time.

Synopsis.

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| (1) <i>Right of guardian to charge the minor's estate</i> (885). | (3) <i>What are necessities</i> (887). |
| (2) <i>Power to bind minor personally for necessities</i> (886). | (4) <i>Guardian's right to acknowledge debts</i> (888). |

884. Analogous Law:—The powers of a *Karta* of a joint Mitakshara family must be distinguished from those of a guardian and of the latter, when he is a *de facto* guardian and when he is appointed by a will or by the court.

885. To a certain extent the powers of a *de facto* and a *de jure* guardian are identical. Both must, generally speaking, deal with the ward's property, as a man of ordinary prudence would deal with it if it were his own, and he may do all acts which are reasonable and proper for the realization, protection or benefit of the property ⁽¹⁾ or for the maintenance of his ward. ⁽²⁾ The guardian is entitled to borrow money on the credit of his ward's estate for any purpose binding on the minor, such as for instance, the performance of the funeral rites of his father ⁽³⁾ or to pay off his father's debts, ⁽⁴⁾ to marry and maintain the minor, to purchase jewels to be presented to the minor's wife during marriage ⁽⁵⁾ and in fact on any of the heads of what is known as legal necessity. But he cannot make his ward personally liable by a simple contract debt; nor can such debt be recovered out of his estate unless it is charged ⁽⁶⁾ except where it is incurred for the minor's necessities, or is a trade debt which is subject to a different rule. ⁽⁷⁾ A guardian of a minor cannot bind his ward's estate except by a document purporting to bind it. ⁽⁸⁾

886. Minor's necessities.—The guardian is empowered to bind the minor personally by contracts entered into for necessities of the minor or of his estate. ⁽⁹⁾ Such liability is not affected by the fact that the loans were advanced at the instance of the guardian. "His contract on his behalf might be ineffectual like one entered into by himself, but the liability to discharge debts incurred for necessities would remain. The necessity for them would determine whether or not he was bound to repay them, and not we think, the reasonable belief of the borrower that they were for necessary purposes." ⁽¹⁰⁾ Where the promise is to pay money which has been expended for necessities, the estate of the minor may be liable not on the promise but because the money had been supplied. ⁽¹¹⁾

(1) S. 27 Guardians and Wards Act (VIII) of 1890.

(2) *Nandan Singh v. Harkishen Singh*, 3 A. 535.

(3) *Nathu Ram v. Chhagan*, 14 B. 562.

(4) *Murari v. Tugana*, 20 B. 286.

(5) *Kankipati v. Racherla*, (1911) 2 M. W. N. 477.

(6) *Ranmalsingji v. Vadilal*, 20 B. 61; *Bhawal Sahu v. Baijnath*, 35 C. 320.

(7) *Bhawal Sahu v. Baijnath* 35 C. 320 (329). *Ram Partap v. Footibai* 20 B. 767. *Sakrabhai v. Maganhai* 26 B. 206 F. B.; *Raghunathji v. Bank of Bombay*, 34 B. 72; *Jivibai v. Tejmal*

13 N. L. R. 100 (110 111).

(8) *Patelu v. Vajula* 36 M. L. J. 29 F. B.; *Padma Krishna v. Nagamani* 39 M. 915; *Subramania v. Arumuga*, 26 M. 330; *Pukaram v. Ramachandra* 20 B. 767. *Surendra Nath v. Atul Chandra* 34 C. 892.

(9) Contract Act (X of 1872) S. 68; *Bhawal Sahu v. Baijnath* 35 C. 320 (328, 324).

(10) *Ranmalsingji v. Vadilal* 20 B. 61; *Juggessur v. Nilambur* 3 W. R. 217; *Bhawal Singh v. Baijnath*, 35 C. 320 (328).

(11) *Sundararaja v. Pattanathusami* 17 M. 306; *Bhawal Sahu v. Baijnath* 35 C. 320 (328).

887. The term "necessaries" must be understood with reference to Hindu Law. For instance the marriage of a sister is a "necessary" within the meaning of Hindu Law for which a minor's estate would be liable for the payment of money borrowed from another. (1) To a Hindu marriage is a prime necessity and a *samskar* (a religious sacrament) (2) the expense of which is a charge on the inheritance.

888. Guardian may acknowledge debt.—Though the guardian cannot revive a barred debt (3) he is competent to acknowledge it on behalf of his ward before it becomes time barred. (4) His authority to revive a barred debt depends upon the language of S. 25 of the Contract Act which enforces "a promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf to pay wholly or in part a debt of which the creditor might have enforced payment but for the law of limitation of suits." (5) The position then depends upon whether the guardian is the minor's agent "generally or specially authorized" to promise to pay barred debts. Even where he is the manager of a joint family, he would appear to possess no power to revive such debt. (6) A *fortiori* guardian cannot possess such power.

The guardian cannot acknowledge a debt on behalf of his ward after he is dead. (7)

67. A guardian cannot contract in the name of a ward, so as to impose on him a personal liability.

Personal contract
by guardian.

Synopsis.

(1) *Personal contract by guardian not binding on minor* (889). (2) *Charge distinguished* (890).

889. Analogous Law.—This rule is based upon a decision of the Privy Council (8) decided upon the following facts: The guardian mother on behalf of her minor son sold certain villages rent free, personally covenanting both for herself and for her minor son, to indemnify the purchaser should any one disturb the purchaser, or should the Government assess any rent on the property sold. The Government having assessed the villages to revenue and cesses, the purchaser sued the minor after he came of age upon the covenant and his defence was that his guardian could not legally enter into any covenant so as to make him at any time personally liable—a contention which the

(1) *Nandan Prasad v Ajudhia Prasad*, 32 A 325 (328) F.B.; *Vaikuntam v. Kallabhiran*, 28 M 512.

(2) *Kameswara v. Veerachari*, 34 M. 422.

(3) *Veerappa v. Muthusami*, 7 M. L. T. 388; *Subbanarayana v. Narendra*, 19 M 255

(4) S. 21 Lim. Act; *Sobhanadri v. Sri-ramulu*, 17 M. 221; *Subramania v. Arumuga*, 26 M. 390.

(5) S. 25 (3) Contract Act.

(6) *Chinnaya v. Gurunatham*, 5 M. 169 F.P.; *Naikat v. Appaji*, 20 B. 155; *Copal-*

narain v. Muddomutty, 14 B.L.R. 21. But an executor of an administrator possesses such authority—*Tilackchand v. Jitmal*, 10 B. H. C. R. 206; *Jethibai v. Pullabai*, 14 Bom L. R. 1020 (1027)

(7) *Yellappa v. Desayappa*, 80 B. 218, in which (the Nazir had acknowledged a debt after his ward was dead).

(8) *Waghela v. Sheikh Masludin*, 11 B 551 P. C.; *Tukeeran v. Ramachandra*, 2 N. L. R. 25; *Jitibai v. Tejmal*, 18 N. L. R. 109.

Privy Council upheld, holding that it was so under the English law and as there was no rule of Hindu Law, "the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law, if found applicable to Indian society and circumstances." They then added: "They conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward, and they hold that in this case the guardian exceeded her power so far as she purported to bind her ward." (1) The same principle underlay the decision in another case in which the father of a boy named Ganga had delivered his minor son to one Durga who promised to educate him and appoint him his heir. He brought him up and dying intestate, his widow contested his right to inherit and the Privy Council upheld her contention holding that there was no completed contract between Ganga and Durga, as Ganga could not make an agreement which should legally bind his son on attaining majority to remain with Durga, which was the sole consideration for Durga's promise to constitute him his heir. (2) But in such a case where a minor comes to court to have an account taken as between himself and an agent, the latter is entitled to deduct the advances made to the guardian for the benefit of the minor. (3)

890. Though the guardian cannot enter into a personal covenant on behalf of his ward, there is no law to prevent him from charging his estate. (4)

Charge distin-
guished.

68. (1) A transfer made by the guardian may be avoided by the minor, if it is wholly or partially unsupported by necessity or not for the benefit of the estate.

Transfer by guar-
dian when void-
able.

(2) Provided that in the latter case, the alienee is entitled to restitution of the money paid for such necessity or benefit.

(3) Provided further, that where the bulk of the consideration is supported by legal necessity, the court may, instead of setting aside the transfer, order payment to the transferor such consideration as is not supported by necessity or benefit.

Synopsis.

- (1) *Minor's right to avoid transfer by guardian* (891-892). *fit* (893-896).
(2) *Liability of minor to restore bene-* (3) *Limitation for suits by minor* (897-900).

891. Analogous Law.—This section deals with two classes of transfers: (a) that made without any legal necessity, and (b) that which is to some extent supported by legal necessity. In the former case the minor is entitled to avoid the sale and he is subject to no equity to refund the consideration paid to his guardian on his account. (5) In the latter case however, he is

(1) *Waghela v. Sheikh Masludin*, 11 B. 551 (556) P. C.

(2) *Lala Narain v. Lala Ramnauj*, 20 A. 209 P. C.

(3). *Surendra Nath v. Atul Chandra*, 34 C. 892 (895).

(4) S. 66 ante. *Rammalsingji Maharana v. Fadil* 20 B 61 (74).

(5) *Hunooman Persaud Panday v. Babooe*, 6 M. I. A. 398 (421); *Bunseedhur v. Bindesoree*, 10 M. I. A. 454 (474).

equitably bound to restore the benefit received by him ⁽¹⁾ which may be charged on the estate he sues to recover from the transferee. ⁽²⁾ A transfer by a certificated guardian is subject to the provisions of S. 31 of the Guardians and Wards Act. ⁽³⁾

892. Transfer by the guardian.—A transfer made by a certificated guardian is subject to the rule enacted in S. 30 of the Guardians and Wards Act, ⁽⁴⁾ which lays down that it may be set aside by any person other than the guardian if he was affected thereby. ⁽⁵⁾ As such the minor whose property was transferred may avoid the transfer on the short ground that it was made in contravention of the Act. Where, however, the minor has no certificated guardian, but is subject to a natural guardian, the latter may transfer his property on any ground which under the law to which the minor is subject would bind his interest.

893. Restitution.—In either case where the transfer is set aside, the question arises and is covered by S. 41 of the Specific Relief Act ⁽⁶⁾ which enacts that “on adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require.”

894. The question then is what is the requirement of justice in such a case of cancellation. Now, a consideration for a sale may (a)—be wholly paid, or (b)—partially paid, the balance being payable and not paid; (c)—it may be paid for necessity which is not proved; (d)—or is only partially proved; and lastly (e)—it may be paid by a transferee *bona fide* after due enquiry being satisfied that it was necessary, though in fact, it was not necessary.

895. In cases (a) and (b) where the whole or part of the consideration has been paid and the transfer is set aside, there can be no question of restitution if no part of the consideration was supported by necessity and there was no inquiry as mentioned in case (e). There is then no equity, since the transfer is wholly void and the transferee has to thank himself if he loses both the property and his money too; for he knew that he was merely dealing with a guardian and it was his duty to inquire into the necessity of the transfer. If, however, he did inquire and paid the money *bona fide* being satisfied that the transfer was necessary, then the equitable rule enacted in S. 38 of the Transfer of Property Act ⁽⁷⁾ would come into play and even if there was no necessity the court might still uphold his transfer. ⁽⁸⁾ But assuming that there was no inquiry and no necessity justifying the transfer to its full extent, then the court may or may not cancel the transfer. If for instance, the bulk of the consideration was utilized for purposes binding on the minor, the court would not cancel the transfer, though it will decree the sum paid otherwise than for legal necessity. Such was held to be the case where out of the consideration of Rs. 1,300 necessity was proved to the extent of Rs. 1,022. ⁽⁹⁾

(1) S. 41, Specific Relief Act (1 of 1877); *Bunseedhur v Bindesree*, 10 M. L. A. 454 (474).

(2) *Bukshun v. Doolhin*, 12 W. R. 337; *Pranchandra v. Karunamay*, 15 W. R. 268; *Kesar (Bai) v. Ganga*, 8 B. H. C. R. (Ac) 81; *Mirga Pana v. Saad Sadik*, 7 N. W. P. H. C. R. 201; *Kuvarji v. Moti*, 3 B. 234; *Dallaram v. Vinayak*, 28 B. 181 (192); *Srinaya v. Munisami*, 22 M. 289; *Jagar Nath v. Lalla Prasad* 31 A. 221 (227).

(3) VIII of 1890: *Tejpal v. Ganga*, 25 A.

59; *Giriraj v. Kazi Hamid Ali*, 9 A. 840; *Nizamuddin v. Anandi Prasad*, 18 A. 378 (375).

(4) VIII of 1890

(5) *Dallaram v. Gangaram*, 28 B. 287 (290).

(6) 1 of 1877.

(7) IV of 1882

(8) See Gour's Law of Transfer (4th Ed.).

(9) *Thalagara v. Thalagara*, 27 M. L. J. 132; 26 I. C. 178.

But where out of the total consideration of Rs. 1,425 only a little more than a moiety was paid for necessity and the purchaser has given the vendor a promissory note for Rs. 525 and Rs. 138 were not proved to have been spent on a purpose binding on the minor's estate, the court set aside the whole sale conditional on the plaintiff paying to the vendee Rs. 762. ⁽¹⁾ In decreeing restitution the court may award interest at a reasonable rate. ⁽²⁾

896. This is, of course, an equitable relief which the transferee may forfeit unless he had acted *bona fide*. ⁽³⁾ If he had colluded with the guardian or purchased the minor's estate at an undervalue the court will refuse him the benefit of restitution. On the other hand, he need make no inquiry at all where the money is paid by him for a transfer duly sanctioned by the District Judge under S. 29 of the Guardians and Wards Act, ⁽⁴⁾ or which is otherwise proved to have been justified by necessity. Where a transfer does not affect the minor's interest, the latter cannot be heard to complain on the ground that it was made with reference to his property. So where the guardian mortgaged his property to the defendant and then sold the equity of redemption to the plaintiff who sued to redeem the prior mortgage, the court held that the minor could not complain of the sale to the plaintiff as not being for his benefit as his interest was not concerned. ⁽⁵⁾ But this case does not appear to have been correctly decided, for the sale of the equity of redemption was the sale of the minor's property in which the minor was certainly concerned and the propriety of which he was entitled to challenge.

897. Limitation.—The question of limitation applicable to a minor suing to set aside a transfer made by his guardian is governed by Art. 44 or Art. 91 of the Limitation Act ⁽⁶⁾ which allows him 3 years from the date the ward attains majority. The applicability of the shorter period limitation prescribed in Art. 44 depends upon what is meant by the word "guardian" and upon the nature of the transfer made by him, that is, whether it is voidable or void, for if it is the latter then the transfer being a nullity there is no necessity to avoid it ⁽⁷⁾ but since the possession of the transferee would in such a case be adverse, the minor must sue to set it aside within the ordinary period prescribed in Art. 144 enlarged to the extent allowed in S. 6. Now since a guardian is entitled to alienate his ward's property only in the case of necessity or when it is for the minor's benefit it follows that this must again depend upon the personal law of the party to whom that provision is applied. In the case of a Mahomedan where the elder brother of a minor devisee mortgaged his property and it was found that the brother was not authorized either by the will or by the Mahomedan Law to act as a guardian of the minor, the Privy Council held the mortgage a nullity and one which the minor was not bound to set aside within the period provided in Art. 44. ⁽⁸⁾ This article would be obviously inapplicable, and if so, the only

(1) *Rukmani v. Muthammal*, (1915) M.W. N. 8; 26 I. C. 489; *Kaliapa v. Devayyamani* (1918) M. W. N. 795; 18 I. C. 27.

(2) *Nur Baksh v. Rukum Singh*, 8 A. L.J. 764; 11 I. C. 764; *Muhamad Ismail v. Gaur Parshad*, (1916) P. R. 24; *Manashram v. Ahmed Hoosein*, 20 C. W. N. 68; 37 I. C. 880.

(3) *Sultan Singh v. Hashmat*, (1915) P. R. 109; 29 I. C. 801.

(4) *Akhil Chandra v. Girish Chandra*, 21 C. W. N. 864; 41 I. C. 802.

(5) *Vithoba v. Sakharan*, 4 C.P.L.R. 128.

(6) IX of 1908.

(7) *Hannoman Persaud v. Babooee*, 6 M. I. A. 393; *Mata Din v. Sheikh Ahmad*, 34 A. 213 P. C.

(8) *Sarder Shah v. Haji*, (1903) P. L. R. 182; *Mata Din v. Sheikh Ahmad*, 34 A. 213 P. C.; *Imcbandi v. Mutasuddi* 23 C. W. N. 50 (63) P. C.; *Surdurkab v. Haji* (1908) P. L. R. 182; *Rajalali v. Wajirali* 34 I. C. (P.) 35; 1 Pat. L. J. 183.

other article applicable would be Art. 144. There would be a varying period of limitation even in the case of a Hindu according as the transfer is wholly or partially unsupported by legal necessity since in the former case the guardian being wholly incompetent to convey his ward's estate, the transfer would be void and not voidable merely, as in the other case where it is only partially unsupported by legal necessity.

898. Again where such guardian is also a co-parcenary manager, the same question may assume a greater importance. But these distinctions would be immaterial if regard is had to the fact that a transfer however made for a minor is only voidable at his instance on proof of certain facts without which it is good as much against the minor as against a third party. As such, he must sue for its cancellation within the time prescribed by Art. 44.

899. But though this view is supported by the preponderance of cases, (1) there are also cases (2) which support the longer limitation prescribed in Art. 144. But it is clear that the authority of a guardian is more limited than of a *karta* or manager of a joint Mitakshara family, but since they have both the same right of alienation, the question of limitation does not depend upon the distinction that exists between a manager and any other guardian. But of course, a transfer purported to be made by one who professes to be a guardian but is neither a *de facto* nor a *de jure* guardian would necessarily be a nullity and the minor is not bound to set it aside before recovering possession of his property. (3) Such would be the case where the alienation is made by a co-parcener who is not the manager. (4) The question of limitation may be considered from the following standpoints:—(a) Where the transfer is made by a relation such as a co-parcener but who is not a *karta* of the family or guardian of the minor; (b) where the transfer is made by a *de facto* guardian authorized to transfer for necessity but transferred in fact without any necessity; (c) where such transfer is made not by the guardian but by the manager of a co-parcenary of which the minor was at the time a member; and (d) where it is made by either the *karta* or the guardian for partial necessity.

900. In case (a) it is now settled by the Privy Council that the transfer is a nullity and the minor, is therefore, not bound to cancel it either under Art. 44 or Art. 91 and that his suit is subject to the ordinary limitation prescribed in Art. 144 enlarged to the extent provided in S. 6. (5) But the courts are not agreed as to the limitation applicable in the other cases. In case (b) it has been held in some cases that the transfer is equally void, and that therefore, it

(1) *Satish Chandra v. Chunder Kant*, 3 C. W. N. 278; *Shama Chandra v. Gadadhar*, 13 C. L. J. 277; *Krishna Dhoni v. Bhagwan*, 34 I. C. (C.) 188; *Ramansar v. Raghubar*, 5 A. 490; *Tejpal v. Ganga*, 25 A. 59; *Sinaya Pillai v. Munisami*, 22 M. 289; *Hazari v. Lallu*, 7 O.C. 181; *Ranga Kaddi v. Narayana*, 28 M. 428; *Murari v. Toyana*, 10 B. 286.

(2) *Kamakshi v. Ramasami*, 7 M. L. J. 131 dissented from in *Sivavadevelu v. Ponammal*, 22 M. L. J. 101; 15 I. C. 865; *Velayudham v. Perumal*, 15 I. C. (M.) 811; *Basaruth Ali*, 25 A. 909; *Abdul Rahman v.*

Sukhlalal, 32 A. 392; *Unikuneri*, 14 M. 16; *Kalyan Singh v. Pitambar*, 18 A. L. J. 94; *Asaram v. Ratan Singh*, 12 N. L. R. 12; *Husen v. Rajanm*, 10 N. L. R. 183.

(3) *Mata Din v. Sheikh Ahmad* 34 A. 213 P. C.

(4) *Banwarilal v. Daya Sunker*, 18 C. W. N. 815.

(5) *Mata Din v. Sheikh Ahmad*, 34 A. 213 P. C.; *Banwarilal v. Daya Sunker*, 18 C. W. N., 815; *Sardar Shah v. Haji* (1908) P. L. R. 182; *Rejob Ali v. Wazir Ali*, 34 I. C. (P) 85; 1 Pat. L. J. 188.

need not be set aside, ⁽¹⁾ whereas it has been held in others that the transfer is in every case good till it is avoided by the minor and that therefore it is voidable and not void and as such the minor is, as regards limitation, subject to Art 44 or Art. 91. ⁽²⁾ It must be confessed that in some of these cases ⁽³⁾ the distinction between the unauthorized transfer of a guardian and the transfer of an unauthorized guardian was not kept in view, but it is a distinction which cannot be ignored. Nor is the distinction between a mere guardian and a *karta* on this point immaterial. ⁽⁴⁾ As regards case (d) the courts are agreed on the shorter limitation on the ground that since the authority to transfer depends on necessity or benefit, its insufficiency may make the transfer voidable, being improper but it cannot render it altogether null and void *ab initio*.

69. A guardian cannot bind his ward
 Guardian must act as such. by an act not purported to be done on his behalf.

Synopsis.

(1) *Guardian's acts binding on minor only when he acts as such* (901-902).

901. Analogous Law.—This rule is founded on the principle that a guardian cannot be permitted to act on his own account with the chance of transferring his obligations to the minor if he finds it to his advantage. ⁽⁵⁾ Such was the case of the mother who had taken a lease which she surrendered during the minority of her adopted son against whom the lessor sued for its rent. It did not appear that the mother had taken the lease *qua* guardian of her minor son. The suit against the son was launched on the ground that he had ratified it on coming of age which could not be proved. The Privy Council held that the plaintiff could not bind the minor on the ground that he had taken the lease through his mother because the mother's *Kabuliyat* did not purport to be on his behalf or to bind his estate. ⁽⁶⁾ The fact his estate had had benefited by the transaction is immaterial, for, as observed by the Privy Council: "It is not in every case in which a man has been benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay." ⁽⁷⁾ But the principle of this case only applies to cases where it is doubtful in which capacity the guardian had purported to act. Where, therefore, the guardian had no estate of his own, the Court held that the conveyance could not be impeached on the ground that the guardian had omitted to mention that he was acting for his ward. ⁽⁸⁾

(1) *Kamakhshi v. Ramasami*, 7 M. L. J. 131; *Umri v. Kunchi*, 14 M. 26; *Ramansar v. Raghubar*, 5 A. 490; *Lal Hurro Prasad v. Dasaruth*, 25 A. 909; *Abdul Rehman v. Sukh Dayal*, 28 A. 30 (32); *Bachchan Singh v. Kamta Prasad*, 32 A. 392; *Kalyansingh v. Pitambar*, 13 A. L. J. 94; *Shree Shankar v. Ram Shewari*, 21 C. 77 (Art 91 inapplicable); *Balappa v. Chonbasappa*, 17 Bom. L. R. 1134; *Husen v. Rajaram*, 10 N. L. R. 133; *Asoram v. Ratansingh*, 12 N. L. R. 12; *Thayammal v. Kuppanna*, 38 M. 1125.

(2) *Batish Chunder v. Chunder Kant* 3 O.W.N. 278; *Shama Chandra v. Gadadhar*, 18 C. L. J. 277; *Krishna Dhoni v. Bhagawan*

34 I C (C) 188; *Ranga Reddi v. Narayana*, 28 M. 1811.

(3) *Thayammal v. Kuppanna*, 38 M. 1125 (1126).

(4) *Mahableshwar v. Ramchandra*, 38 B. 98.

(5) *Indur Chunder v. Radha Kishore*, 19 C. 507 (513), P. C.

(6) *Ib.* p. 512, 513; To the same effect *Gadgappa v. Apaji*, 3 B. 237 (240).

(7) *Ram Tutrel Singh v. Bisessar*, 23 W. R. 305 cited and applied in *Gadgappa v. Apaji*, 3 B. 237 (240); *Babur Ali v. Sookea*, 13 W. R. 68.

(8) *Murari v. Tayana*, 20 B. 286; *Ghasi Ram v. Binia*, 1 N. L. R. 66.

But the contrary has been laid down in other cases in which it has been laid down as established law that a guardian cannot bind his ward's estate except by a document purporting to bind it. (1) If therefore the bond was executed by the guardian in his own name, and it was sought to prove that it had been executed for the minor, the court held that it was not open to it to go behind the terms of the bond for the purpose of construing it: "In our opinion, when a third person enters into dealings with the guardian of a minor, and advances money for necessities of the minor or for the benefit of the estate and takes a bond for the debt from the guardian, the responsibility rests on him to take care that the bond is so drawn as to render the estate of the minor in law liable for the debt." (2)

902. The rule must then be merely confined to cases of uncertainty and not to those of defective conveyancing.

Minor's privilege is personal.

70. A transaction entered into with a minor is only voidable at the option of the minor.

Synopsis.

(1) *Minority, a personal privilege* (903). (2) *Minor's fraud* (904).

903. Analogous Law.—It has been held that minority is a personal privilege and no one dealing with a minor can object to a transaction on the ground of his incompetency except the minor himself. (3) So where the minor conveyed his property to the plaintiff after which the minor died and was succeeded to by his father as his heir, the plaintiff sued for a declaration of his title against the father who pleaded the invalidity of his sale on the ground of the minority of his son but the court held the plea was one open only to the minor and could not be availed of by his heir. (4) Where the guardian enters into a contract prejudicial to a minor, the latter is entitled to sue him through his next friend. (5)

904. The question whether a minor is precluded from obtaining relief on a contract induced by him by a fraudulent statement that he was of age, is one which has often been agitated in the courts of this country with varying results. In some cases it was held that the minor was estopped under S. 115 of the Evidence Act (6) while in others there was held to be no estoppel, the word "person" in S. 115 of the Evidence Act being construed to refer to one *sui juris* and not to a mere minor. This view has now been affirmed by the Privy Council in a Colonial appeal from Penang, when their Lordships adopted the rule laid down by the King's Bench in a case to which they referred for their guiding principle. (7) In the English case the plaintiff a money-lender had sued a minor for recovery of £400 and £75 for interest on the ground that the defendant had contracted the loan by fraudulently representing himself to be of full age at the time. In dismissing the claim Lord Sumner passed in review the entire case law on

(1) *Rattmalsingji v. Vadilal*, 20 B. 61; *Bhawal Sahu v. Baijnath* 85 C. 320 (329).

(2) *Bhawal Sahu v. Baijnath*, 35 C. 320 (329).

(3) *Hari Ram v. Jilam Ram*, 3 B. L. R. (Ac) 426; *Sashi Bhushan v. Jadu Nath*, 11 C. 552; *Mahamed Arif v. Saraswati Debbya* 18 C. 256.

(4) *Mahamed Arif v. Saraswati*, 18 C. 259;

Vithoba v. Sakaram, 4 C. P. L. R. 128; *Contra Deelchand v. Chandkhan*, 11 N. L. R. 1 (8).

(5) *Abdulla v. Ramdas*, 2 N. L. R. 146.

(6) 1 of 1872.

(7) *Leslie Ltd v. Sheill*, (1914) 3 K. B. 607 followed in *Mahomed v. Yeoh*, 21 C.W. N. 257 (265) P. C., 39 I.C. 401; 43 I. A. 256 P. C.

the subject the result of which may be thus stated : (i) that where a minor has by a fraudulent mis-statement of his age induced another to lend him money the court cannot order its recovery on the ground of fraud since the rule as to infant's immunity was made to safeguard the weakness of infants at large, even though here and there a juvenile knave skipped through ; (ii) that nevertheless wherever it is possible to order restitution the court will strive to effect it ; where, for instance, the money can be traced to the possession of the minor, the court will order its return ; (iii) and that apart from restitution, it cannot decree the claim *ex contractu* either on the ground of estoppel or fraud or otherwise overwhelming equity destroying the privilege of infancy. (1)

71. (1) A minor is bound by the result of a suit to which he was a party, if he was properly represented therein.

Minor's liability under decree.

(2) Provided that if any decree be passed on a compromise, such compromise must be sanctioned by the court.

(3) Provided further that no decree obtained by consent has any effect against the minor unless it was consented to by his natural or certificated guardians.

(4) But no decree so obtained has any effect against him if it was secured by the fraud or misconduct of such guardian.

Synopsis.

(1) *Minor's liability under decree on minor* (906).

(905).

(3) *Fraud or misconduct of guardian*

(2) *Compromise decree when binding* (907).

905. Analogous Law.—A suit may be instituted by a minor through his

Cl. (1). next friend. It is not necessary that he should sue only

through his guardian though it is the ordinary rule. (2)

Where he is a defendant it is cast on the plaintiff to sue him through a guardian who must be appointed for that purpose by the court. (3) Ordinarily it will appoint a certificated guardian (4) and in his absence the natural guardian (5) and failing him, any other person fit and willing to act as his guardian. Such person is designated the guardian *ad litem* and is then, for the conduct of the suit, subject to the provisions of O. 32 of the Code of Civil Procedure ; and the directions of the judge as therein stated. A suit relating to the estate or person of a minor, and for his benefit has the effect of making him a ward of court, and no act can be done affecting the property of the minor unless under the express or implied direction of the court itself. (6)

The decree passed against the minor is subject to the provisions of that order final and as binding upon him as if he were adult.

906. No guardian *ad litem* can compromise a suit without the leave of the court (7) expressly recorded in the proceedings. (8) "Any

Cl. 2 and 3.

such agreement or compromise entered into without the leave of the court so recorded shall be voidable against

(1) *Leslie Ltd. v. Sheill*, [1914] 8 K.B. 607. M. 377 (378).

(2) O. 32 R. 4 (2) C. P. C.

(7) O. 32 R. 6 (1).

(3) *Ib.*, O. 32, R. 3.

(4) *Ib.*, O. 32 R. 3.

(5) *Ib.*, O. 32 R. 3 (4) and 4 (2).

(6) *Karamali v. Rahimbiroy*, 18 B. 187

followed in *Doraswami v. Thungasamy*, 27

(8) O. 32 R. 7 ; as to which see *Pray Das v. Girdhar Das*, 28 A. 35 ; *Lakshmasia v. Chinnathambi*, 24 M. 326 ; *Atmaram v. Bhila*, 15 Bom. L. R. 228 ; 19 I. C. 424.

all parties other than the minor." (1) These provisions are embodied in clauses 2 and 3.

907 Clause (4) is based on the general principle of law which protects minors and other disqualified persons against the fraud or misconduct of their guardians. (2) But this rule should not be extended to guardians who are also managers of a joint Mitakshara family in which the minor has no separate interest. In such a case the fact that he is joined as a necessary party does not entitle him to open a decree obtained against the joint family unless there was anything to show that the other members had colluded to defraud him. (3)

The effect of a suit on the rights of a minor not properly represented belongs to the domain of general law to which reference should be made for further information.

72. A guardian of the minor's person has the right to the custody of his ward during the period of his guardianship.

Right to custody.

Synopsis.

(1) *Guardian's right to the custody of his ward* (908). (2) *Procedure for recovering custody* (909).

908. Analogous Law.—This is in accordance with S. 24 of the Guardians and Wards Act which enacts as follows:—

A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires

The next section empowers the court to restore the guardian's custody, enforcing it, if necessary, by arrest of the ward and delivery to his guardian.

909. Apart from the Act the natural guardian is entitled to the custody of his ward. (4) The Act has merely transferred to the court general powers to be exercised for the protection of the welfare and well-being of children. (5) Even apart from the Act, the High Court in its equitable jurisdiction, has authority to interfere with the legal right of the guardian, even if he is the father, if he be an improper person. (6) No regular suit lies for the custody of a minor, the only remedy being by an application under the Guardians and Wards Act, which was intended by the legislature to be a complete code defining the rights and remedies of guardians and wards. The father is therefore, not entitled to sue as guardian of the infant child, detained by the defendant who is the maternal grandmother of the child. (7) In an application under the Acts the court has to decide the position of custody with reference to the welfare of the minor irrespective of its age. "The practice in such cases is that if the children be of a proper age, the court gives them their election as to the custody in which they will be; if not, the court takes care that they be delivered into proper custody." (8)

(1) O 32, R. 7 (2).

(2) *Ram Antar v. Mumtaz Ali*, 24 C. 853 P. C.; *Rameswar v. Ram Bahadur*, 34 C. 70 P. C.

(3) *Rameswar v. Ram Bahadur*, 34 C. 70 P. C.; *Daya Shankar v. Habbal*, 37 A. 105; *Madari v. Har Dayal*, 13 O. C. 158; 7 I. C. 538; *Anarpal Singh v. Chhabraj* 11 I. C. (O). 105; *Ajudika v. Mahabir*, 22 I. C. (O) 923.

(4) *Holmes In re* 1 Hyde. 99; *Carran*

In re 1 Hyde. 143.

(5) *Joshy Assam In re* 23 C. 290.

(6) *Carran In re* 1 Hyde. 143; *Bhikus Koer v. Chamela*, 2 C. W. N. 191.

(7) *Sham Lal v. Bindu*, 26 A. 594; *Ghasila v. Mazria*, (1896) P. R. 41 F. B.

(8) *K v. Grenville* 4 A. and E. 624 (1839-642); *Sathuri In re* 16 B. 307 (cases reviewed).

CHAPTER VII.

LAW OF MAINTENANCE

910. Topical Introduction.—The law of maintenance is not based on any contract but is evolved out of the right in property to which a person was *prima facie* entitled, but which he became disqualified from sharing, by reason of the nature of the estate or his own disqualification whether personal or sexual. Being thus excluded from participation in the estate, law afforded him the solatium of maintenance. The right of maintenance is thus not dependent on near relationship but on the existence in the hands of the heir of property upon which all dependent members of a joint family lay a claim. (1) Even where there is no joint family the law of necessity enjoins on a certain person by reason of his jural relationship to another, the duty of maintaining him. Such is the duty of the husband and the father. It is the duty of the State to protect its infant population and that duty tics upon those who are primarily responsible for bringing them into existence. This is the underlying principle of S. 438 of the Code of Criminal Procedure. Apart from that enactment, Hindu Law recognizes the necessity of maintenance founded upon the dictates of natural justice, sometimes supported by the theory of co-ownership, (2) personal identity, (3) moral duty, (4) or relationship, but in all cases it is ultimately traceable to the original fount of *jus natural* which the wisdom and experience of mankind has taught to be best for the community and the underlying principles of which are visible in the frame work of the jurisprudence of every nation.

911. The close connection of maintenance with the law of person and property is everywhere visible in Hindu Law. In the second stage of social evolution when the patriarchal family became transformed into a joint family, the growth of individual rights developed and altered the early notions of property. As it became divisible, it was seen that an equal division was not possible, both because the rights of all members were not equal as also because some members were not equal, and also because some members by reason of their sex or deformity had not the same claim as others who contributed to the wealth and strength of the joint family. Subordinate rights became thus recognized which in some cases naturally took the shape of maintenance grants either as a substitute or as a solatium for the greater right in property. But being still a right which was intimately allied to the right of property, it became spoken of as a charge thereupon. But as legal concepts became more defined, it was perceived that a right might be closely connected with land and

(1) *Ramabai v. Trimbeck*, 9 B. H. C. R. 288; *Savitri Bai v. Luzam Bai*, 2 B. 573; *Apaji v. Gangabai*, *ib* p. 682; *Gopikabai v. Dattatray*, 24 B. 386 (392, 393)

(2) *Jamna v. Machul Salu*, 2 A. 213.

(817).

(3) *Srenath v. Probodh Chunder*, 11 C. L. J. 580; 6 I. C. 244

(4) *Sidessury v. Janardhan*, 29 C. 557.

yet separate from it. Such is the history of all debts which at one time were regarded as charged both on the debtor and his land till their relation to him and his land became more defined. As such, maintenance was so regarded at one time. But it was then perceived that it did not possess even the certainty of a debt; till its amount was ascertained and fixed, it was not even a debt. But even in the abstract, a claim for maintenance is no more a charge on property than the expenses of marriage, or other religious ceremonies. Debts due by a deceased person stand higher than other claims upon his estate, and yet debts are no charge upon specific property unless expressly made so by bond or by a decree. (1) Nevertheless being a right obtained in lieu of a right in property it was an appropriate subject of a charge, and one which bears some relation to the property. In the case of the wife, Yajnavalkya fixed one-third of the husband's estate as an appropriate solatium to a deserted wife by way of maintenance, (2) but as will be seen presently that such rigid necessity was fixed without regard being had to demands of other claimants upon it. The law of maintenance is consequently almost wholly the law of leading principles deducible from the decided cases and these will now be set out.

Personal obligation to maintain certain relations.

73. A person is personally bound to maintain the following persons :—

- (a) his minor sons, whether legitimate or illegitimate ;
- (b) his unmarried daughters ;
- (c) his wife so long as she is chaste and remains under his roof and protection ;
- (d) his aged father and mother.

Synopsis.

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|---|--|
| (1) <i>Personal obligation to maintain certain relations</i> (912). | (8) <i>Sister</i> (921). |
| (2) <i>Wife</i> (913-914). | (9) <i>Chela</i> (922). |
| (3) <i>Concubine</i> (915). | (10) <i>Son's widow and grandchildren</i> (923). |
| (4) <i>Legitimate son</i> (916). | (11) <i>Step-son and step-mother</i> (924). |
| (5) <i>Illegitimate son</i> (917-918). | (12) <i>Son-in-law</i> (925). |
| (6) <i>Parents</i> (919). | (13) <i>Brother</i> (926). |
| (7) <i>Daughter</i> (920). | (14) <i>Adopted son</i> (927). |

912. Analogous Law.—The law of maintenance has been developed from the following scanty texts :—

Texts. **Manu** :—" Let the father alone support his sons ; and the first born his younger brother ; and let them behave to the eldest, according to law as children behave to their father". (3)

9. " He who bestows gifts on strangers, with a view to wordly fame, while he suffers his family to live in distress, though he has power to support them, touches lips in the honey, but swallows poison ; such virtue is counterfeit "

10 " Even what he does for the sake of his future spiritual body to the injury of those whom he is bound to maintain, shall bring him ultimate misery both in this life and in the next " (4)

201 " Eunuchs and outcasts, persons born blind or deaf, madmen, idiots, the dumb, and such as have lost the use of a limb are excluded from a share of the heritage."

(1) *Beer Chunder v. Raj Coomar*, 9 C. XX (Mandlik) p. 158.

585 (555).

(3) *Manu* IX-108.

(2) *Ch. 1-76 (Mandlik) p. 171 ; Mayukh*

(4) *Ib. XI-9, 10.*

202 " But it is just, that the heir who knows his duty, should give all of them food and raiment for life without stint according to the best of his power: he who gives them nothing sinks assuredly to a region of punishment." (1)

189. " The same ceremony (of penance) must be performed even of women degraded, for whom clothes, dressed rice and water must be provided, and they must dwell in a hut near the family house." (2)

Digest :—" Another : a father, a wife and a son shall not be forsaken: he who forsakes either of them unless guilty of a deadly sin, shall pay 600 *panas* to the king." (3)

" Manu declared that a mother and a father in their old age, a virtuous wife and an infant son, must be maintained even though doing a hundred times that which ought not to be done." (4)

Narad :—" If among several brothers one childless should die or become a religious ascetic, the others shall divide his property excepting the *stridhan*.

They shall make a provision for his women till they die, in case they remain faithful to the bed of his husband. Should the women not remain chaste, they must cut off that allowance." (5)

913. The wife's right to maintenance belongs to the law relating to husband and wife and has been already set out in that connexion (§ 20). Ordinarily she is entitled to maintenance as she is liable to live with and under the protection of her husband. If she abandons him without any just cause, such as habitual cruelty endangering her personal safety, then she would be entitled even to a separate maintenance. (6) But an occasional outburst of temper or assault does not justify her in deserting her husband. The fact that the husband had married another wife is no ground for leaving him : (7) still less will she be justified in leaving him to live in adultery. (8) On the other hand if she lives with her husband she is entitled to maintenance even though she be unchaste. (9) If a wife after leaving her husband without just cause is willing to return to live with him but he declines to receive her, he must allow her a separate maintenance so long as she is willing and he is not. (10)

914. The question how far her right is conditional and contingent upon her chastity has been already considered (§ 515). At any rate, a wife is not entitled to sue for maintenance from her husband, if at the time of the suit she is living in adultery and persists in that vicious course. (11) But this was a case in which the wife had not given birth to an illegitimate child but was actually living in adultery at the time of her suit. If, however, she had withdrawn from her vicious course when she sued, then she could not be deprived of maintenance on the ground of her unchastity. (12)

915. According to Hindu Law a man is under no legal obligation to maintain his concubine, however long might have been the concubinage. (13) The concubine has no legal right to maintenance because she is under no legal duty to her paramour. She lives with him so long as she likes, and she is at any time free to leave him. (14) She cannot urge that she was willing to live with her

(1) *Ib.* IX-201, 202

(2) *Ib.* XI-189.

(3) Manu VIII 89.

(4) 8 Dig. B.k. V.Ch. VI, p 400 cited and followed in *Savitri Bai v. Luxmi Bai*, 2 B 592 (597)

(5) Narad XIII-25, 26; 83 S.B.E pp. 195, 196.

(6) *Kullyanessuree v. Dwaraka Nath*, 6 W. R. 115; *Sita Nath v. Hambully*, 24 W. R. 877; *Matangini v. Jayendra*, 19 C. 34 :

Sidlingapa v. Sudava, 2 B. 634.

(7) *Virasvami v. Appasami*, 1 M.H.C.R 375

(8) *Illata v. Illata*, 1 M.H.C.R 372

(9) *Parani v. Mahadevi*, 34 B. 278

(10) *Yeshodabar v. Lal Talabashet*, (1886) B. P. J. 281

(11) *Debi v. Daulata*, 39 A. 234 following *Subhagya v. Bhavani* 24 I.C. 390.

(12) *Subhagya v. Bhavani*, 24 I.C. 390.

(13) *Ramanarazu v. Buchamma* 23 M. 282.

(14) *Ningareddi v. Lakshmana*, 26 B. 163.

paramour but the latter drove her out or that she had to leave his house because he was keeping other mistresses. (1) Even the fact that she has given birth to a son by him does not improve her right to maintenance. (2) But though this is the law as between her and her paramour, on the latter's death a concubine acquires a right of maintenance out of his estate if she had continued faithful to him till his death. (3)

916. The right of a legitimate son to maintenance during his minority against his father is both provided in S. 438 of the Criminal Procedure Code, and is also supported by Hindu Law. (4) But upon attaining his majority the son cannot enforce this right against his father's self-acquired property (5) though he can do so against his father's ancestral estate. (6) Where the son has the right of maintenance, it is not forfeited by reason of his disobedience or refusal to live with his father. It may be a good ground for reducing the amount to the minimum but it is no ground for discontinuing it altogether. (7)

917. Similarly, the right of an illegitimate son to maintenance against his natural father is now equally recognized by S. 488 of the Code of Criminal Procedure as it is supported by Hindu Law (8) and is settled by the Privy Council. (9) This right exists whether the father belongs to a regenerate caste or is a Shudra, though in the latter case the son is even entitled to inheritance. (10) The right to maintenance is not altered because the illegitimate son is by an adulterous intercourse (11) or was begotten on a female slave or on a concubine. (12) Under the Mitakshara law his right is lifelong in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. (13) But it is conditional upon his obedience to the head of the family. "If he be docile", says Vajnaneshwar (14) — "provided he be not disobedient" — says Mitra Misra. Quoting these texts, the Allahabad High Court said: "Obedience to the head of the family, not the age of the illegitimate descendant, or his capacity to earn his own livelihood, is the test by which under Hindu Law, the continuance of the right to receive maintenance must be decided. Till the illegitimate sons reach full age, this test cannot be applied; but thereafter it cannot be ignored — what constitutes docility or disobedience in the sense of the texts, is a question the answer to which is not easy. We think that on attaining full age, the respondents must as a condition of receiving maintenance from the estate of Manji Lal, render to the head of the family such reasonable service as is

(1) *Ramlasangi v Gangabai*, (1886) B. P. J. 22.

(2) *Sikki v Venkatasam*, 8 M. H. C. R. 144.

(3) *Ningareddi v Lakshmana* 26 B. 163; *Yashwantrav v Kashi Bai*, 12 B. 6; *Panchapakesa v Kanaka*, 33 M. L. J. 455, 42 I.C. 344.

(4) *Manu* IX 108.

(5) *Amma Kannu v. Appu* 11 M. 91.

(6) *Sardul Singh v Partab Singh*, (1877) P. R. 46; *Futtich Singh v. Shere Singh*, (1868) P. R. 84; *contra Budawa v. Gurdit Singh*, (1870) P. R. 65.

(7) *Sardul Singh v Partab Singh*, (1877) P. R. 46.

(8) *Sakharan v. Rani*, 1 B. H. C. R. 191;

Muthusamy v Venkatasubha 2 M. H. C. R. 298.

(9) *Choturya v Sahab Purhulad Syn*, 7. M. I. A. 13; *Parichat v. Zalim Singh*, 3 C. 214; *Roshun Singh v Bahwan Singh*, 21 A. 191 P. C.

(10) *Panday v. Pali*, 1 M. H. C. R. 478 affirmed O. A.; *Inderan v. Ramaswamy*, 13 M. I. A. 141.

(11) *Sulramanya v. Velu*, 20 M. L. J. 850; 5 J. C. 915; *Kuppa v. Singaravelu*, 8 M. 825; *Virararamurthi v. Singaravelu*, 1 M. 306.

(12) *Rahi v Govind*, 1 B. 97; *Sarusuti v. Manu*, 2 A. 184 (186); *Hargobind v. Dharamsingh*, 6 A. 329 (322, 333) where the texts are cited.

(13) *Anantikaya v. Vishnu* 17 M. 160.

(14) *Mitakshara* Ch. 1-11, 12

ordinarily rendered by cadets of a family in that station of life to which the parties belong.”⁽¹⁾ This is a personal right and cannot be devised or inherited.⁽²⁾

918. The Criminal Procedure Code makes no distinction between the **Son by a non-Hindu woman.** illegitimate son of a Hindu mother and one born of a non-Hindu mother but a claim made under that code must conform to its provisions and is limited as to the amount therein specified. But apart from the code, the illegitimate son of a Hindu father and a non-Hindu mother has no right to maintenance. Such has been the view of the court in a case where the son was born of a Mahomedan⁽³⁾ or a Christian concubine.⁽⁴⁾

919. Though an adopted son has the same right of maintenance as a **Adopted son.** legitimate son, no such right can be claimed if the adoption is found to be invalid. As pointed out by Sir Michael Westropp, C. J. “An invalid adoption works nothing. It leaves the alleged adoptee precisely in the same position which he occupied before the ceremony, no matter how formally it may have been celebrated”.⁽⁵⁾

920. The liability to maintain one's parents is clear both from the text already cited⁽⁶⁾ as also the decided cases⁽⁷⁾ and is **Parents.** independent of inherited assets.

921. The unmarried daughter has a legal claim to be maintained by her **Daughter.** father or out of his estate⁽⁸⁾ but an illegitimate daughter though possessing a legal claim against the father has no such claim to maintenance out of his estate.⁽⁹⁾

922. An unmarried and widowed destitute sister must be maintained **Sister.** by the heir or out of the assets of the joint family. Even where the sister is a discarded wife, old and infirm, she has the same claim for maintenance as a widowed sister.⁽¹⁰⁾

923. The chela who possesses the status of a son has, on the analogy of **Chela.** a son, the right of maintenance against his *guru* provided that the latter was not an ascetic and follows the life of a householder. Though it is said, he must show that he has been deprived of procuring his ordinary means of livelihood,⁽¹¹⁾ this is by no means necessary in every case since the question must depend upon the nature of the guru's estate and the status and the nature of his relationship to his *chela* and the custom or usage if any, determining their rights.

(1) *Hargobind v Dharamsingh*, 6 A. 329 (835) P. C.

(2) *Bakant Singh v. Roshan Singh* 18 A. 268 O. A., *Roshansingh v. Bahadur Singh*, 22 A. 191 (197) P. C.;

(3) *Addoye v. Woojan*, 4 C. L. R. 164

(4) *Lingappa v. Esudasan*, 27 M. 10 (15).

(5) *Laksmappa v. Ramaya* 12 B. H. C. R. 864 (897); *Dalpat Singhs v. Ravisingh*, 17 Bom. L. R. 566.

(6) *Manu* VIII. 88; see other texts cited in *Savitri Bai v. Lazimi Bai*, 2 B. 592 (597)

(7) *Prankoonwar v. Deokoonwar*, 1 Borr. (2nd Ed.) 404; *Dai v. Purshotum* *Id.*, p. 453; *Savitri Bai v. Lazimi Bai*, 2 B. 578; *Koobai v. Ramabai*, *id.*, p. 592; *Subharaya v. Subhakka*,

8 M. 286.

(8) *Inderun v. Ramasawmy*, 13 M. I. A. 141 (159); *Ramabai v. Trimbak*, 9 B. H. C. R., 288; *Mangal v. Rukhmuni*, 23 B. 291; *Jamma v. Machul* 2 A. 315. *Tulsha v. Gopal Rao* 6 A. 263; *Mansha v. Jivan Mal* *id.* p. 617 (621).

(9) *Inderun v. Ramasawmy*, 13 M. I. A. 141 (159); *Salu v. Hari*, (1977) B. P. J. 34; *Rahi v. Govind*, 1 B. 97 (102); *Parvati v. Ganpat Rao*, 18 B. 177 (183); *Saraswati v. Kashi Ram*, 4 C. P. L. R. 43; *Bhagyalal v. Churaman* 9 C. P. L. R. 88 but *contra Salu v. Hari*, (1877) B. P. J. 34 (case of *shudra*).

(10) *Ruttun Singh v. Chundam*, (1866) P. R. 80.

(11) *Narain Dass v. Mahtab*, 7 W. R. 187.

924. Though the father is personally bound to maintain his children he is not bound to maintain his son's widow or his grand children (1) though if maintained, their maintenance is held to be a legitimate ground of necessity (2) and it has been held that on death of the father-in-law his estate might be justly charged to defray the marriage expenses of his grand daughter. (3)

Step son step-mother **925.** Similarly, a Hindu is under no personal obligation to maintain his step-son or step-mother. (4)

926. The son-in law has of course, no claim to maintenance by his father-in-law, though in a case his claim based on an implied contract was upheld on the ground that he had lived in his father-in-law's house as his *gharjaval*. (5)

927. There is again no such obligation to maintain a brother even though a minor, though of course, in a joint family the elder brother as manager is charged with the maintenance of all co-parceners and other near relations as stated in the sequel.

Husband's conversion immaterial. **74.** A wife who is entitled to maintenance does not forfeit her right by her husband's conversion to another faith.

928. Analogous Law.—The right to maintenance arises out of the jural relationship between the husband and the wife created by marriage, which is not dissolved by reason of conversion to another faith, though the converted husband may dissolve his marriage under the provisions of the Native Converts Marriage Dissolution Act (6) but till such dissolution, he remains bound by the tie of marriage and its attendant obligations one of which is the maintenance of his spouse. (7)

75. No mistress of a Hindu has any right of maintenance unless she had been kept by him until his death, in which case she becomes entitled to maintenance out of the estate in the hands of his heirs, so long as she remains chaste.

Synopsis.

- (1) *Texts on mistress's right to maintenance* (929-930). (2) *Concubine's right* (931).

929. The following texts support this right:—

Mitakshara :—"Heirless property or wealth which is without an heir to succeed to, goes to the king or becomes the property of the sovereign deducting however a substance for the females as well as the funeral charges that is, excluding or setting apart a sufficiency for the food and raiment of the women." (8)

Mayukh :—"Except in the case of Brahmins, a king (when succeeding to the estate of an heirless person) who is attentive to his duty should give some thing as maintenance to

(1) *Savitri Bai v. Laxmi Bai* 2 B. 574 F. B.; overruling *contra* in *Udaram v. Sonkabai*, 10 B. H. C. R. 488; *Kalu v. Kashi Bai*, 7 B. 127; *Khetkar Moni v. Kashinath*, 2 B. L. R. (A.C.) 15 F.B.; *Manmabini Dasi v. Balak Chandra* 8 B.L.R. 22; *Nilmoney v. Hingu Lal*, 5 C. 256.

(2) *Chunmun Lal v. Gungput Lal*, 16 W.R. 52.

(3) *Ramescomar v. Ichmonji*, 6 C. 36 (39).

(4) *Daya v. Nath*, 9 B. 279 (284); *Hamamji v. Kedar Nath*, 16 C. 758 (765) P. C.

(5) *Gowind v. Radha Ballabh*, 15 C. W. N. 205; 7 I. C. 118.

(6) XXI of 1866.

(7) 4 M. H. C. R. (App) 3.

(8) Mit. Ch. ii. Sect. 1-§§ 27, 28.

the women (*Stri*) of the deceased. This is the law of inheritance declared; both these have reference to concubines, because the term used is not *patri* (married wife) ⁽¹⁾.

This relates to women kept in concubinage, for the term employed is 'females' (*Yoshul*). The text of Narad likewise relates to concubines, since the word there used is 'women' (*Stri*).

930. Analogous Law.—The wife has a legal status and has consequently legal rights and obligations. The concubine is reprobated by law and she has therefore no right of any kind against her paramour, as she can stay with him or leave him at her pleasure. But concubines were common in Vedic India and their right to maintenance is recognized out of the paramour's estate, whether ancestral or self-acquired, on his death if she was faithful to him till then.

931. Concubine's right of maintenance.—The rules governing the maintenance of concubines may be thus stated: (i)—no concubine has any right to maintenance against her paramour during his life-time, (2) (ii)—an occasional concubine (3) or even a continuous one has no right if she was discarded by her paramour before his death, (4) and (iii)—her maintenance is contingent upon her continuous chastity. (5) So a widow who has remarried in the life-time of her first husband without his consent, is not the legal wife of the second husband upon whose death she would be entitled only to maintenance as a concubine. (6) Such was also held to be the case where a Brahmin woman had married a Shudra, which being a marriage not recognized by law or usage, her status was held to be no better than that of a concubine entitling her to maintenance only as such, dependent upon her continuous connection with her husband. (7) The fact that the concubine has a son by her paramour does not improve her claim to maintenance for herself. (8)

76. (1) The manager of a joint Mitakshara family is bound to maintain all male members of the family, their wives and their children, and on the death of any of the male members, he is bound to maintain his widow and his children.

Manager's duty to maintain.

(2) The obligation is commensurate only with the possession of family property.

(3) The same principles apply to cases governed by the Dayabhag law.

(4) The holder of an impartible estate is bound to maintain all those who are customarily entitled to maintenance.

Synopsis.

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| (1) <i>Duty of manager of joint Hindu family to maintain</i> (926). [928]. | (5) <i>Right of grandmother</i> (931). |
| (2) <i>Right of widow of co-parcener</i> (927-) | (6) <i>Liability of holder of impartible estate</i> (932) |
| (3) <i>Right of daughter-in-law</i> (929). | (7) <i>Right of married daughter</i> (933). |
| (4) <i>Right of step-mother</i> (930). | (8) <i>Right of sister-in-law</i> (934). |

932. Analogous Law.—The unit of Hindu society is the joint family comprising a patriarch, his wives, his unmarried daughters, and his sons with their wives and descendants. This social group had in ancient times a

(1) Mayukh (Mandlik) p. 78.
 (2) *Sikki v. Venkatasamy*, 8 M. H.C.R. 141;
Ramanarasu v. Buchamma, 23 M. 282; *Nm-
 gareddi v. Lakshmana*, 26 B. 163 (167, 168).
 (3) *Ramanarasu v. Buchamma*, 23 M. 282.
 (4) *Ramanarasu v. Buchamma*, 23 M. 282.

(5) *Yashwantrav v. Kashi Bai*, 12 B. 26.
 (6) *Khemkar v. Umishankar*, 10 B. H.
 C. R. 381; *Salu v. Hari*, (1877) B. P. J. 94.
 (7) *Kashi v. Jamna Das* 14 Bom. L. R. 547
 (8) *Sikki v. Venkatasamy*, 8 M. H.C.R. 144.

common dwelling, and lived, ate, worshipped their gods, and enjoyed their estate in common. (1) The rights of the subordinate members have now become recognized, but there still remain those whose rights have either not been reduced to possession or have no present rights at all. The obligation to maintain all such relations lies on the manager of a Mitakshara family or on the father of a Dayabhag household. But this obligation is not personal but confined to him as manager of the joint estate, or in the case of a Dayabhag family to the head of a family in which all the other members have a contingent interest. These and their wives are entitled to maintenance since it is a principle of Hindu Law that an heir succeeding to property takes it for the spiritual benefit of the late proprietor and is under a legal obligation to maintain persons whom the late proprietor was morally bound to support. It is immaterial whether the property so inherited is moveable or immoveable. In each case it must be determined whether, having regard to the relationship, the means and other circumstances of the party claiming maintenance, the late proprietor was morally bound according to Hindu Law and customs and practice of the people, to maintain that party. (2) As such, the rule applies equally to cases whether subject to the Mitakshara or the Dayabhag school of law. The question in each case being: Has the relation any moral claim to maintenance, the moral claim being as regards maintenance, treated as legal claim which the courts would enforce? (3) As such, the relations mentioned in S. 70 have undoubtedly such claim. But there are others whose claim to maintenance is recognized though it is dependent upon the existence of ancestral property.

933. The widow of a co-parcener is entitled to be maintained out of her

(1) **Widow.** husband's estate in the hands of his surviving co-parceners even though she may have been deserted by the husband. (4) But she has no such right if there is no ancestral property (5) or she is leading an unchaste life. (6) A Hindu widow must, in the first instance, look for her maintenance to her husband's family (7) failing which she may claim it from his father or out of his estate. But the widow has no legal claim to maintenance out of the self-acquired property of her father-in-law. (8) But as soon as that property descends to his heirs, e.g., his sons, the latter become legally bound to maintain the widow to the same extent as if they had inherited ancestral property. This result is supported on the ground that since the father-in-law was morally bound to support his daughter-in-law and the discharge of this moral obligation by the son is conducive to his father's spiritual benefit, the moral obligation of the father ripens into a legal obligation as against the son who inherits his father's estate. (9) And the same obligation would continue even if the estate descends on the father-in-law's

(1) *Antiquities of India*, p. 109.

(2) *Kashoe Nath v. Khetur Monee*, 9 W. R. 418; *O. A. Khetramani v. Kashinath*, 10 W. R. 89 F. B.; *Kamini Dasi v. Chandra*, 17 C. 978 (376, 377); *Janki v. Nand Ram*, 11 A. 194.

(3) *Kamini Dasi v. Chandra*, 17 C. 978 (377, 378).

(4) *Ramabai v. Trimbak*, 9 B. H. C. R. 288; *Savitri Bai v. Lavimi Bai*, 2 B. 573 F. B. *Gangabai v. Sitaram*, 1A 170 F. B. *Amrita Lal v. Manick Lal*, 27 C. 551.

(5) *Ganesh v. Yenunabai*, (1878) B. P. J. 180; *Sakharam v. Janki Bai*, (1878) B. P. J. 189.

(6) *Harku Singh v. Nanda Kuar*, (1885) 5 A. W. N. 164; *Daulta Kaur v. Meghu*, 15 A. 382; *Vishnu v. Manjanna* 9 B. 108; *Nagamma v. Virabadra*, 17 M. 392; *Roma Nath v. Rajommoni* 17 C. 674.

(7) *Makhada v. Nundelal*, 18 C. 278.

(8) *Rajmonee v. Shibchander*, 2 Hyde 108; *Khetramani v. Kashinath*, 10 W. R. 89 F. B.; *Savitri Bai v. Lavimi Bai*, 2 B. 573 F. B.; *Ganjabai v. Sitaram*, 7 B. 127; *Janki v. Nandaram* 11 A. 194 (205, 206) F. B.

(9) *Janki v. Nand Ram*, 11 A. 194 (208) F. B.; *Kamini Dasi v. Chandra*, 17 C. 378; *Devi Persad v. Gunwanti* 22 B. 110; *Ramammal v. Echammal*, 22 M. 308.

widow, since she is equally bound by the same rule. (1) But there may be cases in which even the father-in-law may be held bound to maintain her out of his self-acquired property. As Norman, J. observed: "If she resides in the house of her father-in-law and is an infant, and for that or other reasons, is unable to maintain herself, there may be and probably is, both according to Hindu Law, and equity and good conscience—a legal obligation on the part of the father-in-law, who has taken upon himself the care of her person and the charge of entertaining her as a member of his family, and on whose protection she is dependent, to provide her with food and the actual necessities of life." (2)

934. But this is an exception, and the rule remains. But if in such a case the father gifted or devised his estate, then the donee or the devisee, as such, would be under no obligation, for the legal obligation to maintain arises out of the relationship of the heir to the father which cannot descend upon a donee or devisee. (3) The same rule would hold good where a person acquires a share on partition with the father. (4)

935. There is no personal obligation under Hindu Law on the father-in-law to maintain his daughter-in-law, except when he is in possession of ancestral property. (5) As was observed in a Madras case: "An adult son has no right to maintenance against his father. How can his wife's right be regarded as standing on a higher footing? The son's marriage may have been performed after he attained his majority. It may have been performed by him of his own will and perhaps without the father's advice and consent. How could it be held that his widow is entitled to maintenance against his father in such cases?" (6) Even where her father-in-law has inherited property in which his son was a co-partner, his liability to maintain his widow may be determined if the daughter-in-law permanently severs her connection with her husband's family and ceases to be a dependent member thereof, as where she leaves her husband's home during his father's life-time taking up her residence in her father's house as a member of his household, after taking some of her husband's property which was all she considered herself entitled to. But the mere fact that the daughter-in-law leaves her husband's home is no reason for refusing her maintenance. (7) There is no difference in this respect between the Mitakshara and the Dayabhag schools. (8)

936. The obligation to maintain the step-mother depends upon the condition that the son has inherited available assets from his father. (9)

937. The grandmother is entitled to maintenance. As Sir William Macnaghten says: "She has a right to participate in all the comforts which are enjoyed by his family in its undivided estate, and a legal as well as natural claim to that protection which may be derived from a union of her descendants. If,

(1) *Janki v. Nand Ram*, 11 A. 194 F. B.; *Yamunotai v. Monubai*, 23 B. 608

(2) *Khetramani v. Kashi Nath*, 10 W. R. 89 (95) F. B.; *Meenakshi v. Rama*, 37 M. 896 (402).

(3) *Parvati v. Tarwadi*, 25 B. 263.

(4) *Meenakshi v. Rama*, 37 M. 896 (402) explaining *Rangammal v. Echammal*, 22 M. 808 (802).

(5) *Khetramani Dasi v. Kashi Nath*, 2

B. L. R. (A.C.) 15 F.B.; *Meenakshi v. Rama*, 37 M. 896 (401).

(6) *Meenakshi v. Rama* 37 M. 896 (401); *Siddessury v. Janardan*, 29 C. 557.

(7) *Siddessury v. Janardan*, 29 C. 557.

(8) *Visolatchi v. Annaswamy*, 5 M.H.C.R. 159.

(9) *Daya v. Nath*, 9 B. 279; *Sukh Dial v. Ram Ditti*, (1874) P.R. 31; *Thakur Prasad v. Baghabati*, 1 C. L. J. 142.

therefore, she is deprived of such advantages, it is but just she should be enabled to take care of herself, and not be obliged to go from door to door for her support." (1)

938. The manager of a joint family property being liable to maintain all its members, it follows that the same obligation cannot rest on one who by reason of the impartibility of the estate becomes entitled to exclude the other members. (2) In other words, since there can be no co-parcenership in an impartible estate no member of the holder's family has, apart from custom, any right to maintenance. As such, the sons undoubtedly possess such right and custom in their case is so well known that it need not be proved. But the same customary right cannot be presumed in the case of a grandson, and there is no invariable or certain custom that any below the first generation from the last holder can claim maintenance as of right. Apart however, from custom, no one has any claim to maintenance by reason of his relationship to the Zemindar. As the Privy Council said: "An impartible Zemindari is the creature of custom, and it is of its essence that no co-parcenary exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who, if the Zemindari were not impartible, would be entitled as of right to maintenance. There is no claim based on personal relationship." (3)

939. The obligation to maintain the daughter rests upon the parental duty to maintain his own offspring. And in the case of an unmarried daughter this obligation descends to the heir who is equally bound to maintain her. (4) But as soon as the daughter is married, the obligation to maintain her is transferred to the husband. And on his death, she is entitled to be maintained out of his estate. Even if she be in indigent circumstances, she has no right to be maintained out of her deceased father's estate unless she can show that she continued after her marriage to be a dependent member of her father's family with those whom he was legally or morally bound to maintain. She is, however, in no case entitled to separate maintenance out of the estate of her father in the hands of his heirs. (5) But of course, illegitimate daughters have no such right of maintenance. (6)

940. It was at one time laid down that a person was legally bound to maintain his brother's destitute widow independently of all questions regarding union or separation or the existence of ancestral or self-acquired property, (7) but it is now settled that these cases go too far and that the liability of a person to maintain his brother's widow is dependent upon the existence of assets inherited by him from his father or her husband. (8)

(1) *H. L. Partition cited in Puddum Mookhee v. Rayee Monee*, 12 W.R. 409; *Rayee Monee v. Puddum Mookhee*, 13 W.R. 66.

(2) *Nilmoney v. Hingoolal*, 5 C. 256; *Venkatachala Raddiar v. Venkatachella*, 7 M. L. T. 81; 4 I. C. 302.

(3) *Rama Rao v. Raja of Pithapur*, 39 M. 396 affirmed O. A. 41 M. 78 (P. C.) following *Yarlagadda v. Yarlagadda*, 24 M. 147 (155) P. C.; *Nilmoney v. Hingoo Lal*, 5 C. 256 (259) P. C.

(4) *Mangal v. Rukhmimi*, 23 B. 291.

(5) *Mokhoda v. Nand Lal*, 27 C. 555 O. A. 28 C. 278 (288); *Siddessury v. Janardan*, 29 C. 557.

(6) *Parvati v. Ganpat Rao*, 18 B. 177 (188); *Bhagyal v. Sunderia*, 9 C. P. L. R. 88.

(7) *Lakshmi v. Lakshmidas*, 1 B.H.C.R. 18; *Chandrabhagabai v. Khashi Nath*, 2 B. H. C. R. 823; *Timmappa v. Parameshriamma* 5 B. H. C. R. (Ae) 140; *Chandrabhagabai v. Parameshriamma* 5 B.H.C. (Ae) 180; *Udaram v. Sonikabai*, 10 B. H. C. R. 483.

(8) *Prankoonwar v. Deekoonwar*, 1 Borr. 404 (2nd Ed.); *Dai v. Purshotum*, *Id.* p. 458; *Shoo Bai v. Gowreemund*, 2 Borr. 8:8 (2nd Ed.); *Ramabai v. Trimbak*, 9 B.H.C.R. 288; *Savitri Bai v. Luxmi Bai*, 2 B. 578 (628) F.B.; *Hango v. Yamunabai*, 3 B. 44; *Yamunabai v. Manubai*, 23 B. 608 (612, 613).

77. Where a son or other heir is excluded from inheritance by reason of disability he is entitled to maintain himself and his family out of the property which he would have inherited but for his disability.

Maintenance of disqualified heir.

Synopsis.

- (1) *Texts relating to maintenance of disqualified heir* (941). (2) *Lights of disqualified heir's family* (942).

941. Analogous Law.—The right of the disqualified heir and his family for maintenance, is not only expressly provided by the following text, but is one which the courts would have enforced as a matter of justice, even if there had been no text in favour of it :—

Manu :—201. Eunuchs and outcastes, persons born blind or deaf, madmen, idiots, the dumb and such as have lost the use of a limb are excluded from share of the heritage.

202 But it is just, that the heir who knows his duty should give all of them food and raiment for life without stint according to the best of his power : he who gives them nothing sinks assuredly to region of punishment (1)

942. Maintenance of a disqualified heir.—The texts only provide for the maintenance of the excluded heir. But his family which has the right of maintenance against him has equally the same right against his estate from the enjoyment of which he is excluded by reason of his personal disqualifications. It cannot affect their primary right of maintenance. (2) As the Privy Council observed :—“The right to maintenance, so far as founded on or inseparable from the right of co-parcenary, begins where co-parcenary begins and ceases where co-parcenary ceases.” (3)

78. (1) The widow who does not succeed to the estate of her husband as his heir is entitled to maintenance out of her husband's separate property, or out of the property in which he was a co-parcener at the time of his death.

Widow's right to maintenance.

(2) Save and except as above, she has no absolute right of maintenance.

(3) Her right of maintenance is not forfeited by reason of her having lived apart from her husband in his life-time without any justifying cause.

(4) The widow does not forfeit her right of maintenance by reason of her living apart from her husband's relations unless she does so for immoral or improper purposes.

(1) *Manu*, IX-201, 202; *Mitak* Ch. ii. S. 10-1, 3, 6.

(2) *Mitak*, Ch. ii. S. 10 12-15; *Mayukh* Ch. iv. Sec. 11 12; 3 Dig 483; *Dai v. Parshotam*, 1 Borr. 458 (2nd Ed); *Savitri Bai v. Laxmi Bai*, 2 B. 578 (591) F. B.; *Ram Soonder v.*

Ram Sahye 8 C. 919. *Rama Rao v. Raja of Pithapur*, 41 M. 78 P. C. affirming O. A. 39 M 396

(3) *Rama Rao v. Raja of Pithapur*, 41 M. 778 (784) P. C.

(5) Continued chastity is a condition precedent to the widow's right to maintenance. But she is allowed a *locus penitentie* so that if she reforms and leads a continent life, she becomes entitled at least to a starving maintenance.

(6) Maintenance is not a charge upon the estate, but may be so made by contract or a court's decree.

Synopsis.

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| <p>(1) <i>Widow's right to maintenance out of co-parcenary property of her husband</i> (943).</p> <p>(2) <i>Residence apart from husband's relations not a bar</i> (945-946)</p> | <p>(3) <i>Chastity, if a condition of the right to maintenance</i> (947).</p> <p>(1) <i>Maintenance, when a charge on the estate</i> (948).</p> |
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943. Analogous Law.—The general rule stated in clause (1) has long since

been settled, ⁽¹⁾ it being held that the widow is entitled to maintenance out of the whole of the estate in which her husband was interested as owner ⁽²⁾ or co-parcener ⁽³⁾ though he may have been personally disqualified from inheritance, ⁽⁴⁾ whether she possesses property of her own or not, since it is an absolute right due to her membership of the family, and does not depend upon her necessity arising from her want of other means to herself. At a partition made by the husband during his life-time between his sons, his wife was at one time entitled to an equal share with his sons. In course of time this right became lost, but in lieu thereof her absolute claim to maintenance has become established. ⁽⁵⁾

944. Though the widow has no absolute right of maintenance except

as provided in clause (1), the court is entitled to award her maintenance if equity and justice so demand it. ⁽⁶⁾

945. It has already been stated that since the widow's right of maintenance is in lieu of her share, the mere fact that she had

lived apart from her husband is no ground for disqualifying her for maintenance. ⁽⁷⁾

(1) *Shib Dayee v. Doorga Pershad*, 4 N. W. P. H. C. R. 68 (71); *Bhagabati v. Kannailal*, 8 B. L. R. 225; *Brinda v. Radhica*, 11 C. 492 (494); *Narbadabai v. Mahadeo*, 5 B. 93 (106); *Subhvarajulu v. Kamatawalli Bhagaramma*, 35 M. 147.

(2) *Bhagabati v. Kannailal*, 8 B. L. R. 225; *Brinda v. Radhica*, 11 C. 492 (494); *Narbadabai v. Mahadeo*, 5 B. 99 (106).

(3) *Gulab Kanneer v. Collector*, 4 M. I. A. 246 (258); *Shoo Dyal v. Judoonath*, 9 W. R. 61 (67); *Hemia v. Ajoodhya*, 24 W. R. 474; *Dev Prasad v. Gunwanti*, 22 C. 410; *Meherban v. Shoo Kunwur*, 1 Agra 106; *Shib Dayee v. Doorga Pershad*, 4 N. W. P. H. C. R. 68; *Lali Kuar v. Gangya Bishen*, 7 N. W. P. H. C. R. 261; *Becha v. Muthina*, 23 A. 86; *Ramabai v. Trimbak*, 9 B. H. C. R. 283; *Anrit v. Manik*, 12 B. H. C. R. 79; *Savitribai v.*

Laxmini Bai, 2 B. 578 (582); *Adhibai v. Cursanads*, 11 B. 199; *Manjappa v. Lakshmi*, 15 B. 234; *Jankibai v. Shrinivas*, 88 B. 120; *Vasalatchi v. Annasamy*, 5 M. H. C. R. 150; *Subbamma v. Kahan*, 7 M. H. C. R. 226; *Jayanti v. Alamelu*, 27 M. 45.

(4) *Mit. Ch. ii-S. X-5*; *Mayabag Ch. V-11* 14 16; *Smriti Chand Ch. V-10.14*, 20.

(5) *Lingayya v. Kanakamma*, 88 M. 153; dissenting from *contra* in *Ramavati v. Manjhari*, 4 C. L. J. 74; *Radhabai v. Ragho*, (1878) B. F. J. 292.

(6) *Khetter Monee v. Kasheonath*, 10 W. R. 89 (95) F. B.; *Meenakshi v. Rama*, 37 M. 396 (402).

(7) *Ramabai v. Trimbak*, 9 B. H. C. R. 283; *Savitri Bai v. Laximibai*, 2 B. 578 (588) F. B.

946. Still less is she disentitled merely because she chooses to live apart from her husband's relations, unless, she does so for immoral or improper purposes. ⁽¹⁾ But in strict contemplation of law it is in the husband's family that the widow ought to reside ⁽²⁾ and she would be so bound, if her husband had expressly made her maintenance conditional upon her residing with his family. ⁽³⁾

947. This clause is based on the under noted decisions, ⁽⁴⁾ though there are also cases to the contrary. ⁽⁵⁾ The following text, **CI (5).** however, supports the clause :—

Mitakshara :—If a woman becoming a widow in her youth, be head-strong, a maintenance must in that case be given to her for the support of life. This passage of Harit is intended for a denial of the right of a widow suspected of incontinency to take the whole estate. From this very passage (of Harit) it appears that a widow not suspected of misconduct, has a right to take the whole property ⁽⁶⁾

948. The maintenance of a widow is commonly spoken of as a charge on her husband's estate, but it is only so in the sense that that estate is the primary fund out of which it is payable; otherwise it is not such a charge as is defined in S. 100 of the Transfer of Property Act, ⁽⁷⁾ though it may be so made by an agreement, ⁽⁸⁾ will, ⁽⁹⁾ or a decree. ⁽¹⁰⁾

79. The widow is as of right entitled to reside in the family dwelling house. This right cannot be defeated by a sale of the house to a purchaser with notice. Even in the case of a purchaser without notice she cannot be evicted unless she is provided with another residence. But she has no such right where the sale is contracted by the husband or is for a debt binding upon her.

Widow's right of residence.

Synopsis.

- (1) *Widow's right of residence in family house* (949)
 (2) *Nature of the right* (950-952).
 (3) *Right against transferee with notice* (953).

(1) *Pirthee Singh v. Itaj Kauer* 20 W. R. 21 P. C.; *Narayan Rao v. Ramabai*, 3 B. 415 (421) P. C.; *Kasturbai v. Shivajiram*, 3 B. 372 dissenting from *Rango v. Yamunabai*, 3 B. 44; *Gopibai v. Lakshmidas*, 14 B. 490; *Chandrabhagabai v. Kashinath*, 2 B. H. C. R. 841; *Parvati Bai v. Chattru*, 13 Bom. L. R. 1022; *Mokhada v. Nundolal*, 28 C. 278 (287); *Siddessury v. Janardan*, 20 C. 557; *Acharya v. Muckee Looee*, 6 W. R. 37; *Visalatchi v. Anasamy*, 5 M. H. C. R. 150; *Surampalli v. Surampalli*, 81 M. 838; *Umrit Kowaree v. Kuler Nath* 3 Agra 182.

(2) *Raghunada v. Brozo Kisoro*, 1 M. 69 (81) P. C.

(8) *Mulji v. Ujam*, 13 B. 218. *Girianna v. Honamma*, 15 B. 286.

(4) *Parvati v. Mahadevi*, 31 B. 273 (289); *Honamma v. Timanabhot*, 1 B. 559; *Sathya-bhama v. Kesavacharya*, 39 M. 658; *Romanath v. Rajonimoni*, 17 C. 674 (679).

(5) *Valu v. Ganga*, 7 B. 84; in *Visalatchi v. Anasamy*, 5 M. H. C. R. 150 the question

was considered as unsettled.

(6) Mit. Ch. ii S. I. 37, cited in Mayukh Ch. iv. S. viii 8 (Mandlik) p. 79; 2 Dig. 423, 425; Str. H. L. Vol. 2. pp. 172, 175.

(7) *Bharatpur State v. Gopal* 24 A. 160 (163); *Sorolah v. Bhodun Mohun* 15 C. 292 (307); *Digambari v. Dhankumari*, 10 C.W.N. 1074; *Shom Lal v. Banna*, 4 A. 296; *Ram Kumwar v. Ram Dai*, 22 A. 326; *Venkatammal v. Andayappa*, 6 M. 130; *Ramanadan v. Rangam-mal*, 12 M. 260 (272); *Jayanti v. Alamelu*, 27 M. 45 (49).

(8) S. 100 Transfer of Property Act; *Juggernath v. Odhirance*, 20 W. R. 126; *Lakshman v. Sarasvatibai*, 12 B. H. C. R. 69 (76); *Yamnabai v. Nanabhai*, 12 Bom. L. R. 1075; *Mahalakshminamma v. Venkatarat-namma* 6 M. 88 (86); *Bhagirathi v. Ananta*, 17 M. 268.

(9) *Baharalaji v. Itajbai*, 23 B. 342.

(10) *Manshadevi v. Jivanmal*, 6 A. 617 (621); *Krishna v. Simapommu*, 16 M.L.T. 551; 25 I. C. 759.

- (4) *Right against transferee without husband (955).
notice (954).* (6) *Or any transfer for necessity (956).*
(5) *Effect of bona fide transfer by*

949. Analogous Law.—The widow's right of residence in the family dwelling house has been established by a necessary deduction drawn from a passage of Katyayan that "except his whole estate and his dwelling house, what remains after the food and clothing of his family, a man may give away whatever it be, whether fixed or moveable; otherwise it may not be given."⁽¹⁾ Referring to this passage, Sir Barnes Peacock said: "The meaning of that passage is, that he must not give away his whole estate without providing food and clothing for his family, and that he must reserve one house, without which he himself or his family might want a dwelling. . . . The most difficult question is whether the passage of Katyayan, which says that a dwelling house may not be given, is mere moral precept or a restriction on a man's right to convey. It seems to me at present that it is a restriction, and not a mere moral precept, and that the son and heir of the father has not such a right in the dwelling of the family that he can at once of his own pleasure turn out all the females of the family, or sell it or give the purchaser a right to turn them out."⁽²⁾ This was the case in which the adopted son had sold the house to a purchaser who sued to eject his adoptive mother but the court held that the purchaser had no such right at least without providing some other suitable dwelling. This case has been followed in the other courts and establishes the widow's right of residence in the family house which she can maintain even against a transferee with or without notice of her right.⁽³⁾

950. Strictly speaking, the owner is, according to Katyayan's text, legally incompetent to sell the family dwelling house. If, therefore, he sells it, the purchaser acquires no title in law. But inasmuch as the prohibition to sell is coupled with the reason that the house should be preserved for the residence of the family, the courts modify the prohibition to that extent by requiring the purchaser to provide another suitable residence for the females of the family before taking possession of the house. But this is in the nature of an equitable concession to which the purchaser with notice or a volunteer with or without notice is not entitled.⁽⁴⁾

951. The rule stated in the section consists of the following distinct propositions:—(a)—that the widow has an absolute right to live in her husband's family dwelling house⁽⁵⁾; a right of which, (b)—she cannot be deprived by a transferee with notice⁽⁶⁾; (c)—and even if the transferee be without notice, he cannot eject her from her residence,⁽⁷⁾ her right thereto being defeasible only, (d)—by a transfer made by the husband⁽⁸⁾ or (e)—for a debt of her husband⁽⁹⁾ or for a debt binding upon her.⁽¹⁰⁾ These clauses may now be examined.

(1) Cited in 2 Dig. 138

(2) *Manjala v. Dinanath*, 12 W. R. 35 (36, 37).

(3) *Manjala v. Dinanath*, 12 W. R. (O. C.) 35; followed in *Gauri v. Chandramani*, 1 A. 262; *Talemand v. Rukmina*, 3 A. 353; *Venkatammal v. Andayappa*, 6 M. 130; *Dalsukhram v. Lallubhai*, 7 B. 282 (286).

(4) *Imam v. Balammo* 12 M. 384; *Rayawa v. Shwaryayappa*, 18 B. 679.

(5) *Devkore v. Sammulkhram*, 13 B. 101.

(6) *Dalsukhram v. Lallubhai*, 7 B. 282:

Gauri v. Chandramani, 1 A. 262; *Talemand v. Rukmina*, 3 A. 353; *Venkatammal v. Andayappa*, 6 M. 130.

(7) *Manjala v. Dinanath*, 4 B. L. R. (O. C.) 72.

(8) *Manilal v. Baitara*, 17 B. 398.

(9) *Venkatammal v. Andayappa*, 6 M. 130; distinguished in *Ramanadan v. Rangammal*, 12 M. 260 (F. B.); *Jayanti v. Alamelu*, 27 M. 45; *Manilal v. Bai Tara*, 17 B. 398.

(10) *Johurra v. Sreegopal*, 1 C. 470 (475).

952. Widow's right of residence.—The widow is entitled as of right to reside in the dwelling house of her husband (1) though she is not bound to reside therein if she is subjected to cruelty or ill usage. As the Privy Council observed: "If a widow from any other cause than unchaste purposes, ceased to reside in her husband's family and takes up her abode in her parent's family, her rights are not forfeited." (2) This is the right possessed equilly by the widows of all co-purceners (3) and those whose husbands had that right. This right however, cannot be enlarged by demanding on the death of the husband, a specified portion of the dwelling house for the purpose of separate residence. The decree was as to each year's annuity, to be regarded as speaking on the day upon which for that year it became operative. Her right of residence cannot be defeated by offering her a separate house to live in on the ground of her quarrelsomeness. (4)

953. Her right of residence may be enforced by her not only against the members of her husband's family, but also against their transferees with notice of her right. The right of itself does not create any charge on the family house, though it is a right in rem as regards the house, which she is entitled to enforce against all comers possessing notice of her right. (5)

954. Even where the transferee takes without notice of her right, he cannot eject her from the dwelling house in which she lived at the time of her husband's death without providing her with another suitable residence. (6) This is the necessary outcome of Katyayan's text previously quoted and discussed (§§ 949, 950).

955. Her right of residence cannot be defeated by any transfer made even by the husband in fraud of her rights, though it is a right which is not paramount to the necessity of the family for which the house may be sold to a purchaser conferring on him a right to eject the widow even though he should have taken with notice of her right. (7)

956. So again she must subordinate her right to a transfer by whomsoever made for a family necessity. So the house must go with the rest of the family assets on the manager's insolvency due to losses incurred in a family business. (8) And generally the house may be sold for any purpose which would justify sale of any other family property. (9)

(1) *Prankoonwur v. Devkoonwar*, 1 Borr. 364; *Kamla v. Muneeshunker*, 2 Borr. 687; *Parvati v. Kisan Singh*, 6 B. 567; *Dalsukhram v. Lallu v. Bhai*, 7 B. 282; *Devkore v. Sanmukhram*, 18 B. 101; *Mangala v. Dinanath* 4 B. L. R. (O. C.) 72; *Gouri v. Chandramani* 1 A. 262; *Taleman v. Rukmini* 3 A. 353.

(2) *Jadumani v. Kheytranohani*, Sirkar's *Vyavastha Darpan* (2nd Ed.) 984, *Pirthee Singh v. Raj Jowar*, 20 W. R. 21 P. C.; *Narayan Rao v. Ramabai*, 3 B. 415 P. C.; *Parvatibai v. Chatru*, 13 Bom. L. R. 1023.

(3) *Ganpatrao v. Shivprasad*, 4 Bom. L. R. 865.

(4) *Devkore v. Sanmukh Ram*, 18 B. 101 (195).

(5) *Dal Sukhram v. Lallubhai*, 7 B. 282

(286).

(6) *Mangala v. Dinanath*, 12 W. R. (O. C.) 35.

(7) *Nana v. Rama*, (1886) B. P. J. 252; *Lakshman v. Satyabhamabai*, 2 B. 494 (511, 514); *Dalsukhram v. Lallubhai*, 7 B. 242; *Moni Lal v. Tara*, 17 B. 398; *Ramanadan v. Raviganmal*, 12 M. 260; *Jayanti v. Alamelu*, 27 M. 45.

(8) *Johurra v. Srengopal*, 1 C. 470 (475).

(9) S. 39 Transfer of Property Act (V of 1882); *Jayanti v. Alamelu*, 27 M. 45; *Nihal Devi v. Shub Dial* (1907) P. R. 37; *Thamardas v. Gani*, 4 S. L. R. 978; 10 I. C. 905; *Kania Mohini v. Nanchura*, 35 I. C. (C) 566.

No forfeiture on loss
of caste.

80. Mere loss of caste does not deprive a person of his right to maintenance.

957. Analogous Law.—Maintenance is a right, and since no right is affected by the forfeiture of caste by reason of the Caste Disabilities Removal Act, (1) it follows that a mere loss of caste of a person by reason of her conversion or otherwise is no ground for depriving her of maintenance.

81. (1) In fixing the amount of maintenance payable to a widow, regard must be had to the following facts :—

Amount of
maintenance.

- (a) the income of the entire estate,
- (b) the position and status of the deceased husband,
- (c) the value of his estate,
- (d) the stridhan in her possession, and
- (e) her reasonable wants.

(2) Provided that the amount of maintenance shall in no case exceed the annual profits of the share to which the husband would have been entitled to on partition, if living.

Synopsis.

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| (1) <i>Amount of maintenance</i> (959). | (3) <i>Limits of widow's right</i> (966). |
| (2) <i>Principles determining assessment</i> (960-965). | (4) <i>Conditional maintenance</i> (967-968). |
| | (5) <i>Reasonable wants of widow</i> (969). |

958. Analogous Law.—The only texts bearing on the *quantum* of maintenance are as follows :—

Yajñavalkya.—He who forsakes a wife, though obedient to his commands, diligent in household management, mother of an excellent son, and speaking kindly, shall be compelled to pay the third part of his wealth or, if poor, to provide a maintenance for that wife. (2)

But this precept is merely illustrative of the right, and has never been literally enforced, the courts having laid down rules for their own guidance in this matter which are summarized in the section.

959. Amount of maintenance.—Maintenance does not imply merely the cost of food and raiment. It implies a provision for all wants having regard to the position, status and income of the family and the claims of other persons thereto. As observed in a case : "Where a widow has asked for separate maintenance, you look first at the mode of life of the family during her husband's life-time, and you try to find out what amount will be sufficient to allow the widow to live as far as may be consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's life-time. Then you see what

(1) XXI of 1850.

(2) Ch. IV. 76, (Mandlik.) p. 171 cited in

2 Dig. 420 : Mayukh Ch. XX—I (Mandlik) p. 153.

the husband's estate is, and you also see how far that estate is sufficient to supply her with maintenance on this scale, without doing injustice to the other members of the family who also have their rights as heirs, or their rights to maintenance out of the estate". (1) The same principle governs the cases of other claimants to maintenance. (2)

960. In estimating the amount of maintenance which should be allowed to a Hindu widow out of her husband's estate, regard should be had to the estate as gauged by the annual income derivable therefrom, to the position and status both of the deceased, and of the widow, (3) and the expenses involved by the religious and other duties which she has to discharge. (4) So in a case where the widow sued her husband's uncle, the holder of an impartible Raj for maintenance, upon the finding that the annual income of the estate was Rs. 22,000 per annum, the court decreed the widow an annual maintenance allowance of Rs. 3,000 per annum charging it upon the Raj estate. In fixing this sum, the court took it into consideration the fact that the parties were high caste Kshatriyas and the widow was entitled to maintain herself in comfort and maintain a position suitable to her rank. The fact that the widow was childless, in no degree altered her right to maintenance, or differentiated the principles upon which maintenance should be calculated. (5) It was pointed out that if the widow had only been fortunate enough not to lose her husband, he would have inherited the estate and he would have been the owner of an annual income of Rs. 22,000 per annum. The fact that she lost her husband was no ground for sentimental considerations but nevertheless she was entitled to adequate provision sufficient to make her life, as far as possible, one of comfort.

961. While however, the widow is entitled to be suitably maintained, this does not mean that she should be maintained in the same state as her husband would maintain her. So where there were other claimants for maintenance and there were debts, the court held Rs. 800 per annum sufficient to maintain a widow out of an estate the net income from which was Rs. 10,000. (6) But in fixing a sum for maintenance the court is not to be influenced by the Shastric injunction that the widow is to live the life of austerity, semi-starvation and wretchedness, since it is a matter of religious or ceremonial observance rather than of law. (7)

962. In assessing the amount the court is not entitled to take into consideration the value of her jewels or other unproductive property in her hands, if they constitute her *stridhan*, or although forming part of her husband's estate, they are suitable to the position of the family in society. (8)

(1) *Karoonamoyee v. Administrator General*, 9 C. W. N. 651 (652, 658).

(2) *Maresh Pariah Singh v. Dirgpal Singh*, 21 A. 232.

(3) *Nitto Kisserree (Sreemutty) v. Jogendra Nath*, 5 I. A. 55; 3 Suth. P. C. 505.

(4) *Baisni v. Rup Singh*, 12 A. 558; *Rangothayee v. Nelimunisami* 21 M. L. J. 706; 10 I. C. 110; *Rukhma v. Rango Bai* I.C.P.L. R. 83; *Ronno v. Lawmi* (1977) C. P. 8 C. Pt VIII-72; *Raja Rotansingh v. Ram Beni Bai* 1 N. L. R. 93;

(5) *Baisni v. Rup Singh*, 12 A. 558 (561); *Dale v. Ambika*, 25 A. 266 (270).

(6) *Kaleersaud v. Kupper* 4 W. R. 65.

(7) *Hurry Mahan Roy v. Nyantara*, 25 W. R. 474 (476); *Promotho v. Nagendra Bala*, 12 C. W. N. 808; 8 C. L. J. 489 (496); *Umrit v. Kidernath*, 3 Agra 192; *Narayan Rao v. Ramabai*, 3 B. 415 P. C.; *Ram Chandra v. Sagunabai*, 4 B. 261.

(8) *Shib Dayee v. Doorga Pershad*, 4 N. W. P. H. C. R. (63).

963. But it is submitted, and it has been held, that in assessing the amount court is bound to take into consideration the *stridhanam* possessed by the claimant. (1)

964. Where the court found that the widow—a *pardanashin* lady—needed a servant and allowed her Rs. 150 per annum on that ground, the High Court reversed the District Judge who, while admitting the necessity, had reduced the allowance on the ground that she could share that cost with a friend. (2)

965. The amount which the widow is entitled to recover is not only that required for her food, clothes and residence, but also that necessary for the performance of religious and other ceremonies, e.g., the shraddh of her husband, the pilgrimage to Gaya and the performance of other rites necessary for the beatitude of her deceased husband and her own salvation.

966. Limits of her right—Theoretically there is no limit as regards the amount which a woman may recover by way of maintenance. But in practice this amount is never allowed to exceed the profits of the share to which the husband would have been entitled to on partition, if living. (3) “A Hindu wife’s right to maintenance has been attributed to a kind of identity with her husband in proprietary right, though her right may be of quite a subordinate character, but it is by virtue of this right that she gets a share equal to that of a son when partition takes place at the instance of male members” (4) While the claim of the widow for maintenance is, as already stated, subject to the maximum amount which represents the annual income from her husband’s estate or interest, it is also said to be subject to the rule that, ordinarily, it should not fall much less than one-third of such interest. (5)

967. Conditional maintenance.—Although the Shastras enjoin on the widow the duty of residing with her husband’s relatives, it is only a moral precept which the courts do not insist on as a condition of her receiving maintenance. But though she is free to choose her own residence, there are two limitations upon her choice: (a)—if her husband has directed that she shall be maintained in the family house, she is not entitled to maintenance if she resides elsewhere without cause; (6) (b)—in no case can she take up a separate residence for the purpose of unchastity. (7) Again, where the family property is insufficient to admit of an allotment of separate maintenance (8) then the court may allot to her a portion of the land not exceeding one-third, whatever may be its value. (9) Such was the case of the widow who sued the defendants

(1) *Per Westropp C. J. in Savitribai v. Laximi Bai* 2 B. 573 (582) F.B. *Mahadray v. Ganga Bai*, ib. p. 689; *Jodoonath v. Brjounth* 12 B. L. R. 88; *Kishori Mohun Ghose v. Moni Mohun* 12 C. 165; *Poorendra v. Hemangini*, 36 C. 75 (84).

(2) *Krishnabai v. Babaji*, (1895) B. P. J. 414.

(3) *Mahadray v. Gangabai*, 2 B. 689; *Adhibai v. Cursundas*, 11 B. 199 (209); *Jayani v. Alamelu*, 27 M. 45 (49); *Shib Doyee v. Doorga*, 4 N. W. P. H. C. R. 68 (72).

(4) *Srinath v. Prabodh Chunder*, 11 C.L.J. 580 (587); *Jamna v. Machul*, 2 A. 815.

(5) *Ramabai v. Trimbak*, 9 B. H. C. R.

288 followed in *Adhibai v. Cursundas*, 11 B. 199 (209, 210).

(6) *Vyavastha Darpan* 870; cited in *Pirthee Singh (Raja) v. Hanu Raj Koor* 12 B. L. R. 288 (213) P. C. *Mulji v. Ujam*, 18 B. 210; *Goki Bai v. Lakshmi Das*, 14 B. 490 (.96, 497); *Giranna v. Honama*, 15 B. 236.

(7) *Kasturibai v. Shivajiram*, 3 B. 372; *Romanath v. Rajonni*, 17 C. 674; *Bhoba Tarini v. Peary Lall*, 24 C. 646.

(8) *Savitri Bai v. Laxmi Bai*, 2 B. 573; *Kasturibai v. Shivajiram*, 3 B. 372; *Ramchandra v. Saguna Bai*, 4 B. 161 (268); *Godavaribai v. Saguna Bai*, 22 B. 52.

(9) *Godavaribai v. Saguna Bai*, 22 B. 52.

who were the widows of her husband's brothers for maintenance. The courts found that the income from the family lands averaged only Rs. 40 per annum, and thereupon the court assigned to the plaintiff one-third of the vacant site for her residence but declined to award her separate maintenance. ⁽¹⁾

968. The husband is not entitled to limit his widow's maintenance by will, since the right is paramount or superior to his power of testamentary disposition. ⁽²⁾ She was in a subordinate sense a co-owner with him in the property and her right to maintenance is in a limited way a charge on his property. ⁽³⁾ But of course, though neither she nor the court is bound by the allowance so fixed, it is nevertheless entitled to great weight as evidence of what a lady in the position of his widow should need. ⁽⁴⁾

969. Responsible wants of the widow — In assessing maintenance the court is not to be swayed by any sentimental considerations, and the amount fixed must bear a responsible relation to the annual income of the estate and the position and *status* both of the deceased and the claimant widow, assuring her of such living as might be expected in the class or community to which the family belongs. For instance, the widow of a respectable trader is entitled to live unostentatiously but comfortably and not penuriously. The widow is entitled to live up to her social rank. ⁽⁵⁾

970. It has already been seen that her *stridhanam* and other property which yields no income cannot be taken into account in fixing her allowance. ⁽⁹⁶²⁾ But the court cannot ignore her stridhan and other sources of her certain income, since these circumstances, and even the position and conduct of the claimant, may reduce the maintenance. ⁽⁶⁾ Such would be the case, if the widow had lived apart for purposes of immorality, or if she had concealed a portion of her husband's assets. But the court is not justified in punishing the claimant by reducing her allowance, for making vexatious defences in the suit. ⁽⁷⁾

When widow disentitled to maintenance.

82 The widow has no right of maintenance in the following cases :—

(1) If she has sufficient *stridhan* or other means of support from the income of which she can maintain herself.

(2) If she had once received sufficient allotment for her maintenance which she has since dissipated.

(3) If she is remarried.

(4) If she is leading an unchaste life.

(1) *Promotho v. Nagendra Bala* 12 C. W. N. 808; 8 C. L. J. 489 (497).

(2) *Promotho v. Nagendra Bala* 12 C. W. N. 808; 8 C. L. J. 489 (497) citing *Jamma v. Machul* 2 A. 815; *Becha v. Mothini*, 23 A. 86; *contra Joytara v. Ramkhari* 10 C. 638.

(3) *Promotho v. Nagendra Bala*, 12 C. W. N. 808; 8 C. L. J. 489; *Srinath v. Probodh*

Chunder 11 C. L. J. 580, 6 I. C. 244.

(4) *Promotho v. Nagendra Bala*, 12 C. W. N. 808; 8 C. L. J. 489 (498).

(5) *Adhibai v. Cursandas* 11 B. 199 (210).

(6) *Tagore v. Tagore*, 18 W. R. 359 (373) P. C.

(7) *Nitto Kashore v. Jayendra*, L. R. 5 I. A. 55.

(5) If she is living apart from her husband's family for immoral or improper reasons.

Synopsis.

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|---|--|
| (1) <i>Widow when disentitled to maintenance</i> (972). | (973). |
| (2) <i>Possession of sufficient stridhanam or other means of support</i> (972). | (4) <i>Remarriage</i> (974). |
| (3) <i>Dissipation of original allotment</i> | (5) <i>Effect of unchastity</i> (975-976). |
| | (6) <i>Separate residence from family for immoral purpose</i> (977). |
| | (7) <i>Concubine's maintenance</i> (977). |

971. Analogous Law.—All the clauses of this section are drawn from the decided cases.

972. Under the first clause no female can claim a separate maintenance if she is possessed of sufficient *stridhan* or other source of certain income from which she is able to maintain herself. (1) Such was held to be the case where the widow had inherited considerable property from her father. (2) It has been already stated that where such property exists but is insufficient for her maintenance, then it will be taken into consideration in fixing the amount. But in doing so her jewels and other non-productive property must be excluded. (3) And so must be the precarious income that she might be making on account of the charity of her relations or by the performance of menial work unsuitable to her rank and position.

973. The mere gift of property by the husband does not deprive the widow of her right of maintenance. (4) But where the widow had received her full share of maintenance and squandered it, she is not entitled to charge again the estate for another share of further maintenance. It would be against reason and a premium upon extravagance to hold that she would be so entitled. (5)

974. Then again if the widow gets remarried she forfeits all right to maintenance out of her deceased husband's estate, (6) unless, it is said, she belongs to a class amongst whom remarriage was customary independently of the enabling Act in which case remarriage does not deprive the widow of her maintenance. (7) But it is submitted that even amongst the *Shudras* where remarriages are customary, the effect of remarriage is to dissolve the relationship between the widow and the family of her first husband, and as the right of maintenance is founded on relationship, it must cease with the relationship put an end to by remarriage. This is the view of the other courts, though the Allahabad Court had to maintain the contrary by reason of its adhesion to the *stare decisis*. (8)

(1) *Narayan Rao v. Ramabai*, 3 B. 415 P.C.; *Gokil Bai v. Tsakmidas*, 14 B. 410.

(2) *Ramawati v. Manjhari*, 4 C. L. J. 74.

(3) *Shib Dayee v. Durgu Pershad*, 4 N. W. P. H. C. R. 63; *Chundrabhagabai v. Kashi-nath*, 2 B. H. C. R. 341; *Savitri Bai v. Luzmi Bai*, 2 B. 584; *Joytara v. Ramhari*, 10 C. 688.

(4) *Joytara v. Ramhari*, 10 C. 688.

(5) *Savitri Bai v. Luzmi Bai*, 2 B. 573 (588) F. B.; *Gun Joshi v. Sagooa*, 2 Borr. 404 (416).

(6) S. 2 Hindu Widows' Remarriage Act; *Matungini v. Ram Dutton*, 19 C. 289; *Rasul v. Ram Sarun*, 22 C. 589, *Muhammed Umar v. Man Kuar*, 21 C. W. N. 906; *Vithu v. Govinda*, 22 B. 321; *Panchappa v. Sangambasawa*, 24 B. 87; *Murugayi v. Viramakali*, 1 M. 226.

(7) *Har Saran v. Nanda*, 11 A. 380; *Dharamdar v. Nandlal* (1889) A. W. N. 78; *Ranjit v. Radha Devi*, 20 A. 476; *Gajadhar v. Kamsilla*, 31 A. 161 (165).

(8) *Gajadhar v. Kamsilla*, 31 A. 161 (165).

C1 (4).

975. The following texts bear on the subject of maintenance conditional upon continence :—

Narad :— Among brothers if any one die without issue, or enter a religious order, the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord. But if they behave otherwise, the brethren may resume their allowance". (1)

Continued chastity is the condition precedent to enjoyment of the right. Any lapse from virtue imperils her right to the former maintenance. But whether she is then entitled to starving maintenance is a question upon which there have been divergent opinions. On this subject there are three possible views and each of them has found supporters. The first view is that with her unchastity her allowance should be reduced but not cancelled altogether. The second view is that it is forfeited altogether; while the third view favours its suspension with the possibility of its resumption upon the widow reforming her ways. According to the latest view of the Bombay High Court, unchastity is a good ground for reducing maintenance to a starving allowance but it does not justify its complete withdrawal. And if the widow afterwards reforms and is repentant, she is entitled to her previous allowance. (2) So on a review of the texts, Chandavarkar, J. said: "The general rule to be gathered from these is that a Hindu wife cannot be absolutely abandoned by her husband. If she is leading an unchaste life, he is bound to keep her in the house under restraint and provide her with food and raiment just sufficient to support life: she is not entitled to any other right. If, however, she repents, returns to purity and performs expiatory rites, she becomes entitled to all conjugal and social rites unless her adultery was with a man of a lower caste, in which case, after expiation, she can claim no more than bare maintenance and residence." (3) This is one view the other being that widow's right to maintenance is dependent upon her continence and if she turns unchaste, then her allowance may be resumed. (4) The question whether a maintenance grant settled by the husband upon his wife on his death is resumable by reason of her subsequent unchastity depends upon whether chastity is a condition precedent to its continuance. If it is, then the grant would be forfeited. But if it is not, then it cannot be resumed. (5) Of course, such a term may be a part of the grant in which case the question is one of construction. So where the widow's claim was compromised by her husband's brother transferring her some land for her maintenance it was held that the grant could not be resumed upon her unchastity, since if it were the intention it could have been so provided in the deed. (6) But according to the Madras view, such a term is implied in every grant for maintenance. (7)

976. Whatever may be the effect of unchastity upon the widow's right to maintenance, there can be no doubt that he who raises that plea is bound to prove it by clear and cogent evidence, and not merely by evidence which points to a vague suspicion which might be easily be fastened upon a young widow by

**Pleading of
unchastity.**

(1) Narad XIII-25, 26; cited in Dayabhag XI-48.

(2) *Sathyabhama v. Kesavacharya* 39 M. 658.

(3) *Parami v. Mahadevi*, 34 B. 278 (288); *Honamma v. Timanabhat* 1 B. 55; *Roma Nath v. Rajonimoni*, 17 C. 674. *Kandolasani v. Murugammal*, 19 M. 6.

(4) *Vaku v. Ganga*, 7 B. 84; *Vishnu v. Mangamma*, 9 B. 108; *Muthammal v. Kannak-*

shy, 2 M. H. C. R. 337; *Sudhagay v. Thana-kapudayan*, 1 M. H. C. R. 183. *Visalatchi v. Annaswamy*, 5 M. H. C. R. 150; *Nagamma v. Virabhadra* 17 M. 392. *Sathyabhama v. Kesavacharya*, 39 M. 658. *Debi v. Doulla* 39 A. 234.

(5) *Parami v. Mahadevi*, 34 B. 278 *Blup-singh v. Lachman*, 26 A. 321.

(6) *Blupsingh v. Lachman*, 26 A. 321 (325)

(7) *Sathyabhama v. Kesavacharya*, 39 M. 658.

interested and jealous relatives or neighbours or such as it is easy to arouse by idle gossip. In one case after the close of the plaintiff's case the defendant had applied for leave to amend his pleading so as to raise the issue about the plaintiff's unchastity which the defendant averred had just then come to their knowledge. The trial judge refused leave and the Privy Council upheld the refusal, the more so as the decree contained a *dum casta* clause. (1)

977. The same considerations weigh where the widow lives apart from her husband's family. Ordinarily, she is entitled to choose her own residence. But she cannot live apart for the purpose of immorality. (2) And where the family property is insufficient for separate maintenance the court may insist upon her maintenance in the family in which in strict contemplation of law it is her duty to reside. (3) So if she is a minor, her husband's relations are her natural guardians and she should live with them. So again if the husband had expressly directed her to be maintained in the family, she cannot claim separate maintenance without a just cause. (4) Such cause might be furnished by the cruelty and ill-treatment to which she was subjected in her husband's home or her own desire to end her days in a sacred place, or any other cause which the court regards as valid and sufficient.

Concubine's maintenance.

The general principles here set out equally apply to a continuous concubine (5) or any other female.

83. The amount of maintenance is liable to variation with the change of circumstances of the family and the value of the estate.

Change of maintenance.

Synopsis.

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|---|--|
| (1) <i>Rate of maintenance</i> (978). | (3) <i>Case for reduction</i> (980-982). |
| (2) <i>Case for increase in rate</i> (979). | (4) <i>Case for suspension</i> (983). |

978. Analogous Law.—The amount of maintenance must naturally bear a close relation to the income of the estate and the necessities of the claimant from time to time. (6) It is consequently liable to be increased or decreased or discontinued altogether according to circumstance. (7) Even where maintenance is awarded by a decree which contains no clause as it should, in favour of modification according to change of circumstances, that condition is to be implied and it is competent to any party, to maintain a separate suit for its enhancement or reduction. (8)

(1) *Saboo v. Ayeshabai*, 27 B. 485 P. C.

(2) *Pirthee Singh v. Raj Kower* 20 W. R. 21 P. C.; *Narayan Rao v. Ramabai* 3 B. 415 (421); *Kasturbai v. Shirajiram* ib. p. 372 (contra *Bango v. Yaminabai* ib. p. 41 dissenting from); *Parvati Bai v. Chatru* 13 Bom. L. R. 1023; *Molhada v. Nundolal* 28 C. 278 (287); *Siddesury v. Janardan* 29 C. 557

(3) *Raghunada v. Brozo Kishore*, 1 M. 69 (81) P. C.

(4) *Vyavastha Chandrika* 261 followed in *Mulji v. Ujam* 18 B. 218 (220); *Oiriana v. Honamma* 15 B. 286.

(5) *Panchapakea v. Kanaka* 38 M. L. J. 455; 42 I. C. 344.

(6) *Nitto Kishore v. Jogendro* 5 I. A. 55; *Davi Persad v. Gunwanti* 22 C. 410; *Narhar v. Dirgnath* 2 A. 407; *Baisni v. Rupsingh* 12 A. 558; *Ramabai v. Trimbak* 9 B. H. C. R. 283; *Savitri Bai v. Luximi Bai* 2 B. 578; *Apaji v. Gangabai* ib. p. 682; *Gopika Bai v. Dattatraya* 24 B. 386 (392, 398).

(7) *Sreeram v. Puddomookhee* 9 W. R. 152; *Nubo Gopal v. Amrit* 21 W. R. 428; *Gopika Bai v. Dattatraya*, 24 B. 386.

(8) *Vijaya v. Sripathi*, 8 M. 94; *Bangaru v. Vijayanacchi* 22 M. 175; *Rukabai v. Ganda Bai* 1 A. 594; *Moolilal v. Bai Kasi* 17 B. 45; *Gopikabai v. Dattatraya*, 24 B. 386 (392).

979. Case for increase.—A case for increased maintenance may be justified not only on the ground that since the decree, the value of the estate had greatly increased, or apart from any such increase, there has been a material increase in the cost of living which renders the money allowance insufficient to give the widow the means of maintenance suitable to her degree and the circumstances of the family. (1)

980. To raise a case for reduction it is necessary to show that the value of the estate upon which maintenance was charged had been reduced not by any default of the holder or of those through whom he claims, but by the act of God and owing to circumstances beyond his control. (2)

981. Such was the case of the widow who had sued her husband's adopted son for possession of the estate, but settled her suit amicably by an agreement executed by the son to pay her Rs. 264 and 3 bish of paddy annually for her maintenance by assigning to her certain tenants of his zemindari from whom she was to recover the amount fixed for maintenance. One of the tenants who was to pay Rs. 84 and 3 bish of paddy absconded owing to his land having become unfit for cultivation by an inundation of salt water. The widow thereupon sued the son to recover Rs. 84 and the 3 bish of paddy and also further arrears of maintenance. It was found that the defendant's zemindari had suffered as a whole from the same cause impoverishing the defendant so that he was unable to pay Government Revenue and became deeply involved in debt. The Subordinate Judge considering the impoverished state of the estate reduced the allowance to Rs. 15 per mensem and this was upheld by the High Court who observed: "Such decrees apportion maintenance always with reference to the circumstances of the parties, to the reasonable wants of the widow, and the extent of the property out of which the maintenance is to come. So long as the circumstances remain unaltered, the maintenance of course will be paid at the rate agreed upon; but if by circumstances not arising out of the default of the holder of the property the assets of it are greatly reduced, so that he can no longer be reasonably called upon to pay the amount of the maintenance fixed, I think it is open to the court to reconsider the allowance and to readjust it to the altered circumstances." (3)

982. So where in a suit for reduction of maintenance the court found "that the reduction of income was entirely due to the laches of the plaintiffs themselves, having been brought about by acts of fraud, undertaken with a view to defeat the defendant's lawful claim," the High Court threw out the suit for reduction holding that the plaintiff could not be permitted to take advantage of his own laches. (4) A case for reduction must be founded upon circumstances anterior to the suit. The fact that the widow had made a vexatious claim is no ground for reducing maintenance by way of punishment. (5) It would seem that the court is loath to modify an allowance except upon a clear case calling for its interference. It will not act upon vague and indefinite assertions. (6) So again there must be substantial grounds for

(1) *Bangaru v Vijayamachi*, 23 M. 175; *Bhuitacharjee v Puddomookhee*, 9 W. R. 152

(2) *Greeschund v. Sumthoo*, 5 W. R. 98 (99) P. C.

(3) *Rajender v. Pulto Soondry*, 5 C. L. R. 18 (20); to the same effect *Vijaya v. Sri-pathi*, 8 M. 94; *Subramanian v. Vembamall*, 14 M. L. J. 589; *Ruka Bai v. Ganula Bai*, 1 A.

584; *Narhar Singh v. Dirgnath*, 2 A. 407; *Munn v. Kabutra*, (1881) A. W. N. 12.

(4) *Munna v. Kabutra*, (1881) A. W. N. 12.

(5) *Nitto Kishore v. Jogendra*, L. R. 5 I. A. 55

(6) *Greeschund v. Shumbhoo*, 5 W. R. 98 (99), P. C.

reduction. Any reduction in the family income will not justify reduction of maintenance. So where the court had awarded Rs. 25 per mensem for maintenance and Rs. 2-8 for residence out of an estate valued at Rs. 35,000 in which the widow's husband's share would have stood at Rs. 8,750. About Rs. 3,000 of the estate was held in the Post Office Savings Bank which allowed $3\frac{1}{2}$ per cent. interest subsequently reduced, whereupon the plaintiff sued for a corresponding reduction. But the court held that cause insufficient to modify the decree. (1) In another case the court refused to discriminate between the widow with a son and one without, holding that the question in each case was what was a reasonable sum to be awarded due regard being had to all the circumstances of the case. (2) So where the adopted son had compromised the widow's suit for maintenance by assigning to her the rent of certain lands which were thrown out of cultivation by the inundation of salt water which reduced the rent values, impoverishing the defendant, the court held it to be a fit case for revision of maintenance readjusting it to the altered circumstances. (3) Where maintenance is fixed by an instrument for life, it is a question of construction and intention whether it was fixed without advertence to the increase or decrease necessitated by altered circumstances. (4)

983. Case for suspension.—So the widow's right for maintenance may be suspended if she has sufficient means of her own. It was so held in a Mitakshara case in which she had been allowed maintenance from her husband's co-parceners who obtained his property by right of survivorship. Subsequently she inherited property worth at least 2 lacs from her father, whereupon the court dismissed her suit for arrears for maintenance holding that by common law the right to maintenance was one accruing from time to time according to the wants and exigencies of the widow. (5)

84. Debts due from the family take precedence over the widow's claim for maintenance.

Priority of debts

Synopsis.

(1) *Priority of family debts to claim for maintenance* (984).

984. Analogous Law —Maintenance has sometimes been loosely spoken of as a charge on the family assets. (6) But it is not settled that a mere claim to maintenance though justifying a charge does of itself amount to a charge on the property from which maintenance is payable. (7) It, therefore, follows that if it is not charged by a contract or decree it might be defeated by any alienation made for family necessity and in the case of a trading firm in payment of its debts

(1) *Bhagirathi Bai v. Ravji*, (1896) B.P.J. 694.

(2) *Narhar Singh v. Dirgnath*, 2A. 407.

(3) *Rajendra v. Pulla Soudery*, 5 C.L.R. 18.

(4) *Subramanian v. Vembamall* 14 M.L.J. 389.

(5) *Ramawati v. Manjhari*, 4 C.L.J. 74 (78) following *Narayan Rao v. Rama Bai* 3 B. 415 P.C.; *Gokil Bai v. Lakshmidas*, 14 B. 490.

(6) *Khakro v. Jhoomucklall*, 13 W.R. 263; *Tarunginee v. Dwarkanath*, 20 W.R. 196;

Har Dayal v. Radhan, (1871) P.R. 7; *Heera Lal v. Kaunsillah*, 2 Agra 42.

(7) *Ram Kunwar v. Ram Dai*, 22 A. 326; *Bharatpur State v. Gopal Dei*, 24 A. 160; *Beer Chunder v. Raj Coomar* 9 C. 537; *Digambari v. Dhanak Kumari*, 10 C.W.N. 1074; *Kuleda v. Jageshwar* 27 C. 194; *Mahalakshamma v. Venkatarathnamma* 6 M. 88; *Mutiah v. Virammal*, 10 M. 283 F.B.; *Bhagirathi v. Anantha*, 17 M. 268. See this question fully discussed in *Gour's Law of Transfer* (4th Ed.) pp. 662-660.

without reference to any necessity. ⁽¹⁾ And even as an unsecured claim, debts of the family take precedence of maintenance ⁽²⁾ on the ground that such debts we equally binding upon her. ⁽³⁾ Consequently, she cannot enforce her right to maintenance against a purchaser of the family property and sold for such debts. ⁽⁴⁾

Maintenance a personal right.

85. (1) The right to maintenance is a personal right and cannot be transferred.

(2) A right to maintenance cannot be attached in execution of a decree, though arrears of maintenance may be so attached or transferred.

Illustration.

A, a Hindu transfers Sultanpur to his sister-in-law B, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultanpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith, without notice of the agreement B is dispossessed of Sultanpur. She has no claim on the village transferred to C.

Synopsis.

(1) *Right of maintenance, personal* (1985)

entitled to maintenance (1986).

(2) *Transfer where third person*

(3) *Maintenance right non-transferable* (1987).

1985. Analogous Law.—The right to maintenance was at one time spoken of as a charge on the estate ⁽⁵⁾ but it is now clear since the passing of the Transfer of Property Act which has defined a charge for the first time ⁽⁶⁾ that it is not so unless it is fixed and charged on a specific portion of the estate by contract or decree. ⁽⁷⁾ Even prior to the passing of the Transfer of Property Act it was held in several cases that maintenance merely created a personal right and did not enure against a *bona fide* transferee without notice ⁽⁸⁾ though it could be enforced against one who took with notice. ⁽⁹⁾ The correct view and

(1) *Ramlal v. Lakhmichand*, 1 B.H.C.R. (App) 51; *Johurra v. Sree Gopal*, 1 C. 470; *Joykisto v. Nityanund*, 8 C. 738; *Bemola Mohun*, 5 C. 792; *Ram Partab v. Pooli Bai* 20 B. 767; *Bishamhar v. Fateh Lal*, 29 A. 176; *Raghunathji v. Bank of Bombay* 34 B. 72; *Morrison v. Verchyoole* 6 C.W.N. 429.

(2) *Sham Lal v. Banna*, 4 A. 296 (300); *Gur Dyal v. Kaunsilla*, 5 A. 367; *Jayanti v. Alamelu*, 27 M. 45.

(3) *Adhiranee v. Shona Malee*, 1 C. 365; *Natchiarammal v. Gopalakrishna*, 2 M. 126; *Jaganti v. Alamelu*, 27 M. 45; *Jayanti v. Mangamma*, 25 M. 45; *Jamnabai v. Nana-bhai*, 12 Bom L.R. 1075.

(4) *Adhiranee v. Shona Malee* 1 C.365; *Johurra v. Sree Gopal*, Ib. p.470; *Soorja Koer v. Nath Bulesh Singh*, 11 C 102; *Lakshman v. Satyabhamabai*, 2 B. 494; *Balsukhram v. Lalubhai*, 7 B. 282; *Natchiarammal v. Gopalakrishna*, 2 M. 126; *Venkatammal v.*

Audhyappa, 6 M. 130; *Ramanadan v. Ranganammal*, 12 M. 260 F. B; *Shamul v. Banna*, 4 A. 269 (299) F. B.; *Jamva v. Machul*, 2 A. 315; *Gur Dyal v. Kaunsilla* 5 A. 367

(5) *Heeralal v. Kausillah* 2 Agra 42; *Ramchandra v. Savitribai*. 4 B.H. C. R. (Ac.) 73

(6) *Tarunginee v. Dewar Kanath*, 20 W. R. 196

(7) *Coomara v. Venkataswara*, 5 M.H.C.R. 405; *Subramania v. Kaliaki*, 7 M. H. C. R 226

(8) *Mutuswamy v. Venkataswara*, 12 M. I. A. 203; *Lakshman v. Sarasvatibai*, 12 B. H. C. R. 69 *Anund Moyee v. Gopal Munder* (1864) W R. 310, *Bhagabati v. Kanai Lal*, 17 W. R. 433 note; *Jugger Nath v. Odhiranee* 20 W. R. 126; *Adhiranee v. Shona Malee*, 1 C. 365

(9) *Geluck Chunder v. Obilia*, 25 W. R. 100.

one which accords with the statutory law must be, that maintenance as such merely creates a personal right which might be secured by a charge but till it is so secured, it is no more than a claim enforceable in any of the ways open to an unsecured creditor and as such subject to all the provisions of the Transfer of Property Act, regarding a claim against a transferee with notice of the claim and of the fact that the transfer was made in order to defeat or defraud her of her rights (1) but not otherwise. In other words, apart from fraud, such a claim does not avail against a *bona fide* transferee for value, even though he had notice of the claim. (2) On the other hand, it would be enforceable against a volunteer without notice. (3)

986. The law is now embodied in S. 39 of the Transfer of Property Act (4) **Transfer where third person is entitled to maintenance** in the following words: (a) Where a third person, (b) has a right to receive maintenance, (c) or a provision for advancement or marriage, (d) from the profits of immoveable property, and such property is transferred with the intention of defeating such right, (e) the right may be enforced against the transferee, (f) if he has notice, (g) of such intention or if the transfer is gratuitous, (h) but not against a transferee for consideration, (i) and without notice of the right, nor against such property in his hands.

987. Maintenance right untransferable.—The right of a widow to maintenance and residence is a personal right, and is, as such from its very nature, untransferable (5) for the husband's or heir's duty of maintaining the wife or the widow is one which he cannot owe to another. (6) But though this is true of a right, (7) arrears of maintenance may be attached and sold as soon as it becomes a debt, *i.e.*, is ascertained and fixed (8) but not till then. (9)

86. A person cannot defeat the right of his wife or widow to maintenance by disposing of his entire property by gift or devise and if he does so, she has the right to enforce her claim against the donee or devisee as the case may be.

Maintenance cannot be defeated by gift or devise.

Synopsis.

- (1) *Effect of gratuitous transfer on right to maintenance* (988). *nance right* (989).
 (2) *Transfer in fraud of maintenance* (990). (3) *Transfer pendente lite* (990).

988. Analogous Law.—This section merely carries the provisions of S. 39 of the Transfer of Property Act a step further in that it protects a right

(1) S. 58 Transfer of Property Act; *Bharatpur State v. Gopal Dei*, 24 A. 160; *Beharilalji (Shri) v. Rajbai*, 23 B. 342

(2) *Ram Kunwar v. Ram Dai*, 22A. 326, *Beer Chunder v. Raj Coomar* 9 C. 535; *Seerja v. Koer Nath Buksh Singh* 11 C. 102; *Bank Rai v. Bilase*, (1877) P. R. 14.

(3) *Jamna v. Machul* 2 A. 315

(4) For the meaning of which see *Gour's Law of Transfer* (4th Ed) 641-649; 652 661

(5) *Narbada v. Mahadee* 5 B. 99 (103, 104.)

(6) *Bhyrub Chunder v. Nubo Chunder* 5 W. R. 111; *Annapurni v. Swaminathan*, 6 I. C.

(M) 439, *Narbada v. Mahadee*, 5 B. 99 (104); See the subject further discussed in 1 *Gour's Law of Transfer* (4th Ed.) 223.

(7) S. 60 (n) C. P. C.

(8) *Rajarav v. Nanarav*, 11 B. 528 (533) *contra Gulab Kuar v. Bansihar* 15 A. 371.

(9) *Ramabai v. Ganesh* (1876) B. P. J. 188; *Tuffazul Hoosein v. Raghunath*, 7 B. L. R. 187; *Bhyrub Chunder v. Nubo Chunder* 5 W. R. 111; *Kashee Shuree v. Ganesh Chunder*, 6 W. R. (M. R.) 64; *Hoymobutty v. Kerjona*, 8 W. R. 41.

though it may not be ascertained and its amount made payable from the profits of immoveable property, "and whether the right is enforced against a transferee" or a "devisee". But in other respects this rule must be regarded as merely supplementary to that enacted in the Transfer of Property Act though S. 39 of that Act does not as such affect any rule of Hindu Law.

989. Transfer in fraud of maintenance.—S. 39 of the Transfer of Property Act protects maintenance receivable from the profits of immoveable property against fraudulent and gratuitous transfers. But there may be cases when that right might be defeated without any redress being available under that section. Such a case may, for instance, arise where the husband executes a will devising all his property to another thereby defeating his widow's claim to maintenance. Such was the case of a husband who owned a house in Bombay which was his self-acquired property. By an agreement dated 3rd April 1879 he had agreed to give his third wife a room therein to live in and settled on her a monthly allowance of Rs. 7 whereupon she executed a release of even date in favour of her husband renouncing all claim upon his property. On the 17th July 1879, following, he gifted the same house to his undivided sons by his first and second wives. Two months later he died, whereupon the plaintiff sued her step sons for the enforcement of her maintenance grant. The defendants contested the suit on the ground that their father was at liberty to give away his self-acquired property. It was held that the release was ineffectual to deprive the plaintiff of her right to maintenance which her husband could not defeat by any alienation or will without reserving sufficient property for her maintenance "Either the gift was abortive for want of an essential provision, or it passed, along with the right of the donor, the obligation that he was bound to satisfy. In the one case as well as in the other, the sons as donees are liable. The widow's claim ranks next to the family debts" ⁽¹⁾ This was the case of a gift *inter vivos* but in a later case, it was pointed out that the result would have been no different if the alienation had been by a will. As Sir Lawrence Jenkins, C. J., observed in another case: "If it was his self-acquired property he could dispose of it by his will but not so as to override his widow's claim to maintenance." ⁽²⁾

990. A transfer made during the pendency of a suit in which a charge on specific property is claimed, is of course, subject to the doctrine of *lis pendens* enunciated in S. 52 of the Transfer of Property Act. ⁽³⁾

87. The right of maintenance or residence may be enforced against all transferees and devisees of the property liable to the claim except a *bona fide* transferee for valuable consideration paid for a purpose binding upon the claimant, or one without notice of the right.

Synopsis.

- (1) *Nature of the right to maintenance* (991). (2) *Claim against transferee* (992).

(1) *Narbadi v Mahadeo*, 5 B. 99 (108, 109); *Ramchurn v. Jusooda* 2 Agra. 184.

(2) *Krishna Rao v. Bhagwant Rao*, 2 Bom. L. R. 1082.

(3) *Dose Thimmamma v. Krishna* 29 M. 508 following *Bazayat Hoosain v. Dooli Chund*, 4 C. 402 (409) P. C.

991. Analogous Law.—S. 39 of the Transfer of Property Act which protects the right of maintenance against certain transfers does not by reason of the saving clause enacted in S. 2 (d) affect the rule of Hindu Law, though it covers some of the ground of that law relating to maintenance. The right of maintenance and residence against transferees of the husband or of the heir has now become crystallized into the following rules :—

(1) That such right is not a charge upon the estate though it may properly be charged thereon.

(2) That no transfer or devise can be made with intent to defeat that right. Even the husband cannot transfer or devise his self-acquired property in fraud of his widow's right of maintenance, though it be to his own sons.

(3) That even without such intention, the right cannot be defeated by any transfer made to a transferee without consideration, or to one with notice of the right.

(4) That the right may, however, be lost by a transfer made for legal necessity or for a purpose binding upon the family in which case the question of notice is immaterial. Even a transferee who takes with a notice of the claim would hold it free from it.

(5) That where the property is limited, the transferee is bound to enquire whether there is any claim for maintenance or residence, and his failure to do so would be tantamount to notice within the meaning of S. 3 of the Transfer of Property Act and of the Trusts Act.

(6) That as regards residence, if she was living in the family dwelling house at the time of her husband's death, then she cannot be ejected therefrom by a transferee with or without notice, unless it is sold for a purpose binding upon her, or the purchaser provides for her another residence.

S. 39 of the Transfer of Property Act deals only with the first case (1) and that only upon a transfer. As the Act is not concerned with testamentary disposition of property, it does not state the effect of a devise and even as regards transfer, it only protects the right of maintenance from which the right of residence is distinct.

992. Widow's claim against transferee.—It is settled that the widow's claim for maintenance and residence in the family house may be enforced not only against the heir but equally against a donee or devisee. It may, in fact, be enforced against all transferees with or without consideration except a transferee with notice of her claim and not even against him, if he is a purchaser for family necessity. Assuming, however, that he is not such a purchaser, the question then arises when is the transferee deemed to have such notice. From the trend of decided cases it is apparent that the notice spoken of in this connection is such notice as is defined in the Transfer of Property Act (2) and the Trusts Act. (3)

Accordingly it has been held that where the transferee purchases out of an ample estate there is no need for him to enquire. But if he purchases out of a small and insufficient estate, it is his duty to enquire as to what from the widow is receiving her maintenance. If he fails to so enquire and purchases

(1) *Yamuna Bai v. Namabai* 12 Bom. L.R. 1075 (1077, 1078). See Author's comments in his *Law of Transfer* Vol. I. S. 687.

(2) S. 3 of Act. IV of 1882.

(3) S. 3 of Act. II of 1882.

the estate he will be deemed to have had notice of the fact which he could have ascertained by enquiry. ⁽¹⁾

88. Maintenance is payable out of and may be charged on any property of the person personally liable for it ; otherwise it may be charged on and is payable out of the joint family or inherited property according to the nature of the right.

Synopsis.

- (1) *Charge for maintenance, nature and extent of* (993-995). (2) *Maintenance grants, duration of* (996).

993. Analogous Law.—The question to what extent if at all, maintenance is a charge on the estate, has been often considered and by no means satisfactorily decided in several cases. Prior to the passing of the Transfer of Property Act, the word "charge" was a loose expression used to convey not only a definite incumbrance but a fund out of which a claim is payable. Hindu Law does not discriminate between these two notions of a charge. ⁽²⁾ But the fact that it provides for maintenance of disqualified heirs and others out of the property has naturally led to the view that maintenance must be a charge upon the estate. And this view was enunciated in several cases ⁽³⁾ though the contrary was equally maintained in others. ⁽⁴⁾ In 1882, the Transfer of Property Act, for the first time, formulated a definition of the term "charge" as akin to mortgage and though even the Privy Council has since spoken of the maintenance of a mother as a "charge upon the whole estate", ⁽⁵⁾ still it is clear from the context that what their Lordships implied by that expression is no more than that it was a burden upon the estate as against the sons and not a charge in the statutory sense of the term. Such a claim is, to use the language of the Madras High Court, no more than "a mere equity to a provision" ⁽⁶⁾ and whether it is an equitable charge or not, the fact remains that in its effect it does not possess all the attributes of a charge as described in the Transfer of Property Act.

994. This is conceded in the very cases in which maintenance is held to constitute a charge upon the inheritance. In 1877 Sir Raymond West had to consider the nature of the burden created by maintenance upon the estate and upon review of the texts and the earlier cases, laid down, that such a claim did not operate as a charge upon the inheritance unless it was reduced to certainty by a legal transaction ⁽⁷⁾ and that was not a burden on the estate in the hands of a purchaser with or without notice for a consideration binding upon the family. ⁽⁸⁾ But in another case, Westropp, C.J., held past and future maintenance to be a charge on her husband's estate in possession of her step sons. ⁽⁹⁾ The nature of the widow's right of residence in the family dwelling house was the subject of consideration by a Full Bench of the Madras High Court in 1888 when

(1) *Lakshman v. Satyabhamabai* 2 B. 494

(2) See the authorities set out and discussed Per Westropp, C. J. in *Lakshman v. Satyabhamabai* 2 B. 494 (508).

(3) *Ramachandra v. Savitribai* 2 Agra 42; *Lakshman v. Sarasvatibai* 12 B. H. C. R. 69 (71); *Golab Koonwar v. Collector* 4 M. I. A. 246 explained in *Lakshman v. Sarasvatibai* 12 B. H. C. R. 69; *Guga Rao v. Administrator General*, 2 I. J. (N. S.) 124.

(4) *Nistarini v. Mahan Lal*, 9 B. L. R. 27.

Mangala v. Dina Nath, 4 B. L. R. (O. C.) 27. following *Prankoonwar v. Devkoonwar*, 1 Borr 404; *Bhagabati v. Kanailal*, 8 B. L. R. 225.

(5) *Hemangini v. Kedarnath*, 16 C. 758 (766) P. C.

(6) *Kalpagaathachi v. Ganpathi*, 3 M. 184 (191).

(7) *Lakshman v. Satyabhamabai*, 2 B. 494 (521)

(8) *Lakshman v. Satyabhamabai*, 2 B. 494.

(9) *Narbada Bai v. Mahadeo*, 5 B. 99.

Muttusami Ayyar, J. again, reviewed all the cases from which he concluded that until 1877, the mother's maintenance was considered to be a charge on ancestral property. ⁽¹⁾ But in its nature the charge was indefinite in its scope, and, as in the case of a male co-parcener, a right to carve specific and individual property out of a general fund which is the common "property of the joint family." Referring then to the right of residence he said, "As to the mother's right of residence in the family house, it is a right inherent in her and an incident of her status as mother, and the son cannot arbitrarily eject her from it. There is no indefiniteness as to the specific property to which it is referable" and as the residence of Hindu females in family houses is a fact well known in this country, a purchaser was held not entitled to eject her, unless he showed that the sale bound that interest. The reason for distinction between a *jus in re* over general funds and a charge on a specific part of that fund, did not extend to the right of residence in the family house, and it was therefore held with special reference to the mode in which the theory of a charge in the nature of an existing proprietary right was developed, that "the equity of a purchaser for value did not extend to the mother's right of residence in specific property, *viz.*, the family house, unless the sale was binding on her." ⁽²⁾

995. But this is an uncertain fact and whatever may be the widow's right of residence, it does not solve the real difficulty. Is the right to maintenance a charge on the general estate? If so it must be subject to all its incidents as now defined in the Transfer of Property Act. If it is not a charge in this sense, but it is a charge in some other and more limited sense, then that term will have to be again defined and its incidents set out with specific reference to its meaning in this connection. For the present it will suffice to state that maintenance is not a charge on the inheritance within the meaning of the Transfer of Property Act, inasmuch as it is not *secured* thereon by any rule of Hindu Law so as to have the same effect as a mortgage. ⁽³⁾ But it is a right which is a fit one to be charged upon the estate inasmuch as it is one which is a substitute for ownership and is in fact closely allied thereto.

996. Maintenance grants.—The question whether a maintenance grant enures for the life of the grantee, or of the grantor or for ever, depends upon the nature of the right and claim, the character of the estate, the sex of the grantee and the terms and incidents of the grant. A grant by a male to a female relation is presumably held to be a grant only for her maintenance and as such terminable with her life. ⁽⁴⁾ But where the grantee is a male, the fact that the grant purports to be and is expressly declared to be for maintenance does not carry with it any limitation. Such a grant may be perpetual or precarious. It depends upon its terms. The fact that the grantor is the holder of an impartible estate does not limit his right to carve out maintenance grants enuring beyond his own life-time. Such is the *Babuana* grant which is a grant for maintenance of the grantee and his family descendible to his male descendants, ⁽⁵⁾ with the reversionary right in the grantor on failure of heirs. ⁽⁶⁾

(1) *Ramanadan v. Rangammal*, 12 M. 260 (271).

(2) *Ramanandan v. Rangammal*, 12 M. 260 (272) F.B.

(3) *Shamlal v. Banwa* 4 A. 296; *Ramkunar v. Ram Daia* 23 A. 826; *Bharatpur State v. Gopal Dei* 24 A. 160 (163); *Digambari v.*

Dhan Kumari, 10 C. W. N. 1074; *Venkatammal v. Anulyappa* 6 M. 180; *Ramanadan v. Rangammal* 12 M. 260 (271, 272) F. B.; *Jayanti v. Alamelu*, 27 M. 45 (49).

(4) *Sorabjit v. Indrajit*, 2 A. L. J. 720

(5) *Durgadut v. Rameshwar* 86 C. 948 P. C.

(6) *Ramchandra v. Muliwan* 88 C. 1158.

89. A person entitled to maintenance may sue for a declaration of his right, and combine therewith a claim for a past and future maintenance, with or without a charge to be created on any property liable to the claim.

Suit for maintenance

Synopsis.

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| (1) <i>Scope of suits for maintenance</i> (1997). | (7) <i>Defences to a suit for maintenance</i> (1003). |
| (2) <i>Cause of action</i> (998). | (8) <i>Defiance of restrictions imposed by husband</i> (1004). |
| (3) <i>Limitation</i> (999). | (9) <i>Possession of assets</i> (1005). |
| (4) <i>Provision for maintenance</i> (1000). | (10) <i>Measure of maintenance</i> (1006-1008). |
| (5) <i>Recovery of arrears</i> (1001). | |
| (6) <i>Rate of arrears</i> (1002). | |

997. Analogous Law.—It being settled that a right to maintenance as such, creates no charge on any specific property, it follows that a person entitled to maintenance may or may not sue alone for maintenance or he may sue that any sum decreed on that account shall be secured by a charge declared on a specified property out of which it is legally payable. As such a right must depend upon the nature of the estate and the claimant's right thereto, the decision of the question must depend upon the nature of the relationship of the plaintiff to the party sued. For instance, the right of the wife to maintenance against the husband stands on a different footing to the claim of his widow against his heirs. And similarly the right of a disqualified heir is to be distinguished from that of the junior member of the family of the holder of impartible property. In the case of the wife suing for maintenance, the question that arises is whether she has made out a case for maintenance at all and at any rate, for a separate maintenance. If she has, then the court has to consider the further question whether the demands of justice require that her claim should be further protected by a charge on her husband's estate. So far as this rule is concerned, it is intended to set out the nature of the claim that is possible in law. The plaintiff may sue for arrears of maintenance in which case the court may have to ascertain the rate at which it should be allowed. Consequently in a case where this has not been previously agreed upon, the proper course would seem to be one for the settlement of the right and a decree charging the sum decreed for past and future maintenance upon the estate. A mere personal decree for maintenance does not create a charge⁽¹⁾ and is subject to all the uncertainties of such a decree. From the fact that maintenance is regarded as arising out of a subordinate co-ownership in the estate, it is eminently a case in which the court will charge the estate unless some very strong reasons appear to the contrary.

998. Cause of action.—A suit for maintenance by the wife against the husband will not lie in the absence of any allegation that the husband has refused or has ceased to maintain her.⁽²⁾ In any case the plaintiff must have no means for her maintenance. So where the plaintiff sued for maintenance and it appeared that she was then in possession of funds belonging to her husband's family estate sufficient to maintain her for five years, the court threw out her

(1) *Brinda v Radhica*, 11 C. 492.

(2) *Purnabibi v. Radhakissan* 81 C. 476,

suit on the ground that no cause of action had accrued to her inasmuch as the court could not decree a claim in anticipation of her wants. (1) It has some times been said that there is no cause of action for maintenance unless there is demand and refusal but maintenance cannot be refused on that account. (2) At any rate, the mere withholding of maintenance is sufficient and it amounts to a refusal. (3) The question was considered by the Privy Council in a case in which the plaintiff's failure to prove a wrongful withholding was argued as disentitling the plaintiff to maintain a suit but their Lordships negatived that contention, holding that "if the defendant had been misled into the belief that the claim for maintenance was abandoned and had in consequence not set aside any portion of his annual income to meet such a claim, he would have had a good defence to the present action. But, without some such ground of defence, it is impossible to hold that the younger brothers of the defendant had forfeited an undoubted right merely because they were, in the first instance, advised to institute a wrong suit and did not claim their maintenance, as it fell due." (4) In other words, apart from any surprise or prejudice to the defendant, the mere failure of the plaintiff to prove a refusal or withholding does not imperil his suit.

999. But since the denial of a right is a starting point for limitation (5) it is necessary that it should be stated by the plaintiff, at least in answer to the plea of limitation, since it is an established rule that when the defendant pleads limitation to a suit it lies on the plaintiff to show that it is in time. If therefore, in such a case the plaintiff fails to prove the defendant's denial within 12 years, then his suit would be barred by time. (6) On the other hand, the defendant may show that he had denied the right more than 12 years before suit which would suffice to defeat the claims otherwise maintainable.

1000. Provisions for maintenance.—In a suit for maintenance the cause of action may arise under the common law or under a contract or provision of a will. It is the duty of the plaintiff to state in what right he claims to maintain the suit. A widow with a right of maintenance reserved under a will, is entitled to contest its *factum*. Under S. 50 of the Probate and Administration Act (7) the amount of maintenance fixed by the husband testator himself, if not a nominal amount, and not fixed contrary to any provision of Hindu Law, cannot be varied by the court. But a widow cannot be deprived of her right of maintenance by any provision in the will denying her right or excluding her by devising the property to another. But the husband is entitled to provide for reasonable restrictions as to her residence which she is bound to obey unless she has "just cause" to the contrary. So where the testator had devised a monthly allowance of Rs. 125 to his widow on condition that she lived in his houses "at Madhupur or Benares" and it appeared that the house at Madhupur

(1) *Dattatraya v. Rahmahabai*, 33 B. 50.

(2) *Jivi v. Ramji*, 3 B. 207; *Narayanrao v. Ramabai*, 3 B. 415 421 P. C. in which the point was disposed of even on the assumption that refusal was necessary; *Ambabai v. Ramchandra* (1895) B. P. J. 44; *Parwati Bai v. Chhatru*, 36 B. 181; *Rangu Bai v. Subaj*, 36 B. 883.

(3) *Narayan Rao v. Ramabai* 3 B. 415 (421) P. C. contra in *Motilal v. Kashi* 17 B. 45

overruled in *Yarlagadda v. Yarlagadda*, 24 M. 147 (156) P. C.

(4) *Yarlagadda v. Yarlagadda*, 24 M. 147 (157) P. C.

(5) Art. 129 Limitation Act.

(6) As to the law under the Limitation Act XIV of 1852 and IX of 1871 see *Jivi v. Ramji* 3 B. 207 (209); *Chhaganlal v. Bapubhai* 5 B. 68.

(7) *Brinda v. Radhica*, 11 C. 492 (494).

was unfit for human habitation, while his house at Benares was in the occupation of his concubines, the court held it to be a just cause on the part of the wife for not complying with that provision of the will and as her residence elsewhere necessitated a larger expenditure, it raised the testamentary allowance of Rs. 125 to Rs. 320, making it a charge on the estate. (1)

Where a charge is created by agreement or will, the plaintiff may sue to enforce the charge or abandon it and sue merely for a money decree.

1001. Recovery of arrears.—It is not in the discretion of the court to refuse arrears as it is a legal right and the only discretion it possesses is in fixing the amount. (3) It may be recovered for any period not exceeding 12 years. (2) In a suit for arrears there is no necessity, though it is advisable, to prove the withholding of the amount. But a formal demand and refusal need not be proved, and failure to prove other withholding or refusal is of itself no ground for refusal to decree the claim unless the defendants can plead and prove surprise or prejudice, as that if they had known of the demand they would have made provision for its payment (4) and that from the absence of demand, they had reason to believe that the right had been waived or abandoned as where the widow was living with her well to do father out of her husband's family and did not make any demand for a considerable period. (5) But where in such a case the plaintiff who had lived with her father-in-law for several years but demanded maintenance only 3 years before suit but claimed it for 6 years, the court allowed it for only 3 years on the ground that she had been living with her father and had not made any demand before 3 years. (6) Adverting to this case the Privy Council said: "In that case the learned judges of the High Court of Bombay admitted that a withholding of maintenance might be proved otherwise than by a demand or refusal, and if they intended moreover to decide that non-payment of maintenance when due, does not constitute *prima facie* proof of such withholding, their Lordships are unable to agree with the decision." (7) A widow cannot release her claim to future maintenance. (8) At any rate he who relies upon such release must prove its execution in the same circumstances as would bind a minor. But a woman may waive her claim to arrears of maintenance and a defendant pleading such waiver must show not only that the plaintiff had agreed to waive her right or led the defendant to believe as a reasonable man that she would not claim arrears. (9)

1002 The court is bound to allow arrears at the same rate as future maintenance. (10) If the widow has supported herself in the past without incurring any debt then there is no occasion to grant maintenance, "since the right

(1) *Promotho v. Nagendra Bala* 8 C. L. J. 499 (498, 499); 12 C. W. N. 808.

(2) *Lakshminamma v. Subhammal*, (1898) B. P. J. 887; *Ambabai v. Ramchandra*, (1846) B. P. J. 44; *Pirihoe Singh v. Raj Koer*, 20 W. R. 21 P. C. affirming 2 N. W. P. H. C. R. 170; *Venkopadhyaya v. Kavari*, 2 M. H. C. R. 36; *Sinthayee v. Thanakapudayan*, 4 M. H. C. R. 188.

(3) Art. 128 Limitation Act; *Venkopadhyaya v. Kavari*, 2 M. H. C. R. 36; *Subramania v. Kaliani*, 7 M. H. C. R. 226; *Jivi v. Ramji*, 8 B. 207; *Narbadabai v. Mahadeo*, 5 B. 99.

(4) *Mallikarjuna v. Durga Prasad*, 17 M. 862 O. A., *Yarlagadda v. Yarlagadda* 24 M.

147 P. C. *Subramania v. Muthamma*, 21 M. L. J. 482; 9 I. C. 614; *Paravatibai v. Chatru*, 86 B. 181.

(5) *Seshamma v. Subharayudu*, 18 M. 408.

(6) *Motilal v. Kashi*, 17 B. 45.

(7) *Yarlagadda v. Yarlagadda* 24 M. 147 (155, 156) P. C.

(8) *Bhyrub v. Nubo Chunder*, 5 W. R. 111; *Narada v. Mahadeo*, 5 B. 93 (104); *Gangabai v. Krishnaji*, (1879) B. P. J. 2; *Annapurni v. Swaminathan*, 6 I. C. (M) 489.

(9) *Subramania v. Muthamma*, 21 M. L. J. 482; 9 I. C. 614; *Manikka v. Soubagiammal*, 27 M. L. J. 291; 25 I. C. 897.

(10) *Raghubans v. Bhagwant*, 21 A. 183

of a widow to maintenance is one occurring from time to time according to her wants and exigencies". (1) But upon this point the courts are at variance, since the Madras Court upholds the widow's right to maintenance by reason of her interest in land (2) while the Calcutta Court grounds it upon her necessity. (3)

1003 Defence in a maintenance suit.—Besides the usual defences available to a defendant, a suit for maintenance may be defended on the ground that the plaintiff had already received a share of the property in lieu of her right. But the mere fact that the husband had made a gift of *stridhan* is not equivalent to a provision for maintenance. (4) The defendant may also plead plaintiff's unchastity as disentitling her to maintenance (5) and no court will decree a claim made by one found steeped in vice at the time of the suit. (6) Even after the decree the defendant may maintain another suit for its cancellation or modification on that account. (7) The question whether remarriage is a ground for forfeiture of maintenance has been already considered (§ 973). But it is always a good defence since a remarried woman has the first claim upon her husband for maintenance and she who claims maintenance must preserve unsullied the bed of her lord. (8)

1004. Where the husband had left an express direction in his will that his widow is to be maintained in his own house, it is a defence to a suit by the widow, who has left that house to make a home of her own. She may override her husband's wishes for a just cause (9) but if she fails to plead and prove such cause she will lose her action. It is within the competence of the testator to impose suitable restrictions when providing for maintenance and it is upon the court to consider whether the restriction is unreasonable or such as it should not give effect to. (10)

1005. No suit for maintenance will lie so long as the plaintiff has in her possession an unexpended balance of her husband's property, (11) or property otherwise inherited as from her father (12) sufficient to maintain her for the period for which she claims. Though it is the duty of the wife to live with her husband, and of his widow to live with his family, it is not a *sine qua non* to her maintenance. Even the wife may live apart from her husband if driven to adopt this course by his cruelty and immorality. (13) And when she becomes a widow she is entitled to live apart at her own discretion, provided only she does not do so for the purpose of unchastity or for any other improper purpose. (14)

1006. The measure of maintenance is an ever fruitful source of contest, and upon it the courts have not been able to formulate any general working rule.

(1) *Narayan Rao v. Ramabai*, 3 B 415 P. C.; *Rangubai v. Subaji*, 36 B. 383.

(2) *Lingayya v. Kanakamma*, 36 M. 153 followed in *Utharankat v. Utharankat*, 30 I C. (M) 897

(3) *Siddessury v. Janardhan* 29 C. 557.

(4) *Joykara v. Rambari*, 10 C. 688

(5) *Vishnu v. Manjamma*, 9 B. 108; *Daulata v. Mughu* 15 A 382; *Nagamma v. Virabhadra*, 17 M 392

(6) *Debi Saran v. Daulata* 30 A. 284.

(7) *Vishnu v. Manjamma* 9 B. 108

(8) *Janaka v. Mewar Ram* O. S. C. 12; *Kemkor v. Umia* 10 B. B. C. R. 381 *contra* per Banerji. J. held in *Gajadhar v. Kaunsila* 3 A. 161 on *stare decisis*, his opinion being conformity with the text.

(9) *Bidhu Mukhi v. Satischandra*, 9 I. C. (C) 534

(10) *Kanku v. Parvati*, (1890) B. P. J. 182.

(11) *Ramawati v. Manghari*, 4 C. L. J. 74.

(12) *Sita Bai v. Ramchandra*, 12 Bom. L. R. 373.

(13) *Pitheer Singh v. Raj Kover*, 20 W. R. 21 P. C.

(14) *Pitheer Singh v. Raj Kover* 20 W. R. 21 P. C.; *Narayan Rao v. Ramabai*, 3 B. 415 (421) P. C.; *Kassurbai v. Shivajiram*, 3 B. 372; (*contra* *Rango v. Yamunabai* 3 B. 44 dissenting from) *Surampalli v. Surampalli* 31 M. 888; *Mokhada v. Nundo Lall* 28 C. 278 (287); *Siddessury v. Janardhan* 29 C. 557.

Such rules as can be safely deduced from the approved texts and cases have already been set out. But so many factors enter into the measure of maintenance that only the faintest indication can be given of what should be the guiding principles in awarding maintenance. Where the fund for maintenance is a large estate yielding a considerable surplus income, the question does not present the same difficulty as in the case of small incomes where the court has to judge nicely between the rights of those who are to pay and those who are to receive the maintenance. In such cases the *quantum* of maintenance must be fixed with advertance to all the circumstances of the family, the income of the estate, other demands upon it, the relationship of the claimant's husband and his rights in the family, the income received from his share, the claimant's income from other sources (1) her immediate and prospective wants, her position and *status* in the family; *e.g.*, whether a mother or a daughter-in-law; and other individual circumstances which may enter into the calculation of a reasonable allowance. (2) The rate of maintenance that can be allowed to an illegitimate member of a family can be only at a compassionate rate. He cannot claim maintenance on the same principle and on the same scale as disqualified heirs and females who have been members of the family by marriage. In fixing the compassionate rate, regard should be had to the interest of the deceased father in the joint family property and the position of the mother's family. (3) It is not the ordinary practice of the appellate court to interfere with the discretion of the trial court in fixing the *quantum* of maintenance unless strong grounds are shown for their so doing. (4) It has been held that the maximum allowance the widow can get is one-third of the income received from her husband's estate (5) but this is not the invariable rule and the court has conceded her right to receive the full amount of such income. (6)

1007. In assessing the amount of maintenance, properly awardable to the younger brothers of the holder of an impartible Raj, the same principles should be applied as those on which amounts of maintenance allowances are ordinarily determined in the case of Hindu widows. In fixing the proper amount of allowance to the younger sons in any impartible Raj, while on the one hand the allowance is not to be such as to cripple the Raj, it must, on the other hand, be proportionate to the fair wants of a person in the position and rank in life of the plaintiff. Regard must be had to the income of the Raj; to the claims of the other members of the family and other expenses which the defendant has to incur in maintaining his position as a Raja, the legitimate expenses that have to be met by the plaintiff and his sources of other income if any. (7) The elements for consideration in fixing the amount of maintenance awardable to a widow, are the position and status of the deceased husband and of the widow. The court should ascertain the value of the estate with reference to the annual income derivable therefrom, and consider the proportionate amount payable out of it to the widow, including not only the ordinary expenses of living but also the amount which she might expend for religious and other ceremonies. (8)

(1) *Savitri Bai v. Luxmi Bai*, 2 B. 573; *Poorendra v. Hemanga*, 86 C. 75.

(2) *Dinobundhoo v. Rajmohinec*, 15 W. R. 78; *Nobe Gopal v. Amrit Moyee*, 24 W. R. 423; *Dovi Persad v. Gumanthi*, 22 C. 410; *Dalal Kuntwar v. Ambika Pratapsingh*, 25 A. 266 (270); *Sakvarbai v. Bhamanji*, 1. B. H. C. R. 194.

(3) *Gopalasami v. Arunchelum*, 27 M. 82.

(4) *Collector of Madura v. Mutu Ramalinga*, 12 M. I. A. 397.

(5) *Gampi v. Ganpama*, (1883) B. P. J. 144.

(6) *Madharav v. Ganigabai*, 2 B. 639.

(7) *Maresh Parlab Singh v. Dirpal Singh*, 21 A. 232.

(8) *Baisin v. Rupsingh*, 12 A. 558.

1008. In a case where a widow is entitled to maintenance, it is better to award a fixed annual sum and not a share of the income of the estate; ⁽¹⁾ though in a proper case the court might assign certain tenants or lands so as to facilitate recovery without the periodical pressure of the court.

90. (1) A suit by the widow for maintenance must be brought against all or any of the heirs in possession of the estate liable to the claim.

Parties to a maintenance suit

(2) But if the suit be to declare or enforce a charge then all persons interested in the estate must be joined.

Synopsis.

(1) *Necessary parties to a suit for maintenance* (1009).

1009. Analogous Law.— The nature of the claim made must determine the persons arrayed as defendants. If the suit is to enforce a pre-existing charge then the rule as to the joinder of parties laid down in O. 34, R. 1 of the Code of Civil Procedure should apply. If, on the other hand, the suit is for maintenance to be charged upon the estate, even then persons interested in the estate should be made parties. But if the suit relate merely to a money claim, then the plaintiff is entitled to sue any one through whom he can reach the estate ultimately liable to his claim. If, for instance, the claim is made against the joint family, then a suit might be instituted only against the manager who represents it. But in point of law the plaintiff is not bound to implead all persons equally liable to her claim ⁽²⁾ though they will be all liable to contribute, ⁽³⁾ and may if so desired by the defendant, be impleaded as party defendants.

91. (1) A decree for maintenance must fix dates for the periodical payments of the amounts decreed, giving directions for its execution and where it is charged on any estate, it must contain directions for a sale of the property charged, so far as may be in accordance with O. 34, Rr. 4 and 5 of the Code of Civil Procedure.

Maintenance decree.

(2) A decree charging any property for maintenance may be executed in accordance with the law regulating the enforcement of a charge.

Synopsis.

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| (1) <i>Form of decree for maintenance</i> (1010-1011). | <i>proper</i> (1013). |
| (2) <i>Alteration of amount fixed by decree</i> (1012). | (4) <i>Maintenance without charging estate</i> (1014). |
| (3) <i>Merely declaratory decree im-</i> | (5) <i>Charge decree</i> (1015). |

(1) *Jhanna v. Ram Sarup*, 2 A. 777.

(2) *Ramchandra v. Savitri Bai*, 4 B. H. C. R. 78; explained in *Nistarini v. Makhantal*, 9 B. L. R. 11 (27). But the case is one of doubtful authority for it assumes that maintenance is a charge and as such only the eldest brother need be sued, which is contrary to O. 84, R. 1 of the Civil Procedure Code.

(3) *Ramchandra v. Savitri Bai*, 4 B. H. C. R. 78.

1010. Analogous Law.—A decree for maintenance differs from an ordinary money or mortgage decree in that it provides for the satisfaction of a periodically-recurring right, and is as such, executable from time to time. It must be self-

Form of decree. contained and provide for every contingency of satisfaction and non-satisfaction, partial and complete, and where it is charged on any estate it must provide for its sale in case of non-payment of the amount thereby charged.

1011. The following form should suffice in ordinary cases : “ This suit coming on this day, etc., it is hereby declared as follows :—

(1) That the defendant do pay to the plaintiff the sum of Rs. 50 on or before the 15th day of October 1919 and thereafter the same amount every year on or before the same date during the life-time of the said plaintiff or until the further orders of this court.

(2) That the defendant do also pay Rs. on account of the arrears of maintenance on or before the date aforesaid and if the said payment be delayed then the amount so due shall carry interest at 6 per cent per annum until payment.

(3) That as a security for the due discharge of the said amounts hereinbefore ordered to be paid by the said defendant to the said plaintiff, the undermentioned property be and is hereby charged and will continue to be so charged till it is discharged by an order of this court.

(4) That in the event of the defendant failing to pay all or any portion of the said amount hereby charged, the plaintiff shall be entitled to apply for a decree absolute for sale of the property so charged and he may so apply from time to time as the occasion may arise on each default being made in payment of the amount of maintenance hereby decreed.

(5) That the defendant will provide suitable residence to the plaintiff in his family-house, and should the plaintiff be for any sufficient reason dissatisfied with it, she will be entitled to demand from the defendant another suitable residence, or in lieu thereof, recover Rs. 36 per annum in addition to the sum hereinbefore fixed for her maintenance which shall be deemed to be enhanced to that extent for the purpose for recovery from the property charged.

1012. It has been suggested by Parsons, J., that in “ decrees where maintenance is awarded, courts should insert words which would enable them on application to set aside or modify their orders, as circumstances might require, and in such cases the remedy would be the more appropriate one by application under the leave reserved.” (1) But it is submitted that this is a course, which if adopted, would detract from the finality of a decree, and would, on the other hand, be a standing invitation to contest it, every time that it comes up for execution. It would unnecessarily delay recovery, and it may neutralize its effect upon the parties who are presumed to abide by its terms till it is set aside or modified in a separate suit which the contestant might otherwise never institute.

(1) *Gopika Bai v. Dattaya*, 24 B. 386 (190).

1013. There cannot be a decree merely declaratory of the plaintiff's right of maintenance without determining its amount. Even where the plaintiff sues for such declaration the court as a court of equity is bound to enquire into and afford the plaintiff adequate relief. (1) The decree which merely declares the right of maintenance is not capable of execution. (2) The court should discourage a multiplicity of suits for the maintenance of one person and should if possible, make a complete decree providing for past and future maintenance. (3)

1014. Maintenance decree.—A decree for maintenance without charging any estate may be executed in the manner of an ordinary money decree. It creates no priority over other similar decrees. Such a decree becomes executable from time to time as therein provided and if it fails to specify the dates of payment, as where it merely awards payment "of Rs. 36 every year" the decree being dated 7th September 1865, then that amount would be payable on the 7th September of every year: "The decree was as to each year's annuity, to be regarded as speaking on the day upon which for that year it became operative, and separately for each year." (4) In other words, such a decree is a composite decree comprising as it does annual decrees for payment of specific sums, and if therefore there is no execution for any number of years, it would not bar execution of the decree for subsequent years. (5)

1015 Charge decree.—As regards a charge decree it must be framed in accordance with the provisions of S. 100 of the Transfer Property Act and O. 34, Rr. 4 and 5 of the Code of Civil Procedure.

Such a decree is little distinguishable from a simple mortgage decree.

92. A suit for a declaration of a right of maintenance must be brought within 12 years from the time when the right is denied, and a suit for arrears within the same period from the time when the arrears are payable.

Synopsis.

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| (1) <i>Limitation for suits for arrears of maintenance</i> (1016). | (3) <i>Claim for arrears</i> (1019). |
| (2) <i>Starting point</i> (1017-1018). | (4) <i>Suit on contract</i> (1020). |

1016. Analogous Law.—The limitation for maintenance suits is subject to Articles 128 and 129 of the Limitation Act which allow 12 years for a suit "for arrears of maintenance" from "when the arrears are payable" and in a suit for a declaration of a right to maintenance the same period from "when the right is denied."

(1) O. 7. R. 7, C. P. C., *Nistarini v. Mukhun Lall* 17 W. R. 483 (489); *Eshan-chunder v. Shama Churn* 11 M. I. A. 7; *Mohammed Zahoor Ali v. Rutta Koer*, 7 M. I. A. 468.

(2) *Venamma v. Aitamma*, 12 M. 188.

(8) *Per Westropp C. J. in Lakshman v.*

Satyabhamabai, 2 B. 494 (497 498) followed in *Vishnu v. Manjamma*, 9 B. 108 (110).

(4) *Lakshmi Bai v. Madhavray*, 12 B. 65 (67).

(5) *Ashutosh v. Lukhemonio*, 19 C. 189 F. B.

1017 Limitation.—A suit for maintenance contemplated in Articles 128 and 129 of the Limitation Act may be a suit for a declaration of one's right to maintenance, as well as for the recovery of arrears. In either case, law allows 12 years for the suit but the starting point in the second case is most material. That point is reached only when the right is denied and not when it accrues. For instance, the widow may acquire a right to maintenance on the death of her husband, but limitation does not commence to run against her as from that date. She may not care to put her right in suit or she may have other means of maintenance in which case her suit would be thrown out as premature, as was the suit of the lady who had in her possession funds sufficient for her maintenance for five years on the ground that the court was not in a position to forecast events or to anticipate the position of affairs five years later. (1)

1018. It will be noticed that limitation counts only from the moment of refusal. Now since there may be a demand without refusal, and a refusal without demand, the fact that is material is not so much the demand as the refusal. But since ordinarily a refusal implies and is preceded by a demand, the two together contribute the plaintiff's cause of action. The denial of the right must be unqualified. Mere non-payment is not such a denial (2) and it does not entitle the claimant to sue. (3) Her right to maintenance is one accruing from time to time according to her wants and exigencies. The fact that she had not received it for some time does not prejudice her when her wants and exigencies oblige her to demand it. (4) "A statute of limitation might do much harm if it should force widows to claim their strict rights, and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable." (5)

1019. Claim for arrears.—Though the period of limitation for maintenance commences from the date of refusal, that for arrears counts from when they were payable, and since they are ordinarily and presumably payable every year, it follows that arrears for twelve years may always be recovered if they are otherwise recoverable, (6) even if a suit for a declaration contemplated in Article 129 be barred. (7) A decree declaring a person's future right to maintenance must declare the sum recoverable periodically and it may then be executed at any time within 12 years. (8)

1020 Suit on contract.—The larger limitation prescribed in Articles 128 and 129 of the Limitation Act has been held to apply only to a suit instituted on the basis of Hindu Law and not to one instituted on the basis of a contract for maintenance which would be subject to the shorter limitation prescribed in Article 115 or 120. (9)

(1) *Dattiaraya v. Rukhmabai*, 38 B. 50.
(2) *Narayan Rao v. Ramabai*, 3 B. 415 P. C.; *Yarlagadda v. Yarlagadda*, 24 M. 147 P. C.

(3) *Punna Bibee v. Radha* 31 C. 476 (479).
(4) *Narayan Rao v. Ramabai* 3 B 415 P.C.; *Siddessury v. Janardhan* 29 C 557 (568)

(5) *Narayan Rao v. Ramabai* 3 B 415 (490) P. C.

(6) *Venkopadhaya v. Kavari*, 2 M.H.C.R

86; *Sinthayee v. Thanakapudayan* 4 M.H.C.R. 188; *Juni v. Ramji*, 3 B 207; *Narayan Rao v. Ramabai*, 3 B. 415 (420) P.C.; *Siddessury v. Janardhan*, 29 C. 557 (572) contra *Jeerun v. Puttno*, (1871) P. R. 67 was wrongly decided.

(7) *Rathnamasari v. Akilandanmal*. 26 M 261 (318) F.B

(8) *Narendra v. Nalim*, 26 I C. (C.) 999.

(9) *Girjanund v. Sailajanund*, 28 C. 465 (688, 664).

CHAPTER VIII.

THE JOINT FAMILY.

1021. Topical Introduction.—It has been already seen (§§ 27-28) that the primitive social group was the patriarchal family in which the father owned all the members and things comprised in the family. There was then no distinction between his wives, sons and slaves and his cattle. They were all equally his property.

1022 The next stage was reached when the patriarch, instead of being the proprietor of them all, became their representative. This altered conception of familial rights necessarily involved recognition of some rights in its component members. When this stage was reached, the patriarchal family became the joint family. In the one the patriarch possessed all the rights, the other members had neither any individuality of their own, nor possessed any capacity to possess any rights or property. In the other, the members had acquired rights to the same extent as the patriarch lost them. Both in India as in Rome the primary social unit was the family. In both places the father originally exercised the power of life and death over his children and dependents. All their acquisitions belonged to him. But the filial revolt against this paternal mastery had the inevitable result of curtailing the proprietary privileges of the parent. "A certain qualified and dependent ownership had always been recognized by the Roman Law in the perquisites and savings which slaves and sons under power were not compelled to include in the household accounts, and the special name of this permissive property, *peculium*, was applied to the acquisitions, newly relieved from *patria potestas*." (1)

1023 The secularization of law and the speedy growth of individualism fostered by the establishment of free institutions, very soon made the joint family system and its allied institution a memory of the past. But in India the growth of individualism was halting owing to the persistence of sacerdotal authority and its alliance with temporal power. In Rome the early secularization of law led to its development. In India its merger with religion has paralyzed its growth. As such, the joint family system in India of to-day is the survival of a ruder age for which no parallel now exists in the western countries. But at one time, some two thousand years ago, such families were a part of the social system of many ancient peoples, in which the father or the manager wielded the same power over the junior members of his household as the father or the manager of a joint Mitakshara family possesses at the present day. He could modify their personal condition at pleasure; he could give a wife to his son; he could give his daughter in marriage; he could transfer them to another family by adoption. And this is all that the Hindu father can do today. Similarly, as regards the right of property the modern Hindu Law bears close analogy to the laws of ancient Rome. Under both these systems the father or the manager possesses certain rights both over the person and the property of the other members of the joint family. His rights over their persons entitle him to act as the

(1) Maine's Ancient Law. p. 141.

guardian of all minor males and all minor females except as regards their *peculium* or *stridhan*. He arranges for their marriage and provides them with maintenance. He may, subject to the rules already set out, give away his son in adoption and thereby terminate his interest in the joint family.

1024. As regards their property he is entitled to manage it, represent them in suits, incur debts and transfer the joint property for the purpose of family necessity.

1025. In the original conception of a joint family, the family would consist of the aggregate of individuals, without reference to their relationship. But in course of time it became limited to those who were born therein or who became its members by affiliation or marriage. The members of the family will necessarily fluctuate from time to time, not only added to by births and diminished by deaths, but added to by marriage and adoptions and diminished by the same process. The members of this fluctuating body are, however a corporate body with a traditional head and manager who exercises over them his modified *patria potestas* and is the protector of its women, the guardian of its infants, and the representative and accredited spokesman of them all.

1026. The strength of the joint family lies in the joint family property. Without such property a joint family is conceivable but then its jointness would have no meaning, since such families may possess certain personal rights in common but they are comparatively of little account. The importance of a joint family, therefore, lies in the fact that it possesses all its property in common. As such, members have mutual rights and obligations with reference to it. But while Hindu Law postulates and presumes the existence of joint family, it does not either postulate or presume the existence of joint family property, the result being that where a member of a joint family sues another in respect of any property admittedly in possession of the family, he starts with no presumption in his favour as to its jointness. If he alleges it is joint he must prove it. But here the fact that he is a member of a joint family may assist him. For it may be that he is unable to prove that the property is joint by any direct evidence. In that case if he establishes a nucleus of joint property, then, another rule of Hindu Law would again come into play, namely, that whatever is acquired with the aid of joint funds becomes joint property.

1027. The law of joint property and partition fills an important, though diminishingly important, place in Hindu Law. It has been the subject of prolonged controversies and many of its points have not even yet emerged from that cloud land. But the differences themselves have not become crystallized into distinct principles so that there is no difficulty in stating in a codified form their leading principles. Both the terms "joint property" and the "right of survivorship" do not belong to Hindu Law, but have now become an integral part of it. They are terms applicable to the English real property which furnished to the early European writers apt analogies drawn from their own system. In course of time the analogy was forgotten and the singularly inappropriate terms such as "joint tenants" and "tenants in common" began to be used as if they were a part of the Hindu system. It is, of course, well known that under the feudal system, which still prevails in England, all land belongs to the Crown and the utmost that a tenant is capable of holding is a tenancy in freehold. But in India, land may be and is usually held, by private owners. Consequently, when an English lawyer speaks of a "joint tenant" or a "tenant in common" of land held by several owners, he is merely using an expression not to define the extent of his right in the land but merely to define

its incidents. There is, of course, much in common between an English joint tenant and a Hindu co-parcener, since while they differ as to the mode of their creation, they closely correspond as to the mode of their enjoyment and devolution. For instance, (1)—the estates held under both are of the same duration, or nature and quantity of interest, (2)—joint tenants as well as co-parceners are both entitled to possession over the whole of the joint property, and (3)—if one member dies, his right passes to the rest by survivorship. The beneficial acts of one of them respecting the joint estate enure equally to the advantage of all.

1028. But here the analogy ends. For while the joint tenancy can only be created by a deed or will, it is one of the modes for destroying the Hindu co-parcenary which can only arise by birth. Then again, while the interest of a joint tenant must extend over the whole with equal intensity, it is the very reverse in a Hindu co-parcenary where the quantity of interest is ever fluctuating with the births, adoptions, renunciations and deaths of other co-parceners. Since a joint tenancy is created by a deed or will, it may be created in favour of two strangers, whereas such a thing is impossible under Hindu Law.

1029. Analogies drawn from the English Law of Real Property are apt to be misleading, and however useful they might have been at one time to grasp the leading principles of Hindu co-parcenership, they belong to two different systems which are both radically different in their inception and effect. For instance, the tendency of English Law is towards separation of property and interest, whereas that of the Hindu Law is towards jointness, so that while the moment the three unities of title, time and extent are destroyed, the joint tenancy becomes a tenancy in common, whereas under Hindu Law an estate separate in the hands of the father immediately becomes joint upon its inheritance by his sons.

1030. Again, the wife and children of the joint tenant have not any right of maintenance which is accorded to the wife and children of a co-parcener. And the fact is, that apart from the common attributes already stated, they have nothing else in common. But the terms "joint tenants" and "tenants in common" have unfortunately become too deeply imbedded into the Anglo-Indian Law to be altogether ignored, though their constant misuse is apt to engender confusion in understanding the meaning of legal concepts which now require no mnemonic aid for study.

1031. The joint family is at times spoken of as a corporation ⁽¹⁾ but it is only a corporation in the sense that it has a perpetual existence, but a corporation is a creature of statute, while a co-parcenership is a creature of common law. The corporation, as such, is a juridical person, having a collective existence and rights. So is a co-parcenership. But there the analogy ends. A corporation is subject to fluctuations in its membership due to other causes than a co-parcenary body. Any one may join a corporation; but no one can do so in a co-parcenary which is an aggregate of relations born and to be born into the family. Again, a member of a corporation cannot dissolve it at will, which a co-parcener may do by forcing a partition which is acknowledged to be his vested right.

(1) *Chuckun Lall v. Poran Chunder* 9 28 M 344 (345).
W. R. 498 (484); *Sokkanadha v. Sokkanadha*,

1032. Similarly, the manager of a joint family is often spoken of as a trustee. So Phear, J., in one case said: "It appears to me that the joint family is, as regards the enjoyment of the joint property, a single entity. As long as the members, who have, what may be termed, vested interests in the property, choose to continue in a state of commensality and in joint fruition and enjoyment of the profits of the property, they cannot be said to possess individually, any several proprietary right other than the right to call for partition—a right which they may alien. For proprietary purposes, they exist as a whole somewhat in the character of a corporation. They manage the property together, and the *karta* is but the mouthpiece of the body, chosen and capable of being changed by themselves. The family may in this respect be likened to a committee with the *karta* as chairman. No doubt in practice, the members of the family often do leave pretty nearly everything in the hands of the *karta* and under his control, but this is in most cases the result of the respect which seniority in age and generation is apt everywhere to engender, and most especially in the case of a Hindu joint family where it takes place, it is a willing abdication of personal care and supervision. It is not a distinct agency or delegation of a separate authority: each member may still, at times, interfere if he chooses. And he may always insist upon division if he is dissatisfied with the management. Even where the members of the family apparently leave the most unrestricted power in the hands of the *karta*, it is, I believe, usual to hold a family conclave at least once in the year to confirm and approve of what the *karta* has done, and to discuss jointly what should be done hereafter as to the family affairs." (1) And so Lord Lindley delivering the judgment of the Privy Council in a case held, that the manager was "not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such a person is not that of principal or agent, or of partners; it is much more like that of trustee and *cestui que trust*." (2)

1033. But this was, again, merely a simile and it should not be pushed too far. As will be presently seen, the joint family possesses peculiar incidents of its own and its manager similarly possesses certain rights and powers which are in some respects the survival of his plenary powers, which he enjoyed in the patriarchal age, which in so far as they have been curtailed by the growing rights of the junior members, they may be at times those of a trustee, guardian and even an agent; but his complex powers cannot be more compendiously described otherwise than by setting them out in detail.

1034. Both the Mitakshara as well as the Dayabhadg families are joint and have co-parceners. But their incidents differ. For instance, while the Mitakshara co-parcener is entitled to the right of survivorship, no such right can be claimed by a Dayabhadg co-parcener. This is again indicated by the borrowed phraseology of English law, the one being designated joint tenants and the other, tenants in common. Again, the right of the Mitakshara co-parcener arises on his birth, while the right of the Dayabhadg co-parcener arises on the death of his father, leading to far reaching results as regards the right of the father. Under the Mitakshara law he is merely a manager of the joint estate and his rights are limited by those of his son and other co-parceners, whereas under the Dayabhadg the father is the absolute owner of all his estate whether

(1) *Chuckun Lall v. Poran Chunder*, 9 W. R. 488 (484); to the same effect, *Garu Savank v. Narayan*, 7 B. 467.

(2) *Annamalai v. Murugesu*, 26 M. 544 (558) P. O; to the same effect, *Sahu Ram v. Bhup Singh*, 39 A. 437 (447, 448) P. C.

self-acquired or ancestral, and he can deal with it in any manner he likes irrespective of the consent of his sons. ⁽¹⁾ Again, the vested right of the Mitakshara co-parcener entitles him to call for the partition of his share, but the Dayabhag son having no vested interest in his patrimony, has no right to any partition against his father, who, may, however, make a partition if he so chooses, and in that case he is entitled to a double share of the son.

1035. Again, since the Dayabhag father is the owner of his estate he is entitled to transfer or bequeath it to any one he likes by his will. ⁽²⁾ Then as regards the extent of the co-parcener's right, while under the Mitakshara, it is distributed over the whole estate, that under the Dayabhag is restricted to that fraction of the property which he would get on partition. In other words while the share of the Mitakshara co-parcener is neither fixed nor defined, that of the Dayabhag co-parcener is both. ⁽³⁾ On the death of the father the right in the one case passes to the son by survivorship, in the other case by inheritance or devise. On the death of the father the sons may call for a partition or remain joint. In that case the co-parcenary will be subject to the rules applicable to the Mitakshara co-parcenary as regards its management and the rights of the manager and the co-parceners *inter se*, ⁽⁴⁾ with this difference that while the right of the Mitakshara co-parcener to alienate his share for value is not universally conceded, and his right to alienate otherwise is universally denied, the Dayabhag co-parcener having his share fixed, is free to devise or transfer it for or without consideration. He may further sue or be sued individually in respect of his share. But he cannot, without partition, appropriate any portion of it to his exclusive use or enjoyment.

1036. The law of joint family may be classified under four heads: (i)—the joint family, its constitution and property, (ii)—the rights and duties of its manager (iii)—the rights and duties of co-parceners *inter se*, and (iv)—in relations to strangers.

It is discussed in this order in the sequel.

93. "Issue" of a person means and includes his son, son's son and son's son's son by legitimate descent, or valid adoption.

"Issue" defined.

1037. Analogous Law.—Hindu Law regards the son, the son's son and the son's son's son as in reality the same person in different bodies. ⁽⁵⁾ As such, the three take by their birth the wealth and the spiritual debts of their three ancestors. As will be seen in the sequel this liability is by a special rule of limitation now limited to the grandson. But the term "*putra*" is nevertheless used in the Sanskrit texts in that generic sense as comprising the next three male descendants. In this chapter this term has been eschewed as liable to be misunderstood. But its definition here is intended to obviate misapprehension of the texts quoted.

(1) *Dharma Das v. Amulyadhan*, 88 C. 147.
1119 (1124).

(2) *Debendra v. Brojendra*, 17 C. 886.

(3) *Soorjemeney v. Denobundoo*, 6 M. I. A. 526 (558); *Rajkishore v. Gobind*, 1 C. 27 P. C.;
Sheo Soonjary v. Pirthee Singh, 4 I. A. 458.

(4) *Abhaychandra v. Pyasi Mohan*, 18 W. R. 75 F. B; *Dwarika Nath v. Bungshi*, 9 C. W. N. 882.

(5) Ghose's H. L. (2nd Ed.), pp. 457,

- 94.** (1) Ancestral property means property which a person inherits from his father or father's father or father's father's father; and
- Ancestral property defined.** (2) all property acquired out of the income of such property.

Synopsis.

- (1) *Texts on 'ancestral property'* (1038). (3) *Property inherited from father, etc.* (1042).
- (2) *What is ancestral property* (1040). (4) *Accretions to such property* (1043-1044).

1038. Analogous Law.—The following texts bear on the question of ancestral property :—

Yajñavalkya :—The ownership of father and son is co-equal in the acquisitions of the grandfather, whether land, settled income or moveables. (1)

Mistakshara :—Therefore it is a settled point that property in the paternal or grand paternal (2) estate is by birth, although the father have independent power in the disposal of effects other than immoveables, for indispensable acts of duty and for purposes prescribed by texts of law, as gift through affection, support of the family, relief from distress and so forth. But he is subject to the control of his sons and the rest in regard to the immoveable estate whether acquired by himself or inherited from his father or other predecessor, since it is ordained. (3) Though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unbegotten, and they who are still in the womb require the means of support; no gift or sale, should therefore be made. (4)

1039. The second clause states the general rule that accretions and accumulations follow the corpus. (5) *Accessorium sequitur sum principale*. But this rule may be varied by custom. (6)

1040. What is ancestral property.—The term “ancestral property” is a technical term and bears a special meaning as denoting only such property as a person inherits from his father, father's father and father's father's father. (7) But he must acquire it by descent, and not by devise or a gift *inter vivos*. Property so acquired would be the donee's or devisee's self-acquired and not ancestral property. (8) It is not necessary that the property which the son acquires from his ancestor should be “ancestral” in the hands of the latter. For it may be his own acquisition, or it may have been acquired by him by descent or devise. The mode of its acquisition is immaterial except for the purpose of his own enjoyment. The position is then this. A man may possess property, partly inherited, partly devised and partly his own separate acquisition. As to the first, his right of disposition is controlled by his issue, since it is his ancestral property. As to the second, his issue have no vested right and the property though it may have been acquired from his ancestor does not by reason of the mode of his acquisition bear upon it the impress of “ancestral property.” It is so long as he is alive his, self-acquisition, and as such indistinguishable from his property of the third class which is the product of his own unaided industry. It will be thus seen how all property in the hands of a Hindu has a constant

(1) ii-121.

(2) Colebrooke translates it as “paternal or ancestral” which is wrong, as the word used is ‘Pitamaha’, i.e., grandfather. *Jamuna Prasada v. Ram Partap*, 29 A 667 (669)

(3) Vyasa.

(4) Mit L-1-27.

(5) *Umrithnath v. Goureenath*, 13 M. I. A. 542 (546); *Sudanund v. Soorjoo*, 11 W.R. 486;

Krishnappa v. Ramaswamy 8 M.H.C.R. 25

(6) *Nawabuddin v. Kani*, (1901) P.R. 12.

(7) *Attar Singh v. Khakur Singh*, 85 C.

1089 P. C.; *Venkata v. Court of Wards* 28 M.

383 P. C.; *Bishmanalli v. Gangadhar*, (1917)

Pat. 356.

(8) *Jug Mohan Das v. Mangal Das*, 10 B

528 (554, 578).

tendency to become ancestral property, and the only means of preventing it from assuming that character is to gift or devise it, while it remains a separate property.

1041. There is, however, another possibility for the ancestral property to lose its character, which it does when it is not inherited by the son, grandson or great grandson, but by or through a female, a collateral, an uncle, a brother, (1) nephew or the like. So property acquired from a mother's father or mother's grandfather is not ancestral property (2) In such cases the property though obtained by descent is in the hands of the heir--his separate property. Sanskrit text writers speak of the former as *Apratibandh*, or unobstructed property, and of the latter as *Sapratibandh*, or obstructed property, implying that in the one case the heir has a vested interest, while in the other it is merely contingent and dependent upon the failure of issue. These terms will be further considered in the sequel.

1042 For the purpose of ancestral property it is immaterial whether the issue was born before or after its acquisition by descent, provided that it vested in him some time. But as regards the father's separate property, if the son predeceased the father it would not be ancestral property in the hands of his heir. This may be illustrated by the following case:---A father with two sons *A* and *B* had self-acquired property. *A* predeceased his father leaving a widow, and upon his father's death *B* took the property. *A*'s widow claimed maintenance out of it as ancestral property. The Court admitted that in any question between *B* and his sons, it would be ancestral property. But it was not so as regards *A*. During his life-time the property was absolutely at the disposal of the father. As regards *A*, it was neither ancestral nor co-parcenary property, and on his death his widow had no higher claim over it than her husband. Her rights were not enlarged by its change of character when it reached the hands of *B*. (3) But suppose in this case, the property in the hands of the father had not been his self-acquisition but ancestral property, then the widow's claim for maintenance would have stood upon a higher ground, for her husband would then have had a vested interest in his father's property of which he could have forced a partition even during his father's life-time. (4)

1043. Secondly, any accretion made to the ancestral property becomes also ancestral, though this rule is held to be subject to customary law in the Punjab. (5) But such accretion must be made with the aid of ancestral property. (6) If it is so acquired, it becomes incorporated with the ancestral property and the son acquires equally a vested right thereto, whether he was born before or after the accretion is made. (7) The question what "aid" the ancestral property should give so as to make all acquisitions made accretions to it, has been considered in several cases in which it is laid down that it must be material and not merely nominal. (8) The mere fact that a person had received his general education out of the ancestral funds is not enough to make all his

(1) *Gurumurthi v. Gurammal*, v. 32 M. 86 (88).

(2) *Jamna Prasad v. Ram Parlap*, 29 A. 687 (669).

(3) *Janki v Nand Ram* 11, A. 194 (198) F B.

(4) *Devi Pershad v. Gunwanti*, 22 C. 410 (415).

(5) *Nawabuddin v. Kami*, (1901) P. R. 12.

(6) *Gur Charanlal v. Badri Narain*, 17 A. W. N. 187; *Sufa Chund v. Hemraj*, (1869) P. R. 59.

(7) *Jugmohan Das v. Mangal Das*, 10 B. 528.

(8) *Ram-Pershad v. Sheochurn*, 10 M. I. A. 490 (505).

subsequent acquisitions ancestral. (1) So the Privy Council denounced as a startling proposition of law "that if a member of a joint Hindu family receives any education whatever from the joint funds, he becomes for ever incapable of acquiring by his own skill and industry any separate property." (2)

Such accessions ordinarily comprise properties purchased out of the income received from ancestral property. (3)

But ancestral property recovered by a person as by repurchase from a stranger loses its character as ancestral property in accordance with an express text of the Mitakshara. (4)

1044 In one case, one Paras Das, the head and manager of a joint family banking business owning a large amount of joint ancestral property, sued for the recovery of certain property which he claimed to inherit by collateral succession. He borrowed some Rs. 9,000 out of the joint fund for the expenses of the litigation, but this money he repaid in the course of a year without interest. The litigation ended in a compromise in favour of the manager, and the question being raised that the property so acquired had become an accretion to the joint property of the family, the court held that it was no accretion merely because the manager had utilized a portion of the balance of the family's banking business which would have otherwise lain dormant: "The joint estate suffered no appreciable detriment by the transaction and it would be, we think, unduly extending the principles of Hindu Law applicable to acquisitions by the aid of joint funds or joint exertions, if we were to hold that the property which came to Paras Das from a collateral branch of the family became joint family property." (5) In another case, the plaintiff, his brother and his father, all living in union, purchased a house, the price of which they raised by pledging the ornaments of their wives. The sale-deed was taken in the name of the father. The ornaments were redeemed by the plaintiff alone out of his own earnings, and he returned the ornaments of his father and brother. On a partition this house was allotted to the plaintiff who pulled it down and adding to its site by purchasing some more land, he built a new house. It was attached in execution of a decree against the plaintiff's son to which the plaintiff objected. Parsons and Ranade, JJ., admitted his objection but on different grounds. Parsons, J., held that as the house had been acquired with the assistance of joint family, it became joint but not ancestral property, and that therefore, on its allotment in a partition to the plaintiff, it became his self-acquired property, in which his son had no vested interest. Ranade, J., however, held that the house did not become the plaintiff's self-acquired property because it had been allotted to him in a family partition, but he upheld the plaintiff's claim on an assignment which he had taken from his son. (6)

**Joint property
defined.**

95. (1) The joint property of a joint family, comprises the following property, namely :—

(1) *Dhunookdharee v. Gunput Lall*, 10 W. R. 122; *Krishnaji v. Moro*, 15 B. 32

(2) *Pauliem v. Pauliem*, 1 M. 252 (261) P. C.; *Chala Konda v. Chula Konda*, 2 M. H. C. 56 (76); *Mancha v. Narotam Das*, 3 B. H. C. R. (Ac.) 1 (6); *Lakshman v. Jannabai*, 6 P. 225 (241) (case of a vakil); *Ahmedbhoy v. Casumbhoy*, 13 B. 534 (545, 548); *Krishnaji v. Moro*, 15 B. 32 (37); *Dwarka Prasad v. Jamna*

Das, 13 Bom. L. R. 133 (137).

(3) *Bissessur v. Lachmessur*, 5 C. L. R. 477 P. C.; *Sudanand v. Bonamalee*, 6 W. R. 258; *Bona v. Bolee*, 8 W. R. 182.

(4) Cited in *B-lakee v. Court of Wards*, 14 W. R. 34.

(5) *Bachho v. Dharam Das*, 28 A. 347 (355).

(6) *Khandubai v. Pirbhai*, 2 Bom. L. R. 76.

- (a) Ancestral property inherited by a member of the family from a direct male ancestor not exceeding three degrees higher than himself.
- (b) Acquisitions to the property made with the help of joint ancestral property.
- (c) Property acquired by members of the joint family.
- (d) Property acquired with the help of nucleus of ancestral property.
- (e) Property though separately acquired but is thrown into the common stock.

(2) Such property may be called co-parcenary property.

(3) And members of the family possessing a share therein may be called co-parceners.

Synopsis.

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|---|---|--|
| (1) <i>Difference between "Joint property," "Joint family property" and "Joint ancestral property" (1045-1047).</i> | (2) <i>Apratibhandh and sapratibhandh property (1048-1050).</i> | (3) <i>Meaning of ancestral property (1052).</i> |
|---|---|--|

1045. Analogous Law.—The terms "Joint property" "Joint family property" and "Joint ancestral family property" are generally used to designate property which belongs to the members of the family. But these three terms do not always connote the same thing. As pointed out by Beaman, J., the term "Joint property" connotes to an English lawyer merely the sense it bears in English Law, namely, that the property is held by any two or more persons jointly, and its characteristic is survivorship. But in India the term "joint property" conveys a good deal more, since it means that it is property of members of a joint Hindu family. Then again, the term "Joint family property" is not the same thing as "the joint ancestral property" since family property may be joint as in clauses (b) –(e) without being ancestral, and it may be ancestral without being joint. There must have been a nucleus of joint family property before joint ancestral property can come into existence. Because the word "ancestral" connotes descent and therefore, of course pre-existence. Such nucleus is, however, by no means necessary for a joint family property.

1046 The courts draw some distinction between these two species of property, holding that in joint ancestral property the members acquire a right by birth; whereas no such presumption is made in respect of property which is merely joint without being ancestral. But there is really no real difference between the two. As Beaman, J., said: "Bating all presumptions, I state as my opinion without much fear of serious contradiction, that where property is admitted or proved to have been joint family property, it is subject to exactly the same legal incidents in every respect, as property which is admitted or proved to be ancestral joint family property". (1)

(1) *Karsandas v. Gangabai*, 32 B. 479 (491).

1047. Then again joint ancestral property is not the same thing as "ancestral property" which means property which a person inherits from a direct male ancestor not more than three degrees higher than himself—that is to say, from his father, his father's father, and his father's father's father. Property inherited by him from his other relations is his separate property. The essential feature of the one is that if the person inheriting it has sons, grandsons, or great grandsons, they all become joint owners with him, whereas in the case of the other they acquire no such interest. In other words, the son of the heir of unobstructed heritage acquires in his father's inheritance an interest by birth, so that his power of alienation is subject to his rights, whereas in property which he has inherited by obstructed succession he has the same unrestricted right of alienation as he possesses over his self-acquisitions. (1) This distinction is conveyed by the text writers by designating the two properties as *Apratibandh* or *Sapratibandh*, terms which have been translated as unobstructed and obstructed, but which connote the same sense as the terms "vested" and "contingent" of English Law.

1048. These terms are thus explained in the Mitakshara. "Heritage is of two sorts: unobstructed (*Apratibandh*) or liable to obstruction (*Sapratibandh*). The wealth of the father or of the paternal grandfather becomes the property of his sons or of his grandsons in the right of their being his sons or grandsons, and that is an inheritance not liable to obstruction. But property devolves on parents (or uncles), brothers and the rest, upon the demise of the owner if there be no male issue, and thus the actual existence of the son and the survival of the owner are impediments to the succession; and on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction. The same holds good in respect of their sons and other descendants". (2)

1049. Nilkanth describes the same terms as follows: "Where the life of the owner of the property or that of his sons, etc., is interposed, the wealth is called obstructed heritage (*Sapratibandh*); for example the wealth of uncles and the like; but where ownership accrues to sons, etc., from relationship to the owner, without the necessity of having recourse to other means of acquiring wealth, that is unobstructed heritage (*Apratibandh*); for example, the father's wealth." (3)

1050. This division of heritage is not recognized by Jimut Vahan according to whom the right to succession accrues only on the death of the previous owner, (4) the result being, as previously stated, that while the heir in Bengal has the unrestricted right of alienation uncontrolled by his son, the heir under the Mitakshara cannot alienate his unobstructed heritage without reference to the rights of his issue. For this reason property acquired by unobstructed heritage is called "ancestral property" and whereas property acquired otherwise as by inheritance from any other relation such as an ancestor more than three degrees remote, or from or through a female, as for instance, a daughter's

(1) *Nund Coomar v. Ruzseoddeen*, 18 W. R. 477; *Rayadar (In re)* 8 M. H. C. R. 455; *Jowahir v. Guyan Singh*, 4 Agra 78. The rule is the same whether the son be one by adoption—*Babu v. Ratnoji*, 21 B. 319 (895).

(2) Mit 1-1-3: see these terms explained per Couch, C.J. in *Nund Coomar v. Ruzseoddeen*, 18 W. R. 477.

(3) *Mayukh IV-II-2 (Mandlik)* p. 87.

(4) *Mandlik's H.L.* 359, 360.

son, a collateral relation or from a maternal ancestor is not ancestral property nor are the heirs or male descendants co-parceners with him in respect of such property. ⁽¹⁾

It will be thus seen that property which may be self-acquired of the father will become ancestral upon its inheritance by his son, ⁽²⁾ and such ancestral property must necessarily be co-parcenary as regards his own issue, though it is not so as regards his own collaterals since they have no interest in it by birth. ⁽³⁾

1051. Both the terms "ancestral property" as well as "co-parcenary property" are thus technical terms and bear a special meaning at variance with their etymological sense.

1052. "Ancestral property" not only includes the property inherited from an ancestor, as previously stated, but by accession it includes all the profits therefrom which may have been added to the corpus. ⁽⁴⁾ So where a person blended in his account his profits made from ancestral and those made from his self-acquired property, the court held that augmentations which blended, as they accrued, with the original estate partook of the character of that estate. ⁽⁵⁾ All property acquired out of the income of ancestral property is itself ancestral, whether acquired before or after the birth of a son. ⁽⁶⁾

Self-acquired property defined

96. (1) The following property constitutes the self-acquisition of a member of a joint family :—

(a) Property acquired by inheritance from a lineal ancestor more than three degrees remote or from a collateral or from or through a female relation.

(b) Property acquired by gift or devise.

(c) Property acquired without detriment to the joint estate.

(d) Property which is the gains of learning or science acquired without substantial help from the joint funds.

(e) Property which by its nature or extent or the mode of its acquisition is incapable of joint ownership.

(2) Where ancestral property is blended with self-acquired property in such a manner that it is impossible to separate the two, the whole may be presumed to be self-acquired.

(1) *Nund Coomar v. Ruzsooddeen*, 18 W. R. 477; *Gurumurthi v. Gurammal* 82 M. 88; but see *Venkayamma v. Venkata ramanayamma* 25 M. 678 (687, 688) P. C. discussed *post* under "Inheritance."
(2) *Ram Narain v. Pertum Singh*, 20 W. R. 189; *Chaturbhooj v. Dharamsi*, 9 B. 498 (450).

(3) *Tanki v. Nand Ram* 11. A. 194 (198); *Gurumurthi v. Gurammal* 82 M. 88 (90).

(4) *Goroo Churn v. Golukmoney*, Fult. 166; *Lakshman v. Jannabai*, 6 B. 225; *Mahomed Sidick v. Haji Ahmed* 10 B. 11 (16).

(5) *Mahomed Sidick v. Haji Ahmed*, 10 B. 11 (16, 17.)

(6) *Jugmohan Das v. Mangal Das*, 10 B. 528.

Illustrations.

(a) A member of a co-parcenary receives the gift of a village from his father-in-law as his marriage dowry. The village is his self-acquisition.

(b) The father of a co-parcenary gives half of his self-acquired estate to his son A, and the other half to his daughter B, using appropriate words to convey an absolute estate. The estate is the self-acquisition of A and the *stridhan* of B.

(c) A, a member of a co-parcenary, insured his life and purchased the insurance premia out of his salary. The insurance money is his self-acquisition.

(d) A who had received a general education out of the joint funds, acquires property out of his savings made in the practice of his business, as vakil, contractor, or astrologer. The property is his self-acquisition.

(e) A purchased land at a court auction in execution of a decree for money of a co-parcenership. It is his self-acquisition, for under S. 66 (1) of the Civil Procedure Code no evidence is admissible to show that the purchase was on account of the joint family.

(f) A member of a co-parcenary receives a grant of an impartible estate. The estate is his self-acquisition as by its nature it is incapable of joint ownership.

Synopsis.

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|--|--|
| (1) <i>Texts on self-acquired property</i>
(1053-1054). | (8) <i>Gains of science</i> (1063-1065). |
| (2) <i>Early cases on the subject</i> (1056). | (9) <i>Acquisition by unaided effort</i>
(1066-1067). |
| (3) <i>What is a self-acquisition</i> (1057). | (10) <i>Accretion to self-acquired property</i> (1068). |
| (4) <i>Obstructed heritage</i> (1058). | (11) <i>Blended property</i> (1069-1070). |
| (5) <i>Acquisition by gift or devise</i> (1060). | |
| (6) <i>Personal gifts</i> (1061). | |
| (7) <i>Property acquired without detri-</i> | |

1053. Analogous Law.—The following texts support this section :—

Manu :—206. Wealth, however acquired by learning, belongs exclusively to any one of them who acquired it so does anything given by a friend or received on account of marriage or presented as a mark of respect to a guest.

Texts.

207. What a brother has acquired by labour or skill without using the patrimony, he shall not unless by his free will, put it into parcenary with his brethren since in fact it was acquired by himself. ⁽¹⁾

Narad :—6. Property gained by valour or belonging to a wife and the gains of science are three kinds of wealth not subject to partition and so is a favour conferred by the father exempt from partition.

7. When the mother has bestowed a portion of her property on any of her sons from affection, the rule is the same in that case also, for the mother is equal to the father as regards her competence to bestow gifts. ⁽²⁾

Yajnavalkya :— Whatever is acquired by the co parcener himself, without detriment to the fathers' estate ⁽³⁾ as a present from a friend, or a gift at nuptials does not appertain to the co-heirs. Nor shall he who recovers hereditary property which had been taken away give it up to the parceners nor what has been gained by science. ⁽⁴⁾

1b. The wealth which is given to one by parents, belongs to him alone. ⁽⁵⁾

(1) Manu IX-206, 207.
(2) Narad XIII-6, 7
(3) Includes also the estate of any undivided co-parcener-Smṛiti Chandrika VII 28.
(4) II-119, 120, cited and explained in Mit. 1-IV-1-31, Dayabhag likewise devotes a whole chapter to this subject VI-II 40.
(5) Yaj. II-128 (Mandlik) p. 216. Virmirodaya amplifies this by saying that any

gifts within due bounds made by the father to his separated sons out of affection is not to be disputed by the son born after partition, and that the same rule applies in the case of affectionate gifts by the father to his sons before partition. These gifts are to be considered as the peculiar property of the sons and as such impartible"—I-222 P-1 cited Mandlik p. 216 F. N.

2. That which had been acquired by the co-parcener himself without any detriment to the goods of his father or mother, or which has been received by him from a friend, or obtained by marriage shall not appertain to the co-heirs or brethren. Any property which had descended in succession from ancestors and had been seized by others and remained unrecovered by the father and the rest through inability or for any other cause, he among the sons who recovers it with the acquiescence of the rest shall not give up to the brethren or other co-heirs : the person recovering it shall take such property.

Mitakshara :—6. Here the phrase anything acquired by himself without detriment to the father's estate must be everywhere understood and it is thus connected with each member of the sentence, what is obtained from a friend without detriment to the paternal estate, what is received in marriage without waste of the patrimony, what is redeemed of the hereditary estate without expenditure of ancestral property, what is gained by science without use of the father's goods. Consequently what is obtained from a friend as return of an obligation conferred at the charge of the patrimony, what is received at a marriage concluded in form termed *Asur* or the like, what is recovered of the hereditary estate by the expenditure of the father's goods, what is earned by science acquired at the expense of ancestral wealth, all that must be shared with the whole of the brethren and with the father. (1)

1054. Both the Mitakshara and the Dayabhag devote a chapter each to the subject of self-acquisition. Their substance is to exempt all acquisitions made without detriment to the joint estate. The rest is merely illustrative and most of the illustrations refer to occupations now no longer pursued. Thus the Dayabhag gives the following list as constituting the "gains of science" (2):—

- (1) Prize for the solution of a difficulty.
- (2) Fee for teaching a pupil.
- (3) Fee for officiating as a priest.
- (4) Prize for solving a scientific question.
- (5) Deciding a litigated question.
- (6) Prize won in a literary debate.
- (7) Prize won in a reading competition.
- (8) Games of artists and artisans.
- (9) Gambling gains.
- (10) Gains of valour and soldier's booty. (3)
- (11) Marriage presents.
- (12) Personalialia. (4)
- (13) Books.
- (14) House, garden, and the like, constructed on the site of the old family dwelling.
- (15) Lost ancestral property, recovered by one's labour, ability and exertion. (5)

1055. Jimut Vahan emphasizes the fact that anything gained by a person as a reward for learning or valour or by the application of knowledge or skill (6) is his own.

1056. These precepts on the subject of self-acquisition were somewhat narrowly interpreted in the early cases in which the courts were inclined to the view that any assistance from the joint estate, however indirect and inconsiderable, was

Early cases.

- (1) *Ib.* 1-IV-2, 6.
- (2) *Ib.* VI-II-2-12.
- (3) *Ib.* § 20.
- (4) "Clothes, vehicles ornaments, prepared food, water, woman, and furniture for repose or for meals are declared not liable to

distribution." *Ib.* § 23.

(5) All the text writers quote similar instances—See Mayukh IV-IV 1-4 (Mandlik) pp. 39, 40, 214-216.

(6) Dayabhag VI-II-17.

a "detriment to the estate" within the meaning of the texts, so as to render the product of all such individual effort equally joint property. ⁽¹⁾ But this view has long since become equally obsolete, and it is now settled that the law must not be divorced from common sense and the acquirer deprived of his self acquisition, unless it involved material detriment to the estate, or to put it differently, all self-acquisitions belong to the acquirer, unless it can be shown that they were made with the material assistance of the joint fund. ⁽²⁾ Such question may be now considered with reference to the more general principle whether individual acquisitions can be regarded as accretions to the joint estate

1057. What is a self-acquisition.—The question when any property acquired by a member of a co-parcenary becomes joint property of the family has already been considered. And in considering that question references have been made to cases when such acquisitions fail to become a part of the corpus of the joint estate. But the law of self-acquisition had attained sufficient importance even in the medieval age, when separate chapters were devoted to the subject. It has since assumed much greater importance, and therefore calls for separate notice. So far as the sacred texts are concerned, their conjoint effect is to put all acquisitions howsoever made to the single test—were they made without detriment to the joint estate, which means that if they were made without material draft on the family fund, then they cannot be treated as an accretion to the family estate and must be regarded as the separate property of the co-parcener.

1058. It is agreed that all acquisitions made by what is known as "obstructed heritage" must be regarded as falling into this class. Now since all inheritance to a male ancestor more than three degrees remote from the heir is an obstructed heritage, it follows that property inherited from an ancestor other than the father, grandfather and great grandfather becomes a person's separate property and similarly would be the property, inherited from any collateral such as a brother or a paternal cousin, ⁽³⁾ uncle, grand-uncle and the like; or that inherited from or through a female such as the mother ⁽⁴⁾

(1) *Chalakonda v. Chalakonda*, 2 M.H.C. B. 56; *Gangadharudu v. Durasulu*, 7 M.H.C.R. 47; *Mancha v. Narayam Das* 6 B.H.C. (A.C.) 1.

(2) *Nana Narain v. Huree Punth*, 9 M.I. A. 96; *Pauliem v. Pauliem*, 1 M. 252 P.C. *Lal Bahadur v. Kanhaiyalal*, 29 A. 244 P.C.; *Suraj Narain v. Ratan Lal* 40 A. 159 P.C.; *Subanslal v. Harbans Lal*, 1 B.S.R. 121; *Partab v. Tilukdharee*, 1 B.S.R. 236; *Koul Nath v. Jagrup* 5 B.S.R. 14; *Muddan Gopal v. Ram Buksh* 6 W.R. 71; *Bishen Perikash v. Bawa Misser*, 10 W.R. 287 O.A. 20 W.R. 187; *Rameshwar v. Lachmi Prasad*, 7 C. W.N. 688; *Subhanya v. Surayya*, 10 M. 251; *Gunnaiyan v. Kamalshi*, 26 M. 389 (353); *Tottampudi v. Tottampudi* 27 M. 228; *Avay ambal v. Kamalambal*, 19 M.L.J. 65; *Gangabai v. Vamanaji*, 2 B.H.C.R. 301; *Narettam v. Narsandas*, 3 B.H.C.R. (A.C.) 6; *Purshotam v. Vasudev*, 8 B.H.C.R. (O.C.) 196;

Lakshman v. Jannatar, 6 B. 225 (240, 243) *Jugmohandas v. Mangal Das*, 10 B. 528 (578, 580); *Hannantapa v. Jivubai*, 24 B. 547; *Chabildas v. Ramdas*, 11 Bom. L. R. 66; *Lachmi v. Debi Prasad*, 20 A. 485; *Durg Dal v. Ganesh Dal*, 32 A. 305

(3) *Rayadur v. Rayadur*, 3 M. H. C. R. 455; *Nand Chomar v. Razecooddeen*, 10 B.L.R. 188; *Jawahir v. Guyan Singh*, 4 Agra 78; *Pitamsingh v. Ujagar Singh*, 1 A. 652.

(4) *Muttayan v. Zamindar of Sivagiri*, 6 M. 1 (16) P. C. reversing contra O. A. from *Muttayan v. Virayandha*, 3 M. 370 (378); *Sivaganga Zamindar v. Lakshmana*, 9 M. 188; *Saminadha v. Thangathanni*, 19 M. 70; *Chelikhanji v. Appa Rau*, 20 M. 207 (218); *Venkayamma v. Venkataramanayyama*, 25 M. 678; considered and explained in *Karuppai v. Sankaranarayana*, 27 M. 800 (312—315) F.B.; *Jogeswar v. Ramchandra*, 23 C. 670 (679).

a maternal grandfather, maternal great grandfather, father-in-law (1) or the like. (2)

1059. It has already been stated that such property is only the self-acquired property in the hands of the heir, and that it would become joint property in the hands of his own heir unless it was acquired by a gift or devise (§ 1049).

1060. This is in accordance with clause (b). All property from whomsoever acquired by a gift or devise becomes self-acquired property in the hands of the donee or devisee. Consequently, property so obtained even from the father, grandfather or the great grandfather would be self-acquired,

(b) **Acquisition by gift or devise.**

though if the same property be obtained by inheritance, it would be "ancestral" and "joint." (3) But of course, in such a case the question may arise whether the gift or devise was intended to be made to a *persona designata* or to a family. If it is to a person for and on behalf of his family then the property would unquestionably become joint. The question is one of construction and intention. (4) If for example, the village is given to A and B jointly without limitation, by words purporting that they were to take it in distinct shares, the result would be both according to the English as well as the Hindu Law that they take the whole of the joint property by right of survivorship. (5) So where the father left a will devising one of his three houses to his three sons, adding—"therefore my three sons shall use and enjoy this house from son to grandson and so on in succession without power to give as gift or sell the same"—and as regards his other two houses the will provided that out of a total income of Rs. 530 (being the total amount of the income of rent per month) deducting the aforesaid expenses of Rs. 181, "the remaining amount whatever it may be, shall be divided by my executors to my three sons in equal shares. . . . My executors shall divide and give away these properties to my own grandsons being my sons, sons after my sons according to their respective shares. My sons shall have no right whatever to give as gift or to sell these properties"; and one of the testators' sons sued for the construction of the will, the court held that as to the first house, it vested absolutely in the three sons as members of a joint Hindu family, and that the law of inheritance in undivided Hindu families applied, and that as to the second and third houses, the sons took a limited estate as tenants in common in the income of the houses, in the nature of an estate for lives, which would subsist till the death of the last survivor, when the limited estate would come to an end and the provision for the division of the corpus could be carried out; that as to the first house on any of the donees dying, the other sons would take by survivorship excluding the widow of the deceased and that as to the other two houses the limited estate of each son would on his death pass to his legal representatives, and not to the survivors. (6) In another case decided by a Full Bench some land had been transferred to his wife and her children in

(1) *Beharee Lal v. Lall Chand*, 25 W. R. 307.

(2) *Adhar Chandra v. Nobin Chandra*, 12 C. W. N. 108; *Atar Singh v. Thakur Singh*, 35 C. 1089 P. C.; *Jawahir Singh v. Gayan Singh*, 3 Agra 78; *Pitamsingh v. Ujagar Singh*, 1 A. 651; *Nallatambi v. Mukunda*, 3 M.H.C.R. 455; *Saminadha v. Thangathani*, 19 M. 70; *Nund Coomar v. Raseecooddeen*, 18

W. R. 477; *Lochun Singh v. Nemdharee*, 20 W. R. 170; *Gurumurthi v. Gurammal*, 32 M. 88 (90); *Parson v. Somi*, 14 Bom. L.R., 400.

(3) *Diwali v. Brahardas*, 26 B. 445; *Kishori v. Mundra*, 38 A. 655.

(4) *Radhabai v. Nanarav*, 3 B. 151 (153).

(5) *Radhabai v. Nanarav*, 3 B. 151 (153).

(6) *Yethirajulu v. Mukunthu*, 28 M. 868.

accordance with the nuncupative will of the owner. The family was subject to the Marumakkatayam law under which land was impartible. The court held that as the donor had expressed no intention as to how the properties should be held by the donees, and in the absence of such expression, the presumption was that he intended that they should take them as properties acquired by their branch, or as the exclusive properties of their own branch, with the usual incidents of tarwad property in accordance with the Marumakkatayam usage which governed the donees. (1)

1061. Marriage gifts and other friendly offerings are excepted from partition even by the Sanskrit texts (2) which all quote **Personal gifts.** Manu who excepted from partition "any thing given by a friend received on account of marriage, or presented as a mark of respect to a guest." So where a person gifted to his son-in-law a shop and business in which the latter employed his brother as a servant, the court had no hesitation in overruling his pretention of jointness on the short ground that what the brother had received as a present from his father-in-law was his self-acquisition. (3) So nuptial gifts to a member of a joint family made out of the joint fund become his separate property. (4) On this principle the court upheld a gift of 8 acres of ancestral land by the father of a joint family possessing 200 acres to his daughter at her marriage. (5)

1062. As regards self-acquisitions made without detriment to the estate the general rule observable by the courts has already been set out (§ 1055). It has been there stated that the test in such cases is whether the acquirer has received material assistance from the joint funds in his mental equipment which has enabled him to make acquisitions. It is now settled that the mere fact that a person was maintained out of the family, (6) or received his general education out of its funds, (7) does not suffice to make his acquisitions joint; though the case would be different where he had received special education for a particular profession from the income of which he had acquired property. But the tendency of modern cases is against a too narrow construction of the rule. The courts have, consequently, laid down that the income of a Vakil who had been generally educated at the expense of the family was his self-acquired property. (8)

1063. In some of these cases the vakil appears to have received his professional training out of the joint fund but nevertheless his savings were held to be his own. (9) The contrary was laid down in some early cases, (10) but referring to them the Privy Council observed, that it would be a startling

(1) *Kunbacha v. Kutti Mammi*, 16 M. 201 (307) F. B. following *Soorjeemoney Dossee v. Denobundhoo*, 6 M. I. A. 526; *Mahomed Shumsool v. Shewakram*, L. R. 21 A. 7; *Moidin v. Ambu*, 16 M. 202 overruling *Narayanan v. Kaman*, 7 M. 315.

(2) Manu IX 206 quoted *supra*: to the same effect *Narad XIII. 6 7*; 88 S. B. E. 190: Mit. I. IV. 2.

(3) *Beharee v. Lalchand*, 25 W. R. 307; *Adhar Chandra v. Nobin Chandra*, 12 C. W. N. 108.

(4) *Sheo Gobind v. Sham Narain*, 7 N. W. P. H. O. R. 75.

(5) *Anivilla v. Cherla*, 35 M. 628;

Sundaram v. Krishnaswami, 28 I. C. (M) 992; *Kilambi v. Tirumala*, 5 M. L. T. 40; 4 I. C. 1094.

(6) *Chabiidas v. Ram Das*, 11 Bom. L. R. 606.

(7) *Suraj Narain v. Ratan Lal* 40 A. 159 P. C.

(8) *Bhagirath v. Sadashivray*, (1880) B. P. J. 126.

(9) *Suraj Narain v. Ratanlal*, 40 A. 159 (168) P. C.

(10) *Luxmon Row v. Mullar Rao*, (1881) 2 Knapp. 60 (64); *Chalakonda v. Chalakonda*, 2 M. H. C. R. 56; *Gangadharudu v. Durvasulu*, 7 M. H. C. R. 47; *Mancha v. Norotam Das*, 6 B. H. C. R. (A.C.) 1.

doctrine "that if a member of a joint Hindu family receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property." (1)

1064. Following this case the Bombay Court observed: "We think that we shall be doing no violence to the Hindu texts, but shall be only adapting them to the conditions of modern Hindu society, if we hold that, when they speak of the gains of science which has been imparted at the family expense, they intend the special branch of science which is the immediate source of the gain, and not the elementary education which is the necessary stepping stone to the acquisition of all science." (2) This was a case where a person had started with a rudimentary education received in his family, learnt up law in a solicitor's office in Bombay, and then rose to be a Subordinate Judge. His savings were held to be his own. Similar view has been taken of persons who made money as Karkun (or agent) in a Revenue collectorate, (3) commissariat officer, (4) an overseer in the department of Public Works, (5) or astrologer, (6) or a dancer. (7) But the case would have been different if one had trained the other up in dancing at the family expense.

1065. Such was the case of one Bhao for whom his brother had secured a lucrative post in the Mahratta Darbar where he made a fortune, estimated to be over 30 lakhs. While holding this office Bhao continued his connection with his parental home where the brothers had some fields which he left in charge of his brother but continued to receive reports respecting its management. Lord Brougham, L. C., upheld the decree of the courts below based upon a presumption of jointness, though he confessed that he did not feel any great confidence in his judgment. (8) In a leading case, the Bombay High Court animadverted upon this decision holding that it was decided when Hindu Law had not been studied with that attention which has since been devoted to it "and Lord Brougham found it impossible to speak with any great confidence upon a question of Hindu Law which has since been settled as clearly as such questions can be settled. If full effect be given to the words of the judgment which we have quoted, it would come to this, that so long as there is any ancestral property, however small, and so long as any member of the family shares in such property, and has not abandoned it, all acquisitions of such member are subject to partition. That would be equivalent to saying that no member of a united family who shares in an ancestral property can acquire any separate property." (9) But the judgment of the Privy Council in that case was never intended to interest any one beyond the parties immediately concerned.

1066. It is, of course, quite clear from the Hindu texts as well as the decided cases that, any property acquired by a co-parcener without the assistance of joint funds would be *a fortiori* his separate property. So it is open to a co-parcener to acquire property with money borrowed upon his sole credit (10) or the security of his life. Such was held to be the case where a person

Acquisition by un-aided effort.

(1) *Pauliem v. Pauliem*, 1 M. 252 P.C.

(2) *Lakshman v. Jemabai*, 6 B. 225 (248).

(3) *Krishnaji v. Moro*, 15 B. 32.

(4) *Lachmi v. Debi Prasad*, 20 A. 485.

(5) *Somasundara v. Gangai Bissen*, 28 M. 386 (388).

(6) *Durga Dat, v. Ganesh Dat* 82 A. 805.

(7) *Boo Logam v. Swornam*, 4 M. 380.

(8) *Luzmen Row v. Mullar Row*, 2 Knapp, 60 (64) : 5 W. R. 87 P. C.

(9) *Lakshman v. Jannabai*, 6 B. 225 (281).

(10) 2 Macn. H. L. 151; followed in *Nus-singh Das v. Rai Narain Das*, 8 N. W. P. H. C. R. 217 (235).

had insured his life and paid the premia out of his salary. (1) The same view was taken of compensation paid on the death of a member of a joint family under the provisions of S. 1 of the Fatal Accidents Act. (2) A Jagir is *prima facie* a personal grant not of the soil but only of its revenue. Being personal it is neither partible nor heritable. (3) But a maintenance grant is not necessarily restricted to the grantee personally. It depends upon its terms. (4) If made by the father to his son, it will be held to be the grant of profits assigned in rent free tenure. (5)

1067. But of course such unaided effort must be independent of the family. So where the manager of a joint family used its funds for the purchase of other properties, he could not seek for their separation on the ground that they had been acquired by his individual exertion. Even if the fact that he did exert be admitted, it was an exertion *qua* manager for which he could claim no recompense. (6) On the same principle the grant of a *Desai Inam* to the manager of a joint family was held to enure to the benefit of the family. (7)

1068. On the general principle that accretions follow the principal, all accretions made out of self-acquired property would themselves be treated as self-acquired. (8) Such are the savings and properties purchased therewith by the holder of an impartible estate. (9)

Accretions to self-acquired property.

1069. Blended property.—This clause is based upon a decision of the Privy Council in which the son sued to set aside his father's alienation as made without consideration. The defendant denied that the property sold was ancestral. The Lahore Court found that it was impossible to differentiate between the portions which came from relatives and co-sharers and the portions which might have in some instances been purchased. Thereupon the Chief Court decreed the claim but the Privy Council reversed its decree holding that it was on the plaintiff to prove that the property was his ancestral property and the finding of the Chief Court put the plaintiff out of Court. (10) The contrary was however, laid down by the Bombay court where it was held that purchases made out of the aggregate result of indiscriminate blending of ancestral with self-acquired property was ancestral. In so deciding it was said: "Before property is self-acquired, it must have been actually acquired without any detriment to the ancestral funds." (11) This case may be distinguished on the ground that here the new acquisition was at least partially made out of the ancestral property whereas in the case before the Privy Council, there was evidence of blending, but no evidence that the property claimed as self-acquired had been acquired with the aid of any ancestral property.

(1) *Mahadeva v Rama*, 18 M. L. J. 75; *Rajamma v. Ramakrishnayya*, 29 M. 121.

(2) *Sri Gopal v. Amba Devi*, (1914) P. R. 52: 22 I. C. 846.

(3) *Raghoji Rao v. Lakshman Rao*, 35 B. 689 P. C.

(4) *Muthukumara v. Udayan*, 38 M. 387; *Secretary of State v. Rashidul Haq*, 18 C. L. J. 31; 21 I. C. 93.

(5) *Ramchandra v. Bhikambar*, 37 C. 674; *Mullu v. Raghubar*, 18 I. C. (O) 127.

(6) *Sheo Dyal v. Judoonath*, 9 W. R.

61 (64).

(7) *Nanjundiah v. Venkatasubbiah*, 27 M. L. J. 618, 26 I. C. 87; S. 90, Trusts Act

(8) *Boomad Lall v. Dawkee Nundun*, 19 W. R. 223.

(9) *Parbati v. Jagadishchunder*, 29 C. 433 (453) P. C.

(10) *Atar Singh v. Thakar Singh*, 35 C. 1089 (1045, 1046) P. C.

(11) *Chabildas v. Ram Das*, 11 Bom. L.R. 606 (618) following *Lal Bahadur v. Kanhwalal*, 29 A. 244 P. C.

1070. As regards the Privy Council case it should be added that the case was heard *ex parte*, and the question of onus was stated to be admitted. The clause has, of course, no application where the question is whether any property is ancestral or self-acquired. It will apply only when the two are inextricably blended, and there is no evidence that one had contributed to the acquisition of the other. Such would be the case where a person in possession of ancestral property had means of his own out of which he could have acquired the other properties.

97. (1) The term "legal necessity" implies such pressing requirement of the family or of the estate which the law regards as sufficient justification for contracting a debt, or for the transfer of the joint estate.

"Legal necessity" defined.

(2) In particular and without prejudice to the generality of the foregoing principle, the following objects constitute such necessity :—

- (1) Debt of the father.
- (2) Payment of Government Revenue.
- (3) Maintenance of co-parceners, and of their wives and issue.
- (4) Marriage expenses of co-parceners, and of their daughters.
- (5) Performance of the customary family and funeral ceremonies.
- (6) Costs of litigation in recovering or preserving the estate.
- (7) Cost of defending a member of the joint family prosecuted for an offence.

Synopsis.

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|---|---|
| (1) <i>Legal necessity defined</i> (1071). | (7) <i>Marriage expenses of members</i> |
| (2) <i>What is legal necessity</i> (1073). | (1080). |
| (3) <i>Father's debts</i> (1074-1076). | (8) <i>Performance of ceremonies</i> (1082- |
| (4) <i>Debts recoverable from the estate</i> (1077). | 1083). |
| (5) <i>Government revenue</i> (1078). | (9) <i>Cost of litigation</i> (1084-1085). |
| (6) <i>Maintenance of co-parceners and their family</i> (1079). | (10) <i>Expenses of defence of members</i> (1086) |

1071. Analogous Law.—The following texts bear on the subject of necessity :—

Yyas—Even a single individual may conclude a donation, mortgage, or sale of immoveable property, during a season of distress, for the sake of the family, and especially for pious purposes (1)

1072. The terms "legal necessity" and "benefit," observed Lord Atkinson, are "general and elastic terms," (1) and as to the latter, "it is impossible to give a precise definition of it applicable to all cases." (2) The term necessity and benefit are ordinarily coupled together, but though allied they are not identical, for an act may be necessary without being advantageous and *vice versa*. It is, however, quite usual that an act may be both. For example, the payment of Government revenue charged upon an estate is necessary and its mortgage for that purpose advantageous to the estate since it prevents its extinction by sequestration. Other examples could be multiplied to illustrate the dual result. Such for example, would be a charge incurred to protect an estate from submersion by flood or altered watercourse. On the other hand, an act may be beneficial without being necessary. Such would be the case where an estate is sold solely for the purpose of investing the price in a business bringing in an income larger than that derived from the safer and more stable estate. It is clear that this act though probably beneficial to the family is not such as is within the scope of the manager's authority. (3) In other words, it is not "reasonable and proper" within the meaning of the next section. Both the terms "necessity" and "benefit" are thus terms of art and have a special significance in Hindu Law.

So an act may be both necessary and beneficial in the ideal sense of Hindu Law though in reality it is neither. Such is the performance of a pilgrimage or of a religious ceremony. Apart from such acts, the manager's necessary acts are such as are necessary for the material existence of the undivided family, or for the preservation of the family property. (4)

1073. What is "Legal necessity".—"Legal necessity" is a term of art and means such objects of necessity as the law considers sufficient to justify the pledging of the family credit. For "necessity" must have reference either to the family members, whether co-parceners or not, or to the estate. In either case it must be judged in the circumstances of each case. (5)

As West, J., said: "Family necessity is an expression that must receive a reasonable construction, and the head of the family and those dealing with him, must in the interest of the family itself, be supported in transactions which though in themselves diminishing the estate, yet prevent and tend to prevent still greater losses. A reasonable latitude, too, must be allowed for the exercise of the manager's judgment, especially in the case of the father, though this must not be extended so as to free the person dealing with him from the need of all precaution, where a minor son has an interest in the property." (6)

"Legal necessity is of various forms. All the indispensable religious ceremonies, the sacraments, such as marriage and the investiture with the sacred thread, the obsequies, the cremation, the periodical offerings to the manes, the ceremonies customary in the family, the subsistence of the family, the education of the younger members, the payment of the ancestral debts, the giving of presents at particular seasons and on special occasions to the

(1) *Palaniappa v. Sreemath*, 40 M. 709 (1914) P. C.

(2) *Ib.*, p 718.

(3) *Palaniappa v Sreemath*, 40 M. 709 (1914) P. C.

(4) *Ramlal v. Lakhmichand*, 1 B. H. C R.

(App.) 51

(5) K. M. Bhattacharya's Law of the Joint Hindu Family, p. 488

(6) *Babaji v. Krishnaji*, 2 B 686; *Ratnam v. Govindarajulu*, 2 M. 339.

relatives,—these and a thousand other causes of expenditure are constantly cropping up in a fairly prosperous Hindu joint family. All these are, in the strict sense of the word, lawful necessities.” (1)

But all expenses considered necessary by the manager do not constitute “legal necessities” a term which must be confined only to such objects which law recognizes as proper objects for the raising of money on the credit of the joint estate. Naturally this must depend upon the value and income of the estate, the status and position of the family, the claims upon it and the precedents by which it might be supported. But the leading heads of necessity are now well settled and they will now be examined.

1074. According to the Hindu idea the son, grandson and great grandson are in reality the same person in different bodies. Consequently the liability of the son was equally a liability of the grandson and of the great-grandson. This is in accordance with Ashahaya's interpretation of the following text of Narad.

Narad :—If a debt has been legitimately inherited by the sons, and left unpaid by them, such debts of the grandfather must be discharged by his grandsons. The liability for it does not include the fourth in descent.

1075. As to this Ashahaya says that the term “grandsons” must be taken to relate to the grandsons of the debtor's sons, *i.e.*, to the great-grandsons of the debtor, and that the term “fourth descendant” signifies the fourth in descent from the debtor's sons, *i.e.*, the fifth in descent from the debtor himself. This assumption, he says is necessary in order to reconcile the present rule with the statements of all other legislators, and with Narad's own rule. (2) But this construction is opposed both to the text and the sound method of interpretation. And the rule now accepted as settled, is what is apparent from Narad's words, namely, the father's debt is payable only by the son and the grandson, and not by any more remote descendant. This they are bound to do whether the estate inherited by them be the ancestral or the self-acquired estate of the father (3) and their liability is, in any case, limited to the assets inherited by them; and they are only liable if they were joint with their ancestor, or when the debt for which they are made liable was incurred, (4) and the suit is otherwise in time, that is to say, if the claim could have been enforced against the father if he were alive when the suit was brought, since the cause of action against both is identical. (5) The son is moreover not liable for the father's debt if he can show that it was incurred for illegal or immoral purposes. (6)

1076. The legal debt of the father constitutes a recognized head of necessity. “The sons are under a pious obligation to discharge the just debts of their father, because otherwise he would be liable to be punished in a future state for non-discharge of their debts. Upon any intelligible principle of morality, a debt due by the father by reason of his having retained for himself money which he was bound to pay to another, would be a debt of the most sacred obligation, and for the non-discharge of which punishment in a future state might be expected to be inflicted, if in any. The son is not bound to do any-

(1) K. M. Battacharya's Law of the Joint Hindu Family, p. 488.

(2) Refers to Narad, 1-6 : Vishnu, VI-27, 28; Vajnavalkya II 50; 33 S. B. E. 42.

(3) *Hunuman Persaud v. Mt. Buboee*, 6 M. I. A. 398 (421); *Girdhari Lall v. Kantoo*

Lall, 14 B. L. R. 187 (197) P. C.

(4) *Fakir Chand v. Daya Ram*, 25 A. 67

(5) *Fakirchand v. Daya Ram*, 25 A. 67 (70).

(6) *Subramania v. Gopala*, 33 M. 308; *Naro v. Paragwada*, 41 B. 347.

thing to relieve his father from the consequences of his own vicious indulgences, but he is surely bound to do that which his father himself would do, were it possible, namely, to restore to those lawfully entitled, money he has unlawfully retained." (1)

All debts of the father are then due from and payable by the son.

1077. The family is bound to pay all debts recoverable from the estate, that is such debts as were incurred by the manager, and are chargeable to the joint family which constitute a sufficient necessity, justifying the mortgage or sale of the family estate. (2)

Debts recoverable from the estate.

1078. The second head of such necessity is the Government revenue due on the joint estate. By the common law, as under the several Land Revenue Acts, the payment of Government revenue is a *prime* charge on the land (3) and the penalty prescribed for non-payment is either forfeiture or sale. Its payment is, consequently, a recognized head of legal necessity. (4)

(2) Government Revenue.

1079. The maintenance of the co-parceners follows as a matter of course from the fact that he is joint owner of the estate, and so long as he remains joint, he is entitled to be maintained out of the joint funds. His wife and children have equally the same right. As regards other relations, their right of maintenance depends upon their legal or moral claim upon the family. The subject has already been set out in a preceding chapter, (5) and all persons there mentioned as entitled to maintenance out of the joint family are persons for the maintenance of whom the assets of the family, are liable, and might be validly charged.

(3) Maintenance of co-parceners and their family.

The manager is not bound to allow the co-parceners separate maintenance, though he may do so at his discretion. And where he decides to allow them separate maintenance he may equally charge the joint funds with the cost thereof.

1080. Betrothal (6) and marriage of the male (7) and female members of the family is another head of legal necessity. As already stated, marriage is a *Samskar* and a religious necessity. (8) (§ 412). It is the only obligatory ceremony in the case of a Shudra. (9) Consequently, the manager is entitled to burden the estate with the reasonable expenses of the marriage of the co-parceners. (10)

(4) Marriage expenses of members.

(1) *Natasayyam v. Ponnusami*, 16 M. 99 (104) followed in *Peari Lal v. Chandi*, 5 C. L. J. 80 (88).

(2) *Soorjee Pershad v. Krishnan*, 1 N. W. P. H. C. R. 46; *Lalla Gumpul v. Toorun*, 16 W. R. 52.

(3) *Chatraput v. Grindra*, 6 C. 389.
(4) *Gharibullah v. Khalak Singh*, 25 A. 407 (416) P. C.

(5) Ch. VIII.

(6) *Sundrabai v. Shivnarayana*, 32 B. 81 (87) where texts and cases are cited, dissenting from *contra Sundari v. Subramania*, 26 M. 505 and *Govindarazulu v. Devarabhotla*, 27 M. 206 overruled in *Gopala v. Venkatanarasa*,

37 M. 273 F. B.

(7) *Ganpat v. Tulsi Ram*, 13 Bom. L. R. 860.

(8) *Sundrabai v. Shivnarayana*, 32 B. 81; *Gopala v. Venkatanarasa*, 37 M. 273 (274) F. B.

(9) *Sundrabai v. Shivnarayana*, 32 B. 81 (90); *Saravana v. Muttayi* 6 M. H. C. R. 371; *Mahadeva v. Rama*, 13 M. L. J. 75; *Kameswari v. Veerachariu*, 34 M. 4-2; *Gopala v. Venkatanarasa*, 37 M. 273 F. B; *Narayana v. Ramalinga*, 39 M. 587; *Goribullah v. Khalak Singh*, 25 A. 407 P. C.

(10) *Juggessur v. Nilambur*, 3 W. R. 217.

The question is immaterial whether the relation to be married is a female, ⁽¹⁾ provided she is a member of the joint family. This is now settled.

But the Allahabad Court would draw a line after the first marriage, holding the second and subsequent marriages as outside the pale of legal necessity. ⁽²⁾ In strict view of the law this view is right; but it may be doubted whether it is in consonance with modern thought.

1081. The expenses of marriage would include the price paid for the bride, though it may convert the marriage to the *Asur* form disapproved by the sages. But as already seen, such marriages now obey the economic law of supply and demand and are quite common in places where girls are in deficiency. ⁽³⁾

1082. The performance of indispensable religious or customary duties is another head of legal necessity. Such are the performance of initiatory, ⁽⁴⁾ and funeral ceremonies ⁽⁵⁾ and the performance of the father's exequal rites and Shraddh ⁽⁶⁾ and the pilgrimage to Gaya ⁽⁷⁾ but not to Benares. ⁽⁸⁾ since one is the necessary part of the exequal rites which the other is not. But though a pilgrimage to Gaya to offer *pindas* for the spiritual benefit of the deceased is an acknowledged necessity a feast given upon return is not so. ⁽⁹⁾ So referring to the widow it was said: "Pilgrimages are generally made by a widow with a view to present her husband's funeral obligations at the sacred place visited, and to answer for his soul the special merit rising from such presentation. In every case the question must be whether the pilgrimage was for the spiritual benefit of her husband, in the performance of her duty to his soul, and whether the expenses incurred are reasonable and were made honestly, having regard to the estate, the *status* of the family, and other considerations which it is customary for Hindus to take into account in accordance with the religious beliefs and usages." ⁽¹⁰⁾ So a pilgrimage to Pandharpur or any other local Gaya might be considered necessary, and it was so considered in a case. ⁽¹¹⁾

1083. The gift of property to the priest of a temple may be a pious act but is not of legal necessity. ⁽¹²⁾ If the gift be of small value it may pass muster as a pious gift, but a considerable portion of the estate cannot be alienated for a pious purpose. ⁽¹³⁾

1084. Litigation is an evil, but it is a necessary evil, and one which constitutes legal necessity if it is necessary for the recovery, protection or preservation of the estate or of any of its assets, ⁽¹⁴⁾ and it may be added, for the defence of its head, ⁽¹⁵⁾ or of any of its members. ⁽¹⁶⁾ The question was examined by Mahmud, J.,

(1) *Pryag Narain v. Ajudhia*, (1848) 7 B. S. R. 602; 8 I. D. (O. S.) 456; *Chumun Lall v. Gunput Lall*, 16 W. R. 52; *Bhagirathi v. Jokhu Ram*, 32 A. 575; *Makhan Lal v. Gayan*, 8 A. L. J. 13.

(2) *Bhagirathi v. Jokhu Ram*, 32 A. 575.

(3) *Ib.*

(4) 2 W. Mac. Ch. XI-case 6 pp 259, 260. *Puran Dai v. Jai Narain*, 4 A. 482 (484).

(5) *Chumun Lall v. Gunput Lall*, 16 W. R. 52; *Mahomed v. Shoma*, 14 B. 562 (564).

(6) *Chumun Lall v. Gunput Lall*, 16 W. R. 52; *Mahomed Ashraf v. Professoree*, 19 W. R. 426; *Mutteram v. Gopal*, 20 W. R. 187.

(7) *Junmajooy v. Russomoye*, 10 W. R. 209; *Mahomed Ashraf v. Brojessuree*, 19 W. R. 426; *Mutteram v. Gopal*, 20 W. R. 187

Ganpat v. Tulsi Ram, 13 Bom. L. R. 860 (862); *Srimohan v. Brig Behary*, 36 C. 753; *contra Raj Chandra v. Sheshoo*, 7 W. R. 116 (8) *Hurromohun v. Auluck Monee*, 1. W. R. 252.

(9) *Makhan Lal v. Gayan Singh*, 8 A. L. J. 13.

(10) *Ganpat v. Tulsi Ram*, 13 Bom. L. R. 860 (862)

(11) *Ib.* p. 862.

(12) *Ram Kewal v. Ram Kishore*, 22 C. 506.

(13) *Puran Dai v. Jai Narain*, 4 A. 482; *Ram Kewal v. Ram Kishore*, 22 C. 506.

(14) *Karimuddin v. Gobind*, 81 A. 497 (506) P. C.; *Indar Kuar v. Lalla Prasad*, 4 A. 532 (542); *Grose v. Amritamayi*, 12 W. R. 18.

(15) *Beni Ram v. Man Singh*, 34 A. 4 (8).

(16) *Ib.*

who said: "A distinction should be drawn between litigation undertaken to *protect* the property and litigation the object of which is to obtain a possible *benefit* for the estate. The former relates to the security of that which has already been acquired. As a general rule, the former class of litigation would no doubt amount to legal necessity; and in regard to the latter classes of litigation it may be laid down that, if such litigation ends in actual benefit to the estate, any alienation which may have been necessary for prosecuting the litigation would be valid and binding upon the reversioner, on the analogy of the maxim—he who enjoys the benefit ought to bear the burden also. It may be further laid down that in cases where the litigation undertaken by the widow is not undertaken for the benefit of the estate, any alienations made by her for the purpose of prosecuting the litigation are necessarily invalid and do not bind the property. It may even be a question of nicety to determine the exact nature of a litigation when it actually ends in failure. The widow may have been acting with a view to benefit the estate; the creditor may have advanced money to her without any fraudulent intention. But these circumstances alone do not in my judgment warrant the conclusion that the charge created by the widow should bind the property as against the reversioners." (1)

1085. In this case the widow had embarked upon a very costly but uncertain claim to recover property to which her husband had an alleged right of succession, but which he had not himself sought to enforce. The court held that the litigation was not for the benefit of the estate, and did not support the mortgage. (2) Even where a suit is necessary, it may not be necessary to mortgage the estate and carry the case to the Privy Council. In this view the court disallowed a mortgage given by the widow as security for costs, even though the husband had deposited it before it was accepted. (8)

As between suits instituted to protect and those instituted to recover an estate the courts hold the first to be necessary while the second unnecessary though they may be for the benefit of the estate. (4)

1086. The cost of defending the head of the family, whether the father or any other relation, is held to be a necessity justifying the mortgage or sale of the joint estate. (5)

But it seems that it cannot be mortgaged for the defence of any other co-partener, although he must be adequately defended at such cost as the family can afford.

98. The term "benefit" includes such protection or preservation or improvement of the family estate, or the maintenance, education, or advancement of its members, as may, due regard being had to all the circumstances, be considered reasonable and proper.

"Benefit" defined.

Synopsis.

(1) *Benefit to the estate* (1087).

(2) *What is a benefit?* (1088-1090).

(1). *Indar Kuor v. Lalta Prasad*, 4 A 532 (548).

(2). *Indar Kuor v. Lalta Prasad*, 4 A. 532 (584, 546).

(3). *Phool Koer v. Debi Pershad*, 12 W. R. 187.

(4). *Roy Mukhun Lall v. Stewart*, 18 W. R.

121.

(5). *Beni Ram v. Mon Singh*, 34 A. 4; contra *Nathu Rai v. Din Dayal*, 2 Pat. L. J. 166; 39 I C 665 in which, however, there is no discussion; *Nobin Chandra v. Khedar Nath*, 6 C. W. N. 648.

1087. Analogous Law.—In a case already cited, Lord Atkinson stated that the terms “legal necessity” and “benefit” were general and elastic terms, and that as regards “benefit” it was impossible to give a precise definition so as to be applicable to all cases. (1) “The preservation however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection to be taken as benefits and what not.” (2) That necessity and benefit are two concepts distinct and distinguishable from each other is recognized both in the texts as well as in the decided cases. The recovery of a estate from another which the family claimed by succession is a clear case of “benefit” as distinct from necessity. (3) Such is also the case of starting a trade for improving the family fortunes. (4) The older cases, however do not observe any distinction between legal necessity and benefit, holding the latter as a species of family necessity. So in a leading case (5) the Privy Council said that the alienation would be valid if it was made by the managing member of the family “for legitimate family purposes” and in another case where, the father had contracted a debt to purchase a stock of buffaloes to enable him to start the business of milkman, West, J., held that the debt was contracted to put the father in the way of earning a maintenance and therefore, under the pressure of family necessity. (6) On the other hand, in a Calcutta case where the widow had executed a bond for raising funds to prosecute a suit for recovery of certain property the Lower Court upheld her debt as supported by necessity, but Couch, C. J., said: “That is not a necessity at all, because there was no necessity to institute the suits though it may have been a proper thing for her to do, as being beneficial to her as well as to those who would succeed her in the property.” (7)

1088. What is a benefit.—The distinction between necessity and benefit is now well recognized, and though cases must occur in which an act might be justified from the dual standpoint, since an act is sometimes defended as necessary because it is conducive to the spiritual benefit. Even apart from such figurative expressions the two terms are sometimes apt to be confused; though they do not exert the same degree of pressure upon the estate.

The distinction between the two was pointed out by Mahmud, J., in a passage already cited. (8)

1089. The question whether anything is a benefit must depend upon the circumstances. A well and a tank are both useful for irrigating land, but whether the manager was justified in charging the estate for the purpose of excavating them is a question which must depend upon circumstances. If the income of the estate was sufficient, he would in no case be entitled to raise funds on the security of the estate to dig them. If on the other hand, it was the only means of averting drought and there were no funds, it might be both

(1) *Palaniappa v Sreemath*, 40 M. 709 (714) P. C.

(2) *Ib.*, p. 718.

(3) *Roy Mukhun Lal v. Stewart*, 18 W. R. 121.

(4) *Babaji v. Krishnaji*, 2 B. 666; *Achhe v. Jawala*, (1878) P. R. 67; *Ganga v. Khushal*, (1876) P. R. 77; *Raghunath v. Ruheem*, (1869) P. R. 53; *Janki Das v. Sanchi Ram*, (1871) P. R. 11; *Achru v. Merchand*, (1879) P. R. 98; *Thakuri v. Ganda Mall*, (1879) P. R. 78;

Hazura v. Chanda, (1887) P. R. 87; *N. Jamma v. Sardar*, (1888) P. R. 93; *Charanjit v. Telu Mal*, (1888) P. R. 152;

(5) *Suraj Bunsri Koer v. Sheo Pershad*, 5 C. 148 P. C.

(6) *Babaji v. Krishnaji*, 2 B. 666.

(7) *Roy Mukhun Lal v. Stewart*, 18 W. R. 121 (122) followed in *Indar Kuar v. Lalita Prasad*, 4 A. 532 (543)

(8) *Indar Kuar v. Lalita Prasad*, 4 A. 532 (543).

a benefit and a necessity. (1) In either case the act would be justified if it is reasonable and proper. If the litigation has ended in recovery of the estate then the end necessarily justifies the means and he who has the benefit cannot complain of the burden. (2) The construction of a house is not such benefit as to justify the mortgage of the estate. (3)

1090. In one case the widow had mortgaged the property to recover it from the purchaser to whom it had been sold for arrears of road cess. The court disallowed the mortgage holding that as the money was not used to stop the execution, it was not spent to meet a legal necessity. (4) But the question of benefit was not considered. It was perhaps a case where the estate was lost to the family by the widow's negligence. In that case she conferred no benefit on the reversion by her re-purchase of the property which she should never have lost. Where the manager purchases new property out of funds raised by selling or mortgaging the old, the question whether the transaction is beneficial to the family, and as such binding upon its members, depends upon its reasonableness and propriety, which must be decided with due advertance to all the surrounding circumstances, as to which no hard and fast rule is possible, but *inter alia* it must be shown, (i)—that the new lands are at least not inferior in quality and value to the old lands; (ii)—that though the new lands are not superior in value to the old lands, the family would otherwise gain by the change; (iii)—that the family would not lose by parting with ancestral lands and purchasing new lands. (5) But it is not a question for the infusion of sentiment into consideration of the question. The question is one of material advantage. It is not often that the managers in this country are willing to barter new lamps for old. Their chronic conservatism is a sufficient safeguard against making any cataclysmic changes in their ancestral domain. But when they are made conduct must be examined in the cold light of facts.

Constitution of Hindu family.

99. A Hindu family is constituted of the following members, namely :—

- (1) Persons descended from a common ancestor and are related to one another as sapindas.
- (2) Collateral relations descended from a common ancestor in the male line.
- (3) Persons who are adopted into the family.
- (4) The mother, the wives and widows, of the male members, and unmarried daughters.

Synopsis.

Constitution of a joint-family (1091-1092).

1091. Analogous Law.—The unit of a Hindu society is not the individual, but the family, and in their mutual relations it is not the individuals but the

(1) *Makhanlal v. Gayan Singh*, 8 A. L. J. 18; *Bunjeet Ram v. Mhd. Wars*, 21 W. R. 49.

(2) *Karimuddin v. Gobind*, 81 A. 497 P. C.

(3) *Bhogaraju v. Adappalli*, 10 M. L. T. 179.

(4) *Sri Mohan v. Brij Behary*, 86 C. 758

(747); *Kaihur Singh v. Roop Singh*, 8 N. W. P. H. C. R. 40.

(5) *Krishnasami (In re)* (1912) 1 M. W. N. 187; 18 I. C. 648; *Bolru v. Dhuram Singh*, 14 I. C. (A) 746.

families that count. Whenever the individuals count, they do only as representing the family. Each individual in a family has to fill his appointed office recognized by immemorial usage.

1092. But what is a family and who are its members? In its primary conception family consisted of all the descendants in the male line from a common ancestor, their wives, sons and married daughters. The existence of such a family is still recognized. But in practice they are split up into smaller aggregates as soon as their number becomes unwieldy and it may then be that the family comprises only a man, his wife or wives, his sons, their wives and children, and their unmarried or widowed daughters. ⁽¹⁾ But such a family though complete in itself, is only a component part of a larger family consisting of all such who are related to one another as sapindas. ⁽²⁾ These though living apart and possessing, separate property are yet members of the same family in that they are all related through a common ancestor. But a family in this larger sense has no legal attributes. The family to be considered is that which comprises the relations enumerated in the section. So Bhashyan Ayyangar, J., remarked: "The Mitakshara doctrine of joint family property is founded upon the existence of an undivided family as a corporate body and the possession of property by such corporate body. The first requisite, therefore, is the family unit, and the possession by it of property is a second requisite. For the present female members of the family may be left out of consideration and the conception of the Hindu family is a common male ancestor with his lineal descendants in the male line, and so long as that family is in its normal condition, of undivided estate, it forms a corporate body. Such corporate body, with its heritage, is purely a creature of law and cannot be created by act of parties, save in so far that by adoption, a stranger may be affiliated as a member of that corporate family. Persons, who by birth or adoption are not members of a Hindu family cannot in the absence of a custom having the force of law, by mere agreement become or be made members of a joint family. According to the above conception of a family, there may, of course, be one or more families all with one common ancestor, and each of the branches of that family with a separate common ancestor." ⁽³⁾

100. (1) A co-parcenary is a joint family comprising a common male ancestor with his lineal descendants in the male line not more than three degrees remote from him, or of the last holder of a share of his property.

Co-parcenary and co-parcener defined.

(2) A co-parcener is a male related not more than three degrees remote from a direct ancestor who owned an estate or was entitled to a share therein.

Synopsis.

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| (1) <i>What is a co-parcenary</i> (1093-1096). | (3) <i>Co-parcenary of several families</i> (1101-1103). |
| (2) <i>Who are co-parceners</i> (1097-1100). | (4) <i>Females excluded</i> (1104). |

(1) *Suda sanam v. Narasimhulu*, 25 M. 149 (154).

(2) *Karsandas v. Gangabai*, 82 B. 479 (498).

(3) *Sudarsanam v. Narasimhulu*, 25 M. 149 (154).

1093. Analogous Law.—The term “family” as used in connection with Hindu Law is an elastic term and its significance is more often assumed than defined. Taken as a large concept it would include all persons related to a common ancestor. As such, it would include the whole world and this is pointed out in the *Mitakshara*, which says:—“In the explanation of the word *sapinda*, it has been said that *sapinda* relationship arises from the circumstance that particles of one body have entered into the bodies of persons thus related, either immediately or through transmission by descent. But inasmuch as this definition would be too wide, since such a relationship exists in some way or other, amongst all men in the world which has no beginning, the author (1) says: “fifth and seventh removed from the mother and the father respectively.” (2)

1094. In other words, the larger concept of “family” which is intended to convey persons related to one another being thus inadmissible, an artificial rule has to be devised, to designate what should be called a “family.” As such, *Yajnavalkya* gives the term a dual meaning limiting it for the purpose of marriage and inheritance to mean all such persons as are related to a person up to fifth and seventh degrees removed on the mother’s or father’s line, respectively and limiting it for the purpose of joint family only to relations not more than three degrees remote from the common ancestor or a sharer of his property. These relations are his *sapindas* in each case.

1095. In the limited sense assigned to that term in the first case, the *sapindas* are to be counted thus:—“The six descendants beginning with the father, and the descendants beginning with the son, and one’s self counted as the seventh, in each case are *sapinda* relations.” (3) In the case of bifurcation of the line also, one ought to count up to the seventh ancestor, including him with whom the division of the line (branching) begins. For example two collaterals *A* and *B* are *sapindas* if the common ancestor is not farther removed from either of them than 6 degrees. And thus the counting of the *sapinda* relationship is made in every case.” (4)

1096. This subject will have to be more closely examined later on when dealing with the subject of Inheritance. For the present it is sufficient to know that the relations of a person even within these limits may run into hundreds and they are all designated as members of the same “family.”

1097. But it is clear that when we speak of a “Hindu family” we neither intend nor imply the large human family or the comparatively smaller groups of *sapinda* relations in the wider sense. They must then be both excluded as outside the ordinary sense of that concept. What is then a Hindu family? It is clear that the essence of the term “family” is that the relations who comprise that group should live and mess together and possess their estate in common. Ordinarily, such family might consist of all the descendants in the male line of a common ancestor and their wives, sons and unmarried daughters. But even such a family, though conceivable in theory, is not ordinarily to be met with in practice. We must, therefore, draw a much narrower line if we are to discover the real family. The family then to which the term applies is essentially a family composed of a man, his wife or wives, his

(1) *i.e.*, *Yajnavalkya*, II-53.

(2) *Mit.* iii-ii (*Panini*) 109.

(3) *Ib.*, p. 110.

(4) *Ib.*, p. 110.

unmarried or widowed daughters and his sons married and unmarried, and their wives and children. This is all that a family connotes in law and to which the legal presumptions before discussed apply.

1098. But it is clear that even in this family all persons do not possess equal rights. The property which it owns is called "joint family property," but it is a misnomer if it implies possession of any common rights other than the right to maintenance. In the property of such family women possess no share. And even as regards males no relation beyond the son, the grandson and the great-grandson possesses any present right. But this does not mean that other relations have no shares at all. All it means is that given the father alive with his son, grandson and great-grandson, any remoter relation such as the great great-grandson has no present right to call for a partition which is the test of his present interest.

1099. Under Hindu Law, the law relating to partition is so intimately connected with the law of inheritance, that they may almost be said to be blended together. (1) The question then arises what relations are entitled to partition? Now the Mitakshara declares it a settled point that "property in the paternal or grand paternal estate is by birth." (2) The Mitakshara does not mention the great-grandfather but he is included in the Viramitrodaya, (3) and is supported by judicial decisions. (4) The principle of co-parcenary is co-ordinate with the gift of funeral cakes (5) and as no relation beyond the third (or counting one's self, the fourth) degree can offer them (6) it lies in near collaterals, up to the third degree. (7) As observed in a Madras case, "Upon this same principle it appears to us equally certain that the limit of the co-heirs must be held to include undivided collateral relations, who are descendants in the male line of one who was a co-parcener with an ancestor of the last possessor. For, in the undivided co-parcenary interests which vested in such co-parcener, his near sapindas were co-heirs, and when, on his death, the interest vested in his sons, or son, or other near Sapinda in the male line, the near sapindas of such descendants or descendant become in like manner co-heirs with them or him, and so on, the co-heirship became extended through the near sapindas down to the last descendant. Obviously, therefore, as long as the status of non-division continues the members of the family who have, in this way, succeeded to a co-parcenary interest, are co-heirs with their kindred who possess the other undivided interests of the entire estate, and one of such kindred and his near sapindas, in the male line cannot be the only co-heirs, until by the death of all the others without descendants in the male line to the third degree, he has, or he and they have, by survivorship acquired the entire

(1) *Yenumala v. Yenumala*, 6 M. H. C. R. 98 (107).

(2) Mit 1-1-27 Colebrooke's error in translating "Mahapita" महापिता as "ancestral" has already been commented on. The close connection between Partition and Inheritance would be obvious to anyone who notices that both the Mitakshara and the Dayabhag which deal with partition and inheritance call it "dayabhag" (or 'the partition of heritage'). Katyayan said... 'His son' includes the great grandson of the person whose estate is divided because the case of the grandson is

considered.... The meaning is that the partition of heritage extends inclusively to the further degree counting from the proprietor."

(3) Ch. ii-Pt. 1, 16; Gulab Shastri's Tr. p. 72.

(4) *Moro v. Ganesh*, 10 B. H. C. R. 444; *Yenumala v. Yenumala*, 6 M. H. C. R. 98 (107); 1 Str. H. L. 124.

(5) Devala cited in 3 Dig. 10; 1 Str. H. L. 204.

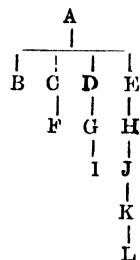
(6) Manu IX-186.

(7) They are called Kulyas, i.e., those belonging to the family

right to the heritage, as effectually as if the estate had passed upon an actual partition with the co-heirs."⁽¹⁾

1100. The relations included in this description were graphically described by Nanabhai Haridas, J., in a case in which the plaintiffs and defendants both descendants of one Udhav a common ancestor, the acquirer of the property, claimed partition. The plaintiffs were beyond and the defendants within the fourth degree from Udhav. The defendants disputed the plaintiffs' right to partition on the ground that they were more than three (counting themselves four) degrees remote from Udhav.

Take for instance the simplest case. A the father acquires an estate. It is his self-acquired property and, therefore, his sons B, C, D, and E have no interest by birth, that is, they are not his co-parceners. But suppose they have issue as given in the tree. On the death of A,—B, C, D, and E, become co-parceners in A's estate, and so do F, G, and H and so on up to K who is in the fourth degree from E; but since K's son is beyond that degree he has no right to force a partition, and therefore, he is not a co-parcenary, but as soon as E dies he will become one. This case illustrates the two rules stated in the section, *viz.*, first, that any co-parcener may be beyond the fourth degree removed from the acquirer or the original owner of the property sought to be divided, provided he is not more than four degrees removed from the last owner, however remote he may be from the original owner thereof. This rule is capable of unlimited expansion.



Secondly, a co-parcenary may consist entirely of collateral relations. Such would be the case on the death of A, if the sons of A do not separate.

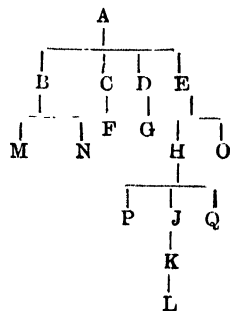
1101. Again, a co-parcenary may consist of several families. Take for instance, the last diagram enlarged by further births of male children in the family.

Here then there are the following families:—(1)

A with his four sons, B, C, D and E and their sons and grandsons M, N, F, G, H, O, P, J, Q constitute the main family. (2) Then B with his two sons M and N, C and D with their sons F, G, E

with his sons, H, O, grandsons P, J, Q and great grandson K, and H and J likewise with their sons and grandson each constitutes a "branch" family.

All the families have one common ancestor A and each branch family has its own head being B, C, D, E, H and J, respectively. On A's death the co-parcenary will consist of the four brothers B, C, D and E and their male issue. On the death of B, C and D, the co-parcenary will consist of E, his nephews, M, N, F, G and all his own issue, but L will be out of it; and will enter the co-parcenary on the death of E.



1102. It is thus apparent that the personnel of the co-parcenary ever varies by births, adoptions and deaths. Those who are not co-parceners to-day may become so tomorrow. Those who are of the co-parcenary today may go out

of it tomorrow by adoption, partition, renunciation, acquiescence,⁽¹⁾ disqualification,⁽²⁾ or death, natural or civil.

1103. Hitherto the entire family depicted in the diagram has been considered joint. But suppose some branches of it separate from the rest. In that case the main family does no longer count. If E separates from his three brothers by taking one-fourth of his patrimony, then his estate becomes, his "ancestral property" in which his issue become co-parceners by birth. The branch co-parcenary then becomes the main co-parcenary and independent of its other branches. But so long as there is no division, the branch families have no legal existence as a separate independent unit; but if they comprise all the members of the branch, or of a sub-branch they can form a distinct and separate corporate unit within the larger corporate unit and hold property as such. Such property may be the self-acquisition or obstructed heritage of a paternal ancestor of that branch, as distinguished from the other branches, which property has come to that branch and that branch alone, or it may be the self-acquisition of one or more individual members of that branch, which by act of parties has been impressed with the character of joint property owned by that branch and that branch alone to the exclusion of the other branches.⁽⁸⁾ So if in the last illustration, should E obtain property from his uncle, or any maternal relation and E and his sons H and O should augment it by their joint labour, the estate so constituted would exclusively belong to that branch, and descend to their issue as an unobstructed heritage.⁽⁴⁾

1104. It has already been stated that women are debarred from the right of enforcing a partition,⁽⁵⁾ which is the test of co-parcenership. **(2) Females excluded.** Mothers do of course, receive a share at partition.⁽⁷⁾

1105. Disqualified co-parceners.—All schools agree that persons disqualified by physical incapacity from inheriting are also disqualified from taking as co-parceners and a co-parcener, may become disqualified by his subsequent incapacity,⁽⁸⁾ but if his disqualification is afterwards removed he re-enters the co-parcenary as an after-born son.⁽⁹⁾

No co-parcenary by contract.

101. The relation of co-parcenership arises by law. It cannot be created by contract.

Synopsis.

- (1) *Co-parcenary, a creature of law* (1106). (2) *Cannot be created by contract* (1106).

1106. Analogous Law.—Both a joint family, and its child a co-parcenary, are the outcome of the Hindu social evolution, and have as such become definite concepts with their two essential attributes, namely :—The existence of an undivided family as a corporate body and the possession by it of property.

(1) *Manu* IX-207, *Mit.* II ii-11, 12; *Sudarsanam v. Narasimhulu*, 25 M. 145 (156).

(2) *Ram Sahye v. Laljee*, 8 C 149.

(3) *Sudarsanam v. Narasimhulu*, 25 M. 149 (155).

(4) *Ib.*, pp. 155, 156.

(5) *Suraj Bunsu v. Sheo Pershad*, 5 C.

148 (165) P. C.

(6) *Punna v. Radha Kissen*, 31 C. 476 (478).

(7) *Mit.* L-ii-9.

(8) *Ram Sahye v. Laljee*, 8 C. 149; *Ram Soonder v. Ram Sahye*, 8 C. 919.

(9) *Mit* II-x-6.

"Such corporate body with its heritage, is purely a creature of law and cannot be created by act of parties save in so far that by adoption, a stranger may be affiliated as a member of that corporate body. Persons who by birth or adoption are not members of a Hindu family cannot in the absence of custom having the force of law, by mere agreement, become or be made members of a joint family". (1) So where the father and his five sons constituted an undivided family and two of his youngest sons, the plaintiff and the defendant commenced to live together, and one of them the defendant commenced business as a Railway contractor in which the plaintiff claimed a co-parcenary interest on the ground of their relationship and joint interest from which he wished the Court to infer an agreement in favour of their becoming joint coparceners, but the Court threw out his suit on the ground that the sub-co-parcenership set up by him was unknown to the law, and could not be created by contract. (2) In another case two brothers being members of a joint Mitakshara family went down to Calcutta and began to work there as coolies. Out of their joint savings they purchased a house. One of them having died the other sued his widow for possession of the house on the ground that he had inherited it by survivorship. But the court threw out his case on the ground that there was no intention to create a co-parcenary between themselves by agreement, (3) to which it might have been added that even if there was, it could not be recognized by law. (4) Such persons could not be regarded as reunited after a division. (5) As women cannot be co-parceners, it follows that property acquired by her and her husband would belong to both, and on the wife's death her share would descend according to the rules of inheritance prescribed for stridhan.

102. (1) The normal state of a Hindu family is one of jointness in mess, and estate.
Normal state of Hindu family.

(2) As such it may be presumed that

- (a) Such family continues to remain joint until the contrary is shown.
- (b) Where property is shown to have been once joint family property it is presumed to remain joint until the contrary is shown.
- (c) All property acquired by or in the possession of a joint member is joint property.
- (d) Where there is a nucleus from which property may be acquired, any property acquired with its aid by a member is joint property.

(3) Provided that no presumption in the last clause will arise where it is admitted or proved that there has been separation from the joint family.

(1) *Sudarsanam v. Narasimhulu*, 26 M 149 (154).

(2) *Ib.* p. 157.

(3) *Motil Bouli v Bhagwan*, 35 I. C. (C.) 695,

(4) *Sudarsanam v. Narasimhulu*, 25 M. 149 (157) commenting on *contra* in *Sham Narain v. Court of Wards* 90 W. R. 197.

(5) *Muthu Ram Krishna v. Mari Muthu*, 26 M. L. J. 592 ; 24 I. C. 363,

Synopsis.

- | | |
|---|---|
| (1) <i>Normal state of Hindu family is joint</i> (1107-1108). | rate names (1124). |
| (2) <i>Presumption of joint ownership of family property</i> (1109). | (11) <i>Separation in mess and residence</i> (1125-1126). |
| (3) <i>Presumption of continuance of joint status</i> (1110-1113). | (12) <i>Separate possession of properties</i> (1127). |
| (4) <i>Presumption of acquisitions being joint family property</i> (1114-1116). | (13) <i>No presumption where partial separation admitted</i> (1129). |
| (5) <i>Presumption of jointness and joint estate</i> (1117-1119). | (14) <i>Law regarding self-acquisition</i> (1130-1131). |
| (6) <i>Presumption applicable only to normal family</i> (1120). | (15) <i>Property jointly acquired</i> (1132). |
| (7) <i>No presumption that joint family possesses joint property</i> (1121). | (16) <i>Property treated as joint</i> (1133-1137). |
| (8) <i>Presumption of union</i> (1122). | (17) <i>Grants by Government, if and joint when family property</i> (1138). |
| (9) <i>Evidence in rebuttal</i> (1123). | (18) <i>Impartible estates</i> (1139-1142). |
| (10) <i>Mutation and purchase in sepa-</i> | (19) <i>Accretions to the estate</i> (1143). |
| | (20) <i>Hereditary offices</i> (1144). |

1107. Analogous Law.—This section states two propositions:—(i)—that the normal state of a Hindu family is one of jointness, and (ii)—that consequently all property possessed by it is presumably joint. Both those propositions are based upon the consensus of authorities. (1) They are both merely rules of evidence creating merely as they do presumptions of jointness in mess and estate which may be rebutted by any one asserting the contrary. This presumption applies to every Hindu family whether subject to the Mitakshara or the Dayabhag school.

1108. It has already been seen that the unit of a Hindu society is a family, and that term, however elastic and at times misleading though it be, has become a definite concept which enters largely into the discussion of all legal questions relating to property and status. It has already been the subject of a previous discussion. Taking the term family in its narrower sense, there can be no doubt that its normal state of existence is one of jointness in mess, worship and estate. (2) The family being thus in every respect joint, all that appertains to it is *prima facie* held in common. This being the rule it gives rise to several presumptions which are, however, all reducible to the two main presumptions set out in clauses (2) and (3).

(1) *Bevin Persad v. Radha*, 4 M.I. A. 187 (168); *Naragunty v. Vengama*, 9 M.I.A. 66(92); *Cheetha v. Miheen Lall* 11 M.I.A. 369; *Kattama v. Rajah of Swanga*, 9 M.I.A. 589; *Neelkist to v. Beer Chunder*, 12 M.I.A. 523 (540); *Prit Koer v. Mahadeo*, 22 C. 85 (89) P.C.; *Bilash Konwar v. Bhawanee* (1864) W. R. 1; *Pran-nath v. Kashinath*, 1864 W. R. 169; *Beer Narain v. Teemowaria*, 1 W.R. 316; *Neelmoney v. Ganga Narain*, 1 W. R. 384; *Muonye v. Lomun*, 2 W. R. 188; *Bissumbhur v. Suorod-huny*, 8 W.R. 21; *Bipopershad v. Kenadeyee*, 5 W. R. 82; *Bhurrmchund v. Rajmohishee*, 5 W. R. 145; *Treelochun v. Raj Kishen*, 5 W. R. 214; *Lukhun v. Modheemookhee* 5 W. R. 278; *Sreenath v. Menhohimes*, 6 W.R. 85; *Sheoratan v. Gour Behari*, 7 W.R. 449; *Radha v. Phool-koomaree*, 10 W.R. 28; *Govindnath v. Govind*

Chunder, 10 W. R. 898; *Dharoo v. Court of Wards*, 11 W. R. 386; *Konjbeharee v. Gyadeen*, 11 W. R. 361; *Parreelal v. Bukhoreelal* 12 W. R. 124; *Brijnath v. Srigopal*, 12 W. R. 468; *Shib Pershad, v. Gangamonee* 16 W. R. 291; *Inder comar v. Doolal* 18 W. R. 258, *Drobo v. Tarachand*, 18 W. R. 459; *Tarnakhunder v. Jodeshur*, 19 W. R. 178; *Babulal v. Tuma*, 22 W. R. 116; *Bhugobutty v. Domun* 24 W. R. 865; *Shushee Mohun v. Aukilchandei*, 25 W. R. 282; *Gane v. Kane* 4 B. H. C. R. (A) 169; *Mancha v. Narotandas* 6 B. H. C. R. (A) 1; *Cassumbhoy v. Ahmaddhoy* 12 B. 280 (809); *Parbutiy v. Sudabut* 2 Hay 816, *Nundram v. Chotoo*; 1 Agra 255

(2) *Nil Kisto v. Beerchunder*, 12 M. I. A. 528 (540).

1109. The third presumption is a qualified one and does not necessarily flow from the very jointness of the family, since a family may be joint and yet it may possess no property of its own. But if it possesses any joint property the law presumes that all acquisitions made with its aid are also joint property, ⁽¹⁾ and the burden of proving that any portion of that property is separate or self-acquired is on the person who alleges it. ⁽²⁾ Clause (1) is taken from a judgment of the Privy Council which has since been repeated in several cases. Delivering the opinion of their Lordships, Lord Chelmsford said: "The normal state of every Hindu family is joint. Presumably every such family is joint in food, worship and estate. In the absence of proof of division, such is the legal presumption; but the members of the family may sever in all or any of these three things." ⁽³⁾ This rule was first stated by the Pandits to Sir Thomas Strange in 1807 ⁽⁴⁾ and he re-stated it as follows: "With respect to the proof of disputed partition, though the law favours separation by which religious ceremonies are multiplied, it presumes joint tenancy as the primary state of every Hindu family; and this especially amongst brothers, it being most natural for such to dwell together in unity".

1110. Where once a family is proved to be joint, it is presumed to continue joint until the contrary is proved. ⁽⁵⁾ This is in accordance with the principle of S. 114 of the Evidence Act which presumes a thing in accordance with probability.

1111. And as a necessary deduction, law equally presumes that not only the joint family, but its joint property continues joint, since the two go together and one cannot be separated without separating the other. But this is merely a presumption applicable to the property proved or presumed to be joint. Where, therefore, the common family house belonging to a joint undivided family having been long ago burnt down, each of the members occupied separate sites and erected his own building thereon, they were held to be the separate property of each. ⁽⁶⁾

1112. So again from the fact that a member is joint, law presumes that all property in his possession and acquisitions made by him are joint property. ⁽⁷⁾ So where certain ancestral lands were sold in execution of a decree against a joint member to an auction-

(1) *Denonath v. Hurry Narain* 12 B.L.R. 849; *Gobind Chunder v. Doorga Persaud*, 14 B.L.R. 887.

(2) *Dhurm Das v. Shama Soondri*, 3 M.I.A. 329; *Gopee Krist v. Gunga Persad* 6 M.I.A. 58; *Naragunt v. Venkama*, 9 M.I.A. 66; *Frankishen v. Moothooramohan*, 10 M.I.A. 18; *Tara Churn v. Jog Narain*, 8 W.R. 226; *Lalla Sreedhur v. Lalla Madho Pershad* 8 W.R. 294; *Frankisto v. Bhagee reitsee*, 20 W.R. 158; *R m Ghulam v. Ram Behari* 18 A. 90; *Gajewder v. Sardar Singh*, 18 A. 176.

(3) *Neelkisto v. Beerchunder*, 12 M.I.A. 528 (540). To the same effect *Naragunt v. Vengamma*, 9 M.I.A. 66; *Dhurm Das v. Shama Soondri* 3 M.I.A. 229.

(4) 2 Str. H.L. p. 847; *Dhunoorkdharee v. Gunput Lall*, 8 M.I.A. 229; *Neelkisto v. Beer Chunder*, 12 M.I.A. 528 (540); *Radhika v.*

Dharma 3 B.L.R. (A.C.) 121; *Koonj Beharee v. Khetur Nath* 8 W.R. 270; *Taruck Chunder v. Jodeshur*, 11 B.L.R. 193 overruling *contra* in *Shiv Gulam v. Boramsingh*, 1 B.L.R. (A.C.) 164 and dissenting from *Khilut Chunder v. Koonj Lall*, 11 B.L.R. 194; *Sosbheddar v. Boolaram* W.R. (S.N.) 57; *Dhunoorkdharee v. Ganpattal*, 11 B.L.R. 201.

(5) *Budha Mal v. Bhagawan Das*, (1886) P.R. 86.

(6) *Gujjalapadi v. Gujjalaladi*, 11 M.L.T. 38; 18 I.C. 118.

(7) *Frankishen v. Mothoora*, 10 M.I.A. 403; *Deela Singh v. Toofanee*, 1 W.R. 307; *Bissum-dhur v. Soorodhuny*, 8 W.R. 21; *Treeslochan v. Raj Kishen*, 5 W.R. 214; *Janokee v. Kisto Komul Marsh* 1; *Kishen Komul v. Janokee*, 28 W.R. 3 F.B. *Gungadthur v. Soorjo Nauth*, 15 W.R. 446; *Gokuru v. Gabardhan*, 3 C.P.L.R. 41; *Bhimra v. Pitchamber*, 11 C.P.L.R. 87.

purchaser who re-sold them to the plaintiff, the court held that the family being joint, the property so purchased by the plaintiff must equally be presumed to be joint until the plaintiff could prove that he had purchased them from his own separate funds. (1) Appearances are not always to be relied upon in the legal idea of undivided, property, since a family may be separated as to residence, meals, and ceremonies, so as to seem even to their neighbours, as well as to others, divided, without being so, in fact, for it may continue to be united in interest, as on the other hand, having partitioned property, they may have become legally divided by a severance in their worldly concerns, and yet continue to live and mess together performing also in common their solemn and accustomed rites, they will appear to be still united, though in reality, and to legal purposes, they are no longer so. (2)

1113. Clauses 1 (a) and 2 (b) are merely consequential and are supported
Cl. (2) (a), (2) (b). by the authority of Phear, J., who said: "It is no doubt laid down in many cases that the normal condition of a Hindu family is joint; therefore, starting with the fact of a family being joint it must be presumed to afterwards remain joint, unless some proof of a subsequent separation is given. Also that where property is shown to have been once joint family property, it is presumed to remain the joint property of all the members of the joint family, until something to the contrary is shown". (3)

1114. Clause 2 (c) takes for granted that the member, the character of whose
Cl. (2) (c). property is to be determined, was at the time to which the matter relates admittedly or is proved to have been joint. It is only then that law justifies a presumption that all acquisitions made by him in his state of jointness were made on behalf of and for the benefit of the joint family, and that all property in his possession is joint property of the family.

If the jointness of the member is not proved, then there can be no presumption of the jointness of his estate except under the next clause under which a nucleus must be established. The combined result of these two clauses, then is, that in order to create a presumption in favour of any property in possession of an individual being the joint property of the family, either of the two things must be proved; *viz.*, (i)—that the acquisition was made while in a state of jointness, or (ii)—that it was made with the help of a nucleus. But where the jointness is neither admitted nor proved, there is of course, no ground for any presumption as to the joint character of the property found with any member. (4)

1115. As to clause 2 Phear, J., in the case already cited, said: "But
Cl. (2) (d). on the other hand, there is more than one case which lays down, that the single fact of a family living joint or in commensality, is not enough to raise a presumption in law that property acquired by one individual member of that family is joint

(1) *Goroo Pershad v. Debee Pershad*, 6 (AC) 161 (186).
 W.R. 58.

(2) 1 Str. H.L. 225, 226

(3) *Shiv Golam v. Barran Singh*, 1 B.L.R.

(4) *Harish Chunder v. Gourao Pershad*,
 16 W. R. 163

property. To render it joint property, the consideration for its purchase must have proceeded either out of ancestral funds, or have been produced out of joint property, or by joint labour. But neither of these alternatives is a matter of legal presumption. It can only be brought to the cognizance of a court of justice in the same way as any other fact, namely by evidence. Consequently whomsoever's interest it is to establish it, he must produce the evidence." (1)

1116. It must however, be noted that this distinction does not appear to have influenced the decision in some earlier cases, where the courts have gone the length of presuming joint ownership even without the proof of nucleus. So Couch, C. J., in one case said: "The presumption of law is that all the property the family is in possession of is joint property. The rule that the possession of one of the joint owners is the possession of all would apply to this extent that, if one of them was found to be in possession of any property, the family being presumed to be joint in estate, the presumption would be, not that he was in possession of it as separate property acquired by him, but as a member of a joint family". (2) He then referred to the judgment of Phear, J., on the necessity of a nucleus and dissented from it as being in conflict with the view of the Privy Council. (3) But the Privy Council have since in several cases insisted upon the existence of a nucleus as a condition precedent to any presumption (4) and it has been recognized in several cases (5) and is held to be the rule equally applicable to Dayabhag families. (4) It will thus be seen that the clause (6) has not been settled without a contest.

These principles do not, of course, suffice to solve the many perplexing riddles which their presumptions and counter-presumptions present in practice.

They will now have to be considered.

1117. Presumption of jointness and joint estate.—As the ordinary and normal state of a Hindu is to live in a state of union

(1) **Presumption of jointness.** with the other members of his family, law presumes it to be so in all cases. But since it is only the usual and not the universal rule, even amongst Hindus, such presumption is capable of rebuttal. The presumption itself is of a varying degree of strength. It is stronger in the case of brothers than in the case of cousins and the farther you go from the founder of the family the presumption becomes weaker and weaker. (7) Even apart from the degree of relationship the presumption is growing daily weaker. As observed by Carnduff, J.: "Jointness is I imagine, becoming almost daily less and less the rule, and the presumption under consideration is, amid the changing conditions, and in response to the natural demands of a progressive society, steadily losing strength in the sense that it is more and

(1) *Shiv Golam v. Baran Singh*, 1 B. L. R. (A. O.) 164 (1866). This case however, erroneously cast on the plaintiff the burden of proving that the family was joint. To the same effect on the necessity of a nucleus *Frankristo v. Bhageerutee*, 20 W. R. 158.

(2) *Taruck Chunder v. Jodeshur*, 11 B. L. R. 198 (200).

(3) *Dhurum Das v. Shama Soondri*, 3 M. I. A. 229.

(4) *Anand Rao v. Vasant Rao*, 5 C. L. J. 388 P. C.; *Lal Bahadur v. Kanhaiyalal*, 29 A. 244 (254, 255) P. C.

(5) *Tarachurn v. Joy Narain*, 8 W. R. 226; *Bance Madhub v. Bhagaobutty*, 8 W. R. 270; *Chundro v. Buksh Ali* 11 W. R. 305; *Radhika Prasad v. Dharma Dasi*, 11 W. R. 499; *Ramkristo v. Bhageerutee*, 20 W. R. 158; *Jogodumba v. Rohinee* 23 W. R. 522; *Kunja Behari v. Nemai Chand* 2 I. C. (C) 526; *Joti Ram v. Surasti* (1888) P. R. 3.

(6) *Ram Nath v. Kusum Kumari*, 4 C. L. J. 56; *Kunja Behari v. Nemichand*, 2 I. C. (C.) 526 (529).

(7) 1 Str. H. L. 225, 226.

more easily rebutted as time advances. It may well be that it will disappear altogether some day, perhaps at no distant date.”⁽¹⁾ The education of the people, the growth of intellectual pursuits and opening of new avenues for the employment of individual enterprise are fast altering the old method of living and the joint employment and enjoyment of property. But so long as the joint Hindu family continues to preponderate there would be justification for the legal presumption, which should nevertheless be cautiously applied, and it must be understood as subject to a counter-presumption which may arise from separate residence, separate messing and separate worship.

1118. So it was observed in a case: “The Subordinate Judge has proceeded upon the presumption that the ordinary state of a Hindu family is joint and he has accordingly thrown on the defendants the onus of proving separation. It seems to us that the Lower Court is in error on this point. When the question simply is whether the deceased was simply separate or joint, the onus no doubt is on the party alleging separation, but where it is found as in this case, that the parties were living separately, messing separately, and worshipping separately, the ordinary presumption falls to the ground. In such a case it rests on the party who alleges the continuance of indivision in spite of severance in these particulars to prove his allegation.”⁽²⁾ This view of the High Court was concurred in on appeal by the Privy Council who said: “The District Judge and the High Court agree that as regards residence, food and worship, the family had long ceased to be joint—the only point of difference being as to partition of ancestral property. Upon this question their Lordships have come to the same conclusion as the High Court.”⁽³⁾

1119. This is, indeed the standpoint from which their Lordships viewed another case in which the nephew had sued his two aunts, being widows of his uncle Ramdayal, for possession of an estate on the ground of his jointness with him. The plaintiff admitted that his grandfather had divided the ancestral property but he pleaded that his father and his uncle nevertheless continued joint. The defence was that the partition alleged by the plaintiff had separated the plaintiff's father from his uncle. There was no proof one way or the other, but their Lordships assumed with the plaintiff that the division was as stated by him. They then added: --“It also appears that whatever the division of the property may have been by Ram Gulam, all the members of the family lived separately and there was no commensality between them. In the case of an ordinary Hindu family who are living together or who have their entire property in common, the presumption is that all that any one member of the family is found in possession of belongs to the common stock,—that is the ordinary presumption—and the onus of establishing the contrary is thrown on the member of the family who disputes it. Having regard however, to the state of the family, when the present dispute arose, their Lordships think that that presumption cannot be relied upon as the foundation of the plaintiff's claim, and therefore, as he seeks to recover property, which was in the possession of Ramdayal, and was ostensibly his own at the time of his death, it lies upon him to establish by evidence the foundation of his case, *viz.*, that the property was joint property to which he and his brother Kesho Ram,

(1) *Ganpat v. Balmukund*, 18 C. L. J. 548 (549, 550) following *Gannu Singh v. Bhagwati Koori*, 3 I. C. (C). 234.

(2) *Ramprasad v. Lahkpati*, 80 C. 281 (241) affirmed O. A. (255) P. C.

(3) *Ib.*, p., 255.

as surviving members were entitled." (1) Here it will be observed that their Lordships did not even start with a presumption, though it was probably because the plaintiff had admitted a division. But nevertheless the case is instructive as showing that the presumption arises only in a case of a normal Hindu family.

1120. What is then a normal Hindu family? It is a family which is in every respect joint—joint in mess, joint in residence, joint in worship, joint in estate, and joint in every other respect. Where such family is found the presumption is legitimate, since it is a fair inference to make that one must live in the same state in which most of the others belonging to the same community live. But if it is admitted or proved that the family to which the presumption is sought to apply is not a normal family, but one of which some members are not joint in one or more respects, the presumption would naturally weaken, and if it is found that they were separate in most respects, then there would be no room for the application of the presumption at all; since the initial presumption of law in favour of jointness would in such a case, be displaced by the counter-presumption of logic that where a person is separate in most respects it is not likely that he would continue joint only in some respect.

This is sometimes stated in a different form, namely, that a partition is presumed to be complete, but the two rules are different.

1121. Presumption of joint property.—Assuming however, that a family is normal, and that as such it is presumably joint, it does not thence follow that it has joint property since there is no presumption that every joint family necessarily possesses joint property. Consequently, unless the nucleus of family property is admitted or proved, the burden of proof of the existence of joint property lies on the claimant. The presumption in favour of the joint family does not obtain in the case of property, and it is for the claimant to prove the property to be joint. If, in any case, the plaintiff alleges that any property is joint property, it is for him to prove it, which he may do either by direct evidence, proving that fact, or by the indirect evidence of establishing a nucleus and by the application of the rule of Hindu Law that whatever has been acquired with the help of the nucleus becomes impressed with its own character.

The question then arises what must be the value of the nucleus necessary to constitute all acquisitions made by its aid joint property. This subject will have to be presently considered.

1122. Presumption of union.—The first clause states a rule expressed to apply only to a family living in a normal state, and one which is joint in all the three respects mentioned therein; that is to say, given a Hindu family of which nothing is known, then law will make the presumption stated in this clause. But such families do not give trouble in practice. The families that do are those which are not normal in the sense that they have severed in one or two of the three essentials of a normal union. For instance, they may have separated in mess or both in mess and worship and the question may then arise how far the presumption is then to prevail. It may be that the fortunes of the whole case depend upon the application of the presumption. The evidence on either side may be negligible or evenly balanced—upon what solid foundation is the court then to rest its decision. If it can be sure that notwithstanding severance in

(1) *Bannoo v. Khasheeram*, 8 C. 815 P. C.

mess and worship, there still exists a presumption, then it will have something to go upon. But there may be other facts equally destructive of that presumption. As pointed out by Sir Thomas Strange in a passage before cited and followed by Nanabhai Haridas, J. in a considered judgment ⁽¹⁾ the strength of the presumption varies with the relationship of the parties concerned. The presumption that arises in favour of the brothers living in a state of union is very different to the presumption in favour of the union of cousins, and still less in favour of more distant relations. Then again it cannot be forgotten that the presumption of union as a whole is getting daily weaker by the very condition of modern society. As Carnduff, J., rightly observed in a passage already cited: "Jointness is, I imagine, becoming almost daily less and less the rule, and the presumption under consideration is, amid the changing conditions, and in response to the natural demands of a progressive society steadily losing strength, in the sense that it is more and more rebutted as time advances. It may well be that it will disappear altogether some day, perhaps at no distant date."⁽²⁾

1123. In considering then the value of such presumption, several facts are material, while on the other hand many facts are regarded as equally immaterial. So, for instance, where one party alleged jointness, and another repARATION, the fact that one member possesses a larger share of the family property than others, and the fact that such property has not been shown to be self-acquired, would be a material factor in supporting the case of union. ⁽³⁾ So on the other hand, the fact that members have for a considerable time possessed and enjoyed separate portions of the family property in equal shares would support the case of separation.

1124. Immaterial facts.—For instance, mutation of names by a person

(1) **Mutation and purchase in separate names**

in favour of another does not amount to relinquishment of the property by one in favour of the other, nor can it be used as evidence of disruption of the joint family. ⁽⁴⁾ Of course, if such mutation is accompanied by any statements supporting the relinquishment, then they would be relevant as admissions from which relinquishment or even severance may be inferred. So again, the fact that the settlement was made with one member of the family would not negative the rights of other members to a participation in the property so settled; nor is it necessary for such other members, if living in commensality with the former as joint proprietors to prove that they actually contributed money towards the acquisition of the property. ⁽⁵⁾ Where commensality is admitted the mere use of one brother's name in documents relating to the property raises no counter-presumption of exclusive ownership in his favour, ⁽⁶⁾ nor is his separate possession any evidence of separate acquisition unless such separate possession can prove consent of the other shares to his keeping a separate account. ⁽⁷⁾ So again where other facts prove jointness, the fact that certain property was purchased in the name of a single member would be

(1) *Moro v. Ganesh*, 10 B.H.C.R. 444 (468).

(2) *Ganpat v. Balmakund*, 18 C. L. J. 548 (549, 550).

(3) *Koyalaji v. Shiva*, (1888) B.P.J. 86.

(4) *Chela v. Miheen Lall*, 11 M. I. A. 869 (880, 881); *Jussondah v. Ajoodhia*, 2 I. J. (N 8) 261; *Shibosondery v. Rakhal Doss* 1 W. R. 88; *Mun Mohinee v. Soodamonee*, 8 W. R. 81; *Bilash Koonwar v. Bhawanee*, (1864) W.

R 1, *Srichand v. Surajkuar*, 9 I. C. 146.

(5) *Eurosoonduree v. Doorga Doss*, 16 W. R. 215.

(6) *Kishen Komulsingh v. Janokee*, 23 W. R. (F B.) 31; *Deela Singh v. Toofanee*, 1 W. R. 307.

(7) *Lalla Beharee Lall v. Lalla Madh Persaud*, 6 W. R. 69; *Ranjeetsingh v. Madud Ali*, 8 Agra 222.

insufficient to rebut it, since it will be presumed that it was purchased with money derived from joint funds. (1)

1125. So again the mere circumstance that one of several brothers occupied a separate dwelling house would not of itself rebut the presumption of jointness. (2) But that it may have that effect was conceded by the Privy Council in a case in which it was said: "The cesser of commensality is only material to the determination of the issues in the cause, in so far as it removes or qualifies the presumptions which the Hindu Law might otherwise raise, that an acquisition made in the name of an individual son of the family was made by the head of the family and as part of the family estate." (3) Their Lordships then considered that fact along with others and considered their cumulative effect upon the case. Cesser of commensality is then an element which may properly be considered in determining the question whether there has been a partition of joint family property, though it is not conclusive. (4)

1126. Of course, of all the three facts of jointness, namely jointness in mess, residence and estate, it often happens that parties usually commence their separation by taking up separate residence necessarily. This is necessarily accompanied by separation in mess. The question then arises what is the effect of such separation upon the normal presumption in favour of jointness. Does it neutralize it so far as to leave the party alleging a jointness thereafter to prove his case. It has been so held in a case in which the lower court had held the contrary. Adverting to it, the court said: "The Judge is also wrong in saying that no presumption whatever arises of a separation from the fact of an admitted separation in dwelling and food. We would observe that such separation, though not conclusive evidence of a separation in estate, would give rise in Hindu Law to a presumption of separation in estate." (5) And a similar view has been expressed by the Privy Council in the cases already cited. (6) Of course, in such a case it may be that the members have been forced to separate mess and residence owing to discords amongst the female relations which so often force upon the male members not only the course of separation in residence but separation altogether. The question of separate worship is seldom now raised, since the household gods of a family are usually divided upon severance of mess and residence, and even when it is not so, it is an index of least importance in considering the question of separation.

1127. Separate possession.—In the foregoing discussion cases have been cited to show how far the courts regard single facts such as separate entry in the mutation register, separate possession, and the like as insufficient to rebut the presumption in favour of jointness. These were also cases in which the testimony of those single facts was overborne by other facts which made for jointness. There are however cases, in which possession for a considerable

(1) *Anund Mohun v. Lama*, 1 Hay 374; *Madhub Bose v. Soodha*, 2 Hay 383, *Nuro nath v. Goda Kolita*, 20 W. R. 342.

(2) *Belas Koer v. Bhowanes*, Marsh. 641.

(3) *Anundee Koonwur v. Khedoo Lal*, 14 M.I.A. 452 (422) cited and followed in *Ganesh Dutt v. Jewach Thakurain* 31 C. 262 (269) P.C.

(4) *Anundee Koonwur v. Khedoo Lal*, 14 M. I. A. 412; cited and followed in *Ganesh Dutt v. Jewach Thakurain*, 31 C. 262 (269) P.C.

(5) *Jagun Koer v. Raghoonundun*, 10 W. R. 148 (149); *Sherajooddeen v. Horalsingh*, 25 W. R. 116 the judgment does not support the head note.

(6) *Anundee Koonwur v. Khedoo Lal*, 14 M.I.A. 412 (422) cited and followed in *Ganesh Dutt v. Jewach Thakurain*, 31 C. 262 (269) P.C. In *Bance Madhub v. Bhagobutty*, 8 W. R. 270, mere separation in mess held insufficient.

period has been held of itself to destroy the presumption of jointness. So where the members lived apart for several years and during that time or for more than 12 years prior to the institution of a suit for partition, they were found to be in possession of portions of the originally undivided property in the assertion of titles mutually exclusive the court held that such severance of enjoyment necessarily drew after it a severance of right. ⁽¹⁾ This was conceded in a later case in which, however, it was pointed out that though exclusive possession and enjoyment is cogent evidence of partition, it merely creates a presumption in its favour which may be rebutted by proving that it was due to a family arrangement ⁽²⁾ or convenience of management or enjoyment. But such arrangement if continued for 30 or 40 years would almost certainly be conclusive of a partition. ⁽³⁾ Certain descendants from a common ancestor commenced to live apart without any formal separation. About 11 years after, one of the parties to the separation sued the others for possession of some property in defendant's possession on the ground that it was joint property. The court held that the separation being admitted it was on the plaintiff to establish his allegation and that he could start with no presumption in his favour. ⁽⁴⁾

1128. Possession is *prima facie* evidence of ownership. ⁽⁵⁾ But of course, such possession must be *prima facie* exclusive and exhaustive.

S. 110, Evidence Act. In the case of joint families, however, the possession of one is the possession of all. Consequently, the presumption arising from the separate possession of a single member is neutralized by the counter-presumption in favour of jointness. In such a case, therefore, if the plaintiff sues for a partition on the basis of joint property he must establish his case.

1129. No presumption where separation admitted.—The presumption

Cl. (3). of jointness with all its corollaries have however, no application where a separation is once admitted. So where the plaintiff sued on the allegation that his father and defendant had continued joint, while their brother separated from the family, the court held that a separation of the family being once admitted it was on the plaintiff to prove that notwithstanding this separation his father had remained joint with the defendant. ⁽⁶⁾ As the Privy Council observed: "There is no presumption when one co-parcener separates from the others, that the latter remain united. In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares in which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all." ⁽⁷⁾ But this does not mean that the separation of one member has necessarily the effect of the separation of all other members

(1) *Sheshappa v. Igapa*, (1875) B.P.J. 37

(2) *Amaram v. Madhavrao*, (1880) B.P.J. 311.

(3) *Vijli v. Magan*, (1891) B.P.J. 44 ; *Vishnu v. Ramchandra*, (1888) B.J. 58 ; *Guracharya v. Bhimacharya*, (1876) B.P.J. 241; *Surbessur v. Gossain Doss* 17, W.R. 210.

(4) *Badul Singh v. Chuttur Dharee*, 9 W.R. 558 ; *Harish Chunder v. Nufur Chunder*, 9 W.R. 461.

(5) S. 110, Evidence Act.

(6) *Radha Churn v. Kripa Sindhu*, 5 C.

474; *Swamirayachari v. Heirs of Mudgalachari*, (1876) B.P.J. 89; *Somnugowda v. Bhurmogowda*.

1 B.H.C.R. 43; *Gopal v. Khande Rao*, (1877) B.P.J. 328 ; *Maruti v. Vishvanath*, (1877) B.P.J. 347 ; *Uma Shankar v. Bai Ratan* (1873) B.P.J. 217; *Badulsingh v. Chutturdharee*, 9 W.R. 558; *Bannoo v. Kashi Ram*, 8 C. 815; *Amirchand v. Ghasita*, (1883) P.R. 148; *Sanidas v. Sahib Devi*, (1892) P.R. 140; *Vaidyanatha v. Aiyasamy*, 32 M. 191.

(7) *Balabux v. Rukhma Bai*, 30 C. 725 (736) P.C.

inter se. (1) As their Lordships point out, it may be so in many cases where it is necessary to fix the shares of other members and then it may virtually amount to a separation of all. In any case, the case is a clear authority for the view stated in clause (3), *viz.*, that where once any separation is admitted or proved, it suffices to destroy the general presumption of jointness and its consequential presumptions. [For the effect of such separation on the general law of partition, see *post*, Chapter on Partition.]

1130. Separate property.—The law of self-acquisition is based on the texts set out in the sequel. (2)

1131. It is now settled that the family is not entitled to participate in any acquisition made by a joint member as a result of his individual effort if made "without detriment to the father's estate." These words have been interpreted to exclude merely a general education received at the expense of the family. (3) So it has been held that the earnings of a pleader who had received only a general education at the expense of the family were his self-acquired property. (4) Such was held to be the case where the acquirer was a Subordinate Judge. (5) So where three brothers who had nothing of joint property except their ancestral house, went out into the world and having obtained service in the Commissariat Department acquired considerable wealth, the court held each entitled to his own earnings. (6) Such have been held to be the earnings of a dancing girl. (7)

1132. Property jointly acquired.—Property may become joint if it is acquired by the joint exertions of the members of the joint family though there be no nucleus to assist in its acquisitions. Such property becomes joint property of the family and not only of those who acquire it. Nor can they set up amongst themselves a sub-coparcenary for the purpose of acquiring and enjoying the result of their joint labour to the exclusion of other members. As Bhashyam Ayyangar, J., said, a joint undivided Hindu family is purely a creature of Hindu Law and cannot be created by act of parties save in so far as the act of adoption may have that effect. (8)

1133. Property treated as joint.—Property may become joint by reason of its being treated as a joint acquisition. The characteristic of this property consists not in the contribution of joint labour to its acquisition, as in the conduct of those against whom the right is claimed. An extreme case of this kind arose where one N had four sons—A, B, C and D all residents of the village of Dongre in the Ratnagiri district where they had a small house, but no lands or other property. About 40 years ago one of them A, left his native village and set up a school at Bhynder in the Thana district where he afterwards opened a shop and commenced trading in salt. A year or two later, his brother B joined him, opened a school in a neighbouring village and

(1) *Ranganatha v. Narayanqami*, 31 M. 482; *Babaji v. Dattu*, 37 B. 64.

(2) *Yaj.* ii-112, 120 explained in *Mit.* 1. IV-1-81 *Contra* *Chalakhonda v. Chalakhonda*, 2 M. H. C. B. 56; *Gangadharudu v. Durvasalu*, 7 M. H. C. B. 47 is inconsistent with *Pauliem v. Pauliem*, 1 M. 252 (361) P. C. and impliedly overruled by it.

(3) *Pauliem v. Pauliem*, 1 M. 252 (361) P. C.

(4) *Bhagirathi Bai v. Sadash'vray*, (1980)

B. P. J. 1264 *Chanbasapa v. Cholaiva*, (1890) B. P. J. 172; *Avayambal v. Kamalambal*, 19 M. L. J. 85; *Mehla Ram v. Rew achand*, 4 S. L. R. 161.

(5) *Lakshman v. Jamnabai*, 6 B. 225.

(6) *Lachman Kuar v. Debi Prasad*, 20 A. 495; *Krishnaji v. Moro*, 15 B. 82 (and cases there cited).

(7) *Boologam v. Swornam*, 4 M. 890.

(8) *Sudarsanam v. Narasimulu*, 25 M. 149.

commenced to act as broker at Bhynder where he died leaving the defendant, then a year old. Later on he was removed to his native village and on coming of age he managed his household business. Two other brothers *C* and *D* later on joined *A* and assisted him in his business. All the three *A*, *C* and *D* used to remit money to their parents at Dongre where their children were married. *C* and his sons then separated in mess and sued *A* and his sons, *D* and *B*'s son for partition, in which *B*'s son equally claimed a quarter share. *A* defended the suit on the ground of his separate acquisition but on the decree being passed against him, he did not appeal. The claim of *B*'s son was rejected, but the High Court decreed his claim on the ground that he had been treated by the brothers as a member of the joint family, like one of their own sons, and that he had been placed in management of their family property and dealings at Dongre. The court held that the right to share did not depend upon the establishment of the fact of actual help having been rendered at the principal place of business. The fact that *B*'s son was treated as standing in the place of his father *B* and served the common interests of the family by staying at home to look after the household with the consent of all the three brothers entitled him to a share which was decreed. ⁽¹⁾ It will be observed that in the case emphasis was laid more on the contribution of labour than on the fact of treatment. So it has been observed in another case: "For the formation of a co-parcenary in Hindu Law such a nucleus is not absolutely necessary, provided the persons constituting it stand in the relation of father and son or other relationship requisite for a co-parcenary system, and these persons by living, messing and worshipping together and throwing all the property jointly into one common stock manifest their intention to deal with one another and with outsiders as members of a co-parcenary system under the Hindu Law." ⁽²⁾

1134. To create a title upon the ground that the owner of a property threw it into the common stock abandoning his exclusive title in favour of his brothers, it is necessary for the latter to show a clear intention on the part of the owner to abandon his separate rights and throw it into the common stock. ⁽³⁾ It is not reasonable or conducive to the peace and welfare of families to construe acts done out of kindness and affection to the disadvantage of the doer of them, by inferring a gift, when it is plain that no gift could have been implied. ⁽⁴⁾ Such was the case in which the evidence showed that the names of the brothers of a single donee under a deed of gift had been entered in the Revenue papers along with his own, that on certain occasions the donee associated with his brothers in suits relating to the property in question, and that the donees made certain payments out of the income of the property to his brothers; but the court held that these facts did not support an inference as a matter of law that the donee had thrown the property gifted to him into the common stock, or that the donee was estopped from questioning his brother's rights. ⁽⁵⁾ Such was the case of one Kuldip who treated his younger brother Sadha Ram, who was born deaf and dumb and so incapable of inheriting property, as if he had been under no incapacity. His name was entered as joint owner in the revenue record, and documents were

(1) *Raghunath v. Mahadev*, (1896) B.P.J. 508. To the same effect *Krishnaji v. Moro*, 15 B. 82.

(2) *Lal Das v. Moti Bai*, 10 Bom. L. R. 175 (177).

(3) *Dharam Chand v. Amba*, (1898) B.P.J.

808.

(4) *Janaki Nath v. Janaki Nath*, 2 A.L.J. 225.

(5) *Muddan Gopal v. Klitchinda Koer*, 18 C. 341 P.O.

issued and taken in his name. For a number of years his case had been treated by the family as one that might be cured. Ultimately there being no hope of his cure, a family arrangement was entered into by which he was set aside as disqualified. Sadhu Ram's collateral sued for his estate. The High Court upheld the claim on the ground that Kuldip had by his conduct admitted Sadhu Ram's title and that it was good even as a family arrangement or by virtue of the law of limitation. But their judgment was reversed by the Privy Council who held that acts of kindness should not be construed into acts to the disadvantage of the doer and that Kuldip's conduct was throughout that of a brother who was anxious to secure to his younger brother the share to which he would have been entitled if not disqualified: "Kuldip naturally and properly treated this afflicted brother as a member of the family and entitled to equal rights until it became absolutely clear that his malady was incurable. Their Lordships think that it would not be reasonable or conducive to the peace and welfare of families to construe acts done out of kindness and affection to the disadvantage of the doer of them, by inferring a gift when it is plain that no gift could have been intended". (1)

1135. In another case of succession to an Oudh impartible estate the plaintiff sued to eject the defendant who was his paternal uncle on the ground that the estate being subject to the law of lineal primogeniture the defendant had no title. The latter pleaded (a)—that both he and his brother were entitled to the estate as it had been recovered by their joint exertions, and that (b)—in any case the plaintiff had by his own acts in 1879 made it over to him. As to contention (a)—their Lordships held that the fact that upon its conferral on the plaintiff's father he alone entered upon possession of the estate, destroyed the theory of joint ownership and that as to contention, (b)—it was perfectly true that the plaintiff had caused the defendant's name to be mutated and recognized his claim, but their Lordships held that it did not prevent the plaintiff from stating the true state of the case after he had learnt it.

1136. "It is not now contended that the mutation operated as a transfer. It would be absurd to suppose that the plaintiff made any misrepresentation to the defendant; neither was the situation of the defendant altered in any way to his prejudice. No consideration was given by the defendant, nor is there anything in the transaction to create a trust. Possibly it might have given the defendant a possession on which time would run; but if so, time has not run long enough to create a bar. . . . A gratuitous admission may be withdrawn unless there is some obligation not to withdraw it; and there is not here any title on which such an admission can rest. If then there is no transfer, no estoppel, no bar by time, no trust, why should not the plaintiff assert his legal rights, whatever he may, in ignorance of the facts or in deference to his uncle or for any other cause not injurious to the defendant, have admitted." (2) But in another case where the Government had confiscated the estate of a rebel family but regranted about a third of it to the eldest brother, and the question was whether this grant was the grantee's self-acquired property or one which became the joint family property of himself and his two other brothers, the Privy Council referred to the grantee's own admission before the settlement officer in which he had admitted that he and his brothers were. "joint in equal shares" referring to which their lordships said: "It would seem, therefore, that it must be inferred that under a family arrangement which cannot now be

(1) *Muddan Gopal v. Khikhinda Koer*, 18 C. 341 (1881) P.C.

(2) *Muhammad Imam Ali v. Hussain Khan*, 26 C. 81 (1900, 1901) P.C.

questioned, the three brothers became jointly entitled as members of an undivided Hindu family to the Shirpur estate, although the Government grant was to Gaya Din alone". (1) The two cases might be distinguished on the ground that while one was a case under Mahomedan law, the other was one under Hindu Law under which the admission into the co-parcenary is possible by such recognition.

1137. The same high tribunal had to decide another case in which it found the acquirer to have blended his income with that of the joint family. This was the case in which the question was as to whether one Durga Prasad's estate was separate or a part of the joint family property of himself and his sons. It appeared that Durga rose from a clerkship on Rs. 150 to be an Inspector of Schools on a salary of Rs. 750 per month. In 1885 he retired on a pension of Rs. 4,000 per annum. It was admitted that Durga had considerable nucleus of ancestral property in his hands after his partition from his two brothers, the income of which he blended with his own. His sons, when they came of age, sent the pay which they received to their father with whom they lived and by whom they were supported. Referring to this fact their Lordships remarked: "This is strong evidence that there was but one common stock of the whole family into which each voluntarily threw what he might otherwise have claimed as self-acquired; and the property purchased by, or with the assistance of, the joint funds, was joint property of the family, and not of any particular member of it." (2) But this was a case of father and son, the father being the *karta*, and there was one common stock. But the case was held to be different where one Ram Narain, a junior member of joint family, who as a pleader at Hardoi, had amassed a fortune, purchased properties at Hardoi out of his earnings in the name of his son-in-law, the husband of his only child. He maintained an omnibus account book in which he blended his professional earnings with his receipts and payments on account of joint properties. Ram Narain continued to be a junior member of his family from 1864 to 1890 when he became manager of the joint family. In 1889 he made a statement to the effect that he had gifted the villages to his son-in-law. In 1900 Ram Narain died and the question was the whether the properties gifted were his self acquisitions. The Privy Council held that they were and in upholding the gift they were influenced by the fact that Ram Narain had abundant moneys of his own to purchase those properties and that "the fact that he blended those that were not otherwise used does not mean that every entry of a purchase in the book is an entry of he transaction so dealt with that it must be regarded as joint property." And as to the gift they held that his purchase of the properties in the name of his son-in-law and a declaration to the effect that he had gifted them to him sufficed to convey a good title in his favour. (3)

1138. Government grant.—Property acquired from a grant from Government is unquestionably self-acquired, (4) unless it was merely restoration of a

(1) *Kedar Nath v. Ratan Singh*, 32 A. 415 (428) P.C.

(2) *Lal Bahadur v. Kanhaiyalal*, 29 A. 244 (255) P.C. distinguished in *Suraj Narain v. Ratan Lal* 40 A. 159 (164) P.C.

(3) *Suraj Narain v. Ratan Lal*, 40 A. 159 (170) P.C.

(4) *Katama Nachiar v. Rajah of Shivagunga*, 9 M.I.A. 543 (610); *Beer Pertab v. Rajendar*, 13 M. I. A. 1 (34) followed in *Ram*

Nundun v. Janki Korr, 29 C. 828 (851) P. C. *Sookraj v. Government*, 14 M.I.A. 112; *Eurpershad v. Sheo Dyal*, 26 W.R. 55; *Brij Indar v. Janki*, 5 I. A. 1; *Shere Bahadur v. Dariao*, 3 C. 645; *Jaganatha v. Ramabhadra*, 11 M. 880; *Mallan v. Purushothama*, 12 M. 287; *Subhaya v. Kamu*, 28 M. 47; *Gunnaiyan v. Kamachi*, 28 M. 889 (and cases cited); *Poona v. Nirpat Singh*, 2 C.P.L.R. 138.

confiscated grant intended to be for the benefit of the family⁽¹⁾ or is a grant made in consideration of the services rendered by the family or at its expense. But a party cannot sue Government for the modification of its grant.⁽²⁾ By an order of Government known as Lord Canning's Proclamation of 1858 all property in the soil of Oudh was confiscated by Government, out of which an estate was transferred to one Gouri Shanker, the head of a banking firm which had supported Government in suppressing the mutiny. In holding that the grant enured for the benefit of his family, the Privy Council said: "As regards that part of the property granted to Gouri Shanker which, if any was not previously part of the family estates, it cannot be held to have been the separate self-acquired property of Gouri Shanker within the meaning of Hindu law. It was granted as a reward for loyalty and for the support and assistance rendered to British officers; such services as those referred to in Gouri Shanker's petition could not have been rendered without the use of funds which must be presumed to have been those of the joint family."⁽³⁾ So where an estate was allowed to continue in possession of its manager, and was at the settlement, granted to "the loyal members of his family", the Privy Council held the grant to be for the grantee's family generally, and not to any persons as *persona designata*.⁽⁴⁾ The question whether a Government grant was personal to the grantee or to him and his family is one of construction and intention to be inferred from the terms of the grant and its surrounding circumstances.⁽⁵⁾ It may be that the grant is personal. Even then it is open to the grantee to treat it as a joint family asset and it becomes so if the grantee constitutes himself as trustee for his family⁽⁶⁾ or by a family arrangement⁽⁷⁾ or by a family custom.⁽⁸⁾

1139. Impartible estate.—From the history of the law of primogeniture given in the foregoing pages (§§ 355-356) it will be clear that in their inception, impartible estates owed their origin to feudal grants, but with the decline and decay of feudalism they have continued to retain their incident of impartibility. Some of them have been the subject of express legislation or a formal grant by Government in which both their impartibility and inalienability is made a term of the tenure. Apart however, from law or grant, an estate may be impartible by its nature or by custom. But in this case, since impartibility is the rule and impartibility an exception, he who relies upon the impartibility of an estate must prove the custom.⁽⁹⁾ In such cases the nature of the estate and the existence or otherwise of a special family custom are questions of fact to be determined on the evidence available in each case.⁽¹⁰⁾

(1) *Hurpershad v. Sheo Dyal*, 26 W. R. 55; *Kedar Nath v. Ratan Singh*, 32 A. 415 P. C.; *Beer Pertab Singh v. Rajender*, 12 M.I.A. 1 (87); *Sookraj v. Government*, 14 M.I.A. 112 (125); *Narayana v. Chengalamma*, 10 M. 1(8) P. C. (really a case of release of its reversionary rights by the crown); *Ram Nundun v. Janki Koer*, 29. C. 828 P.C.

(2) *East India Co. v. Syed Ally*, 7 M.I.A. 555 (578).

(3) *Hurpershad v. Sheo Dyal*, 26 W. R. 55 (58). P. C.

(4) *Govindrao v. Sita Ram*, 21 A. 58 P.C.

(5) *Baijnath v. Tej Bali Singh*, 38 A. 590 (608).

(6) *Sookraj v. Government*, 14 M.I.A. 112 (127); *Hardeo Bua v. Jawahir Singh*, 30 C. 522 (588) P. C.; *Shere Bahadur v. Dariao Kuar*

3 C. 645 (552) P. C.; *Ramanand v. Raghunath*, 8 C. 769 (782) P.C.

(7) *Kedar Nath v. Ratan Singh* 32 A. 415 (426) P.C.; *Periasami v. Periasami*, 1 M. 812 P. C.

(8) *Bhujangrav v. Malojirav*, 5 B.H.C.R. 161 (169); *Madhaerav v. Almaram*, 15 B. 519 (524).

(9) *Gunesh Dut v. Moheshur*, 6 M. I. A. 161 (187) *Venkata v. Parthasarthy*, 37 M. 199 (209) P. C.; *Durga Charan v. Raghunath*, 18 C. W. N. 55.

(10) *Mallikarjun v. Durga*, 13 M. 406 P. C. followed in *Narasimha v. Parthasarthy*, 37 M. 199 P. C. But of course, as previously stated, it is not a question of fact for the purpose of appeal (§ 887)

1140. It may be generally stated that an estate partaking of the nature of a principality or a Raj is ordinarily both impartible and inalienable. ⁽¹⁾ Such are the Zemindaris ⁽²⁾ and Pal-yams ⁽³⁾ of the Madras Presidency, Orissa and Central Provinces which are all classed as non-feudatory states.

1141. The impartible estates are from their very nature incapable of being regarded as co-parcenary property though those who would be co-parceners if the estate were partible, would, amongst others, be entitled to maintenance as a right. This is now settled, ⁽⁴⁾ though in some earlier cases the Privy Council appeared to have thought otherwise. ⁽⁵⁾ The Privy Council observed: "Though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it which under the Mitakshara law is created by birth, does not exist." ⁽⁶⁾

1142. But in spite of this modification, their Lordships continued to hold that the rule of succession is still by survivorship ⁽⁸⁾ and their view was followed by the other courts. ⁽⁷⁾ But in a later case their Lordships definitely declared that no junior members of the family possessed any co-parcenary rights in an impartible estate and their interest therein was merely a contingency ⁽⁹⁾ and this view has since been re-affirmed. ⁽¹⁰⁾ It is of course, clear that as the ownership of an impartible estate vests in the holder for the time being, who has complete dominion over it and no relation of the holder, apart from the personal relationship, has, by reason of his relationship and apart from custom, any right even to maintenance. "An impartible Zemindari is the creature of custom, and it is of its essence that no co-parcenary exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who, if the Zemindari were not impartible, would be entitled as of right to maintenance". ⁽¹¹⁾ And if during the life-time of the holder no other member of the family has any present proprietary interest in the estate, it follows that there is nothing to survive on the death of the holder, and the estate must descend as if it were separate estate, subject only to the

(1) *Ganesh Dutt v. Moheshur*, 6 M. I. A. 164; *Beer Pertab v. Rajendar*, 12 M. I. A. 1: See the subject discussed in 1 Gour's Law of Transfer (4th Ed.) §§ 225, 328.

(2) *Javuridevamma v. Ramandora*, 6 M. H. C. R. 98 (195).

(3) *Kachi Kaliyana v. Kachiyuva*, 28 M 508 P.C.; *Naragunt v. Vengama*, 9 M I A 66.

(4) *Sartaj Kuari v. Deroj Kuari* 10 A. 272 P.C.; *Rama Rao v. Raja of Pittapur* 41 M. 778 P. C.

(5) e.g. In *Kalama Nachiar v. Raja of Shivganga*, 9 M.I.A. 589 they said, "If the Zemindar at the time of his death and his nephews were members of an undivided Hindu family, and the Zemindari, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle." In *Yenumala v. Yenumala* 13 M.I.A. 388 (389) they said: "Their Lordships are of opinion that the estate was in its inception part of the common family property, though impartible, and therefore with certain qualifications enjoyable by only one member of the family at the time" and that succession to

such estates has always been determined by the rule of survivorship; *Naragunt v. Vengama* 9 M.I.A. 66; *Heeranath v. Burni Narain*, 17 W. R. 316 P.C.; *Chintamun. v. Nowlukho*, 1 C. 153 P.C.; *Svagnana v. Periasami*, 1 M, 312 P.C.; *Rup Singh v. Baisni* 7A. 1 P.C.; *Doorga v. Doorga*, 4 C. 190 P.C.; To the same effect *Venkata v. Court of Wards*, 22 M. 883 P.C. (6) *Sartajkuari v. Deroj*, 10 A. 272; *Gur Pershad v. Dhani Rai*, 88 C. 182 (186, 187); *Bachoo v. Mankorabai* 29 B. 51 (57) O.A. 91 B. 373 P.C., *Zamindar v. Trustee*, 82 M. 429. (428); *Venkata v. Venkata*, 28 C.W.N. 173 P.C.

(7) *Jogendro v. Nityanand*, 18 C. 151 P.C. (8) *Kali Krishna v. Raghunath*, 81 C. 224; *Gurpershad v. Dhani Rai*, 88 C 182 (187).

(9) *Laliteshwar v. Ramashwar*, 86 C. 481; *Tara Kumari v. Chaturbhuj*, 42 O.1179 (1195) P.C.; *Rama Rao v. Raja of Pittapur*, 41 M. 778 P.C.; *Zamindar v. Trustee*, 82 M. 429 (438). (10) *Rama Rao (Sri Rajah) v. Raja of Pittapur* 41 M. 778 P. C affirming O.A. 39 M. 896.

(11) *Rama Rao v. Raja of Pittapur*, 41 M. 778 (785) P.O. affirming 89 M. 896.

rule of law that for the purpose of ascertaining the party on whom the estate devolves, the estate would be regarded not as separate estate but as joint family property.⁽¹⁾ The holder of such an estate may subject to any custom resign or renounce it in favour of any person, gift⁽²⁾ or devise it to any one, as he has no one with vested interest in the estate to prevent him from doing so. ⁽³⁾ And in this respect there is no difference between the Mitakshara⁽⁴⁾ and the Dayabhag schools.⁽⁵⁾ But where the holder of an impartible estate, by a gift or will carves out a portion thereout and grants it to his younger son for the maintenance of himself and his descendants, such property is ancestral in the hands of the son and not his self-acquired property which he was at liberty to alienate capriciously to the detriment of the testator's grandson.⁽⁶⁾

1143. The question whether properties acquired by the holder of an impartible estate become part thereof depends on his intention to incorporate the acquisition with the original estate.⁽⁷⁾ But though such intention may alter the mode of succession, it cannot alter the incidents of the estate by impressing upon it the attribute of impartibility since no private individual can create an impartible estate⁽⁸⁾ or alter its course of devolution.⁽⁹⁾ Ordinarily, the savings and purchases from savings of an impartible estate are the self-acquired property of the holder over which he has every right of alienation.⁽¹⁰⁾

1144. Hereditary offices, whether religious or secular, are treated by the Hindu writers as naturally indivisible, but modern custom, whether or not it be strictly in accordance with ancient law, has sanctioned such partition as can be had of such property by means of a performance of the duties of the office, and the enjoyment of the emoluments by the different co-parceners in rotation.⁽¹¹⁾

103. (1) All acquisitions made by the manager of a joint family in the name of any of its co parceners will be presumed to be made out of its fund and for its benefit.

Co-parceners' acquisition presumed joint.

(1) *Zamindar v Trustee* 32 M. 429 (433, 434); *Visvanatha v. Kamulu* 24 M.L.J. 271; 21 I.C. 724; *Hardyal Singh v. Bishan Singh*, 6 A.L.J. 758 : 8 I.C. 907; *Indar Sen Singh, v. Harpal Singh* 34 A. 79 (*Sed quere* Does the successor succeed by survivorship *o.f. Rama Rao v. Raja of Pittapur* 41 M. 778 P.C.)

(2) *Sivasubramania v. Krishnammal*, 18 M. 287.

(3) *Sivagnana v. Periasami*, 1 M. 312 P.C.

(4) *Rama Rao v. Raja of Pittapur*, 41 M. 778 P.C.; *Lalchraj v. Harpal Singh* 34 A. 65 P.C.; *Muthusami v. Bangarammal* 9 M.L. T. 59; 8 I.C. 882.

(5) *Sartaj Kurai v. Deoraj Kuari*, 10 A. 272 P.C.; *Venkata Surya v. Court of Wards*, 22 M. 389 P.C.; *Venkata v. Bhassayakarlu*, 22 M. 588 affirmed O.A. 25 M. 367 P.C.; *Tara Kumari v. Chaturbhuj*, 42 C. 1179 P.C. *Kapilnath v. Government*, 22 W. R. 17 (20,

21); *Rup Singh v. Pirthu Narain Singh*, 20 A. 537. *Beresford v. Ramasubba*, 13 M. 167.

(6) *Udaydev v. Jadun Lal*, 6 C. 113 O.A. 8 C. 199 P.C.; *Narain v. Loknath* 7 C. 461. (7) *Hazarmal v. Abani Nath*, 17 C.W.N. 280.

(8) *Janaki Prasad v. Dwarka Prasad*, 35 A. 918 (401) P.C. following *Parbati v. Jagdis Chandra*, 29 C. 433 P.C.

(9) *Rameshwar v. Lachmi Prasad*, 31 C. 111; *Pireishah v. Manibhai* 36 B. 53.

(10) *Tagore v. Tagore*, 18 W.R. 359 (364); *Tanakeswarroy A. Shoshishikareswar*, 9 C. 952 P.C.; *Karistoremoney v. Norendrekrisna*, 16 C. 385 P.C.; *Purnasashi v. Kalkhan*, 38 C. 608 P.C.; *Kunhamed v. Kunhanbi*, 32 M. 315; *Parbati v. Jagadis Chunder* 29 C. 433 (453) P.C.

(11) *Mancharam v. Pran Shankar*, 6 B. 2 8 (299)

(2) But no such presumption arises where the property stands in the name of a non-co-parcener.

Synopsis.

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|---|---|
| (1) <i>Acquisitions by manager of joint family</i> (1145). | (3) <i>Presumption and mode of proof</i> (1147). |
| (2) <i>Acquisitions by other members presumed to be joint</i> (1146). | (4) <i>Property standing in the name of a non-coparcener</i> (1148-1149). |
| | (5) <i>Dayabhad families</i> (1150). |

1145. Analogous Law.—This section states a rule and its necessary corollary, the rule being that in a Mitakshara family the co-parceners being all joint owners, any acquisition made by the manager must be deemed to be made *qua* manager, on behalf of and for the benefit of the family, and the corollary being that such acquisition, if made for or by a non-co-parcener, cannot be so presumed, and that a co-parcener challenging it as made out of the family funds must prove it like any other fact.

As there are no co-parceners in the Dayabhad system of law, the same presumption cannot be extended to a family governed by that school.

1146. Acquisition by a co-parcener presumed joint.—In the case of an ordinary Hindu family who are living together, or who have their property in common, the presumption is, that all that any one member of the family is found in possession of, belongs to the common stock. That is the ordinary presumption, and the onus of establishing the contrary is thrown on the members of the family who dispute it. (1) The fact of the Hindu family is enough to put the purchaser upon enquiry, and if he deals with a single member without obtaining proof that the property is separate property, he does so at his own risk. (2) This presumption equally extends to property which having passed out of the family by sale into the hands of a stranger, is repurchased by a co-parcener. (3)

Such a presumption may, however, be rebutted by showing either that the family was not joint, or that the acquisition was made by a member out of his separate property, or that it was so acquired with the consent of the co-parceners, or that the latter acquiesced in its separate enjoyment as separate property.

As the presumption only applies to members of a co-parcenary, it has no application where the acquisition is made by a son-in-law (4) the wife, (5) or any person outside the co-parcenership.

1147. Presumption and mode of proof.—A co-parcener alleging any property to be his self-acquisition must, of course, prove it since it is an exception to the presumed community of estate. (6) Such presumption is not rebutted

(1) *Banno v. Kashee Ram*, 3 C. 815 (817) P. O.

(2) *Shibosondery v. Rakhal Doss*, 1 W. R. 38.

(3) *Gooroo Pershad v. Debee Pershad*, 6 W. R. 58.

(4) *Dossee Monee v. Ramchand*, 7 W. R. 249.

(5) *Narayana v. Krishna*, 8 M. 214.

(6) *Dhurm Das v. Shamasondri* 3 M. I. A. 229 (240); *Prankishen v. Mothoor Mohun*, 10 M. I. A. 408; *Cheshta v. Miheen Lal* 11 M. I. A. 869; *Bessasur v. Luchmessur*, 5 C. L. R.

477 (479); *Parbati v. Baikunth Nath*, 18 C. W. N. 428 P. O. *Pron Nath v. Kashi Nath* (1864) W. R. 169; *Deela Singh v. Toofanee*, 1 W. R. 306; *Nilmoney v. Gunga Narain* 1 W. R. 834; *Gopee Lal v. Bhugwan*, 12 W. R. 7; *Bodh Singh v. Ganesh*, 19 W. R. 856; *Heeralal v. Bidyadhur*, 21 W. R. 848; *Jugodumba v. Rohinee*, 28 W. R. 422; *Ramphul v. Deg Narayan*, 8 C. 517; *Narayan v. Anaji*, 5 B. 180; *Cassumbhoy v. Ahmedbhoy*, 12 B. 290 (309); *Balaram v. Ramchandra*, 22 B. 922; *Kanhialal v. Devi Das*, 22 A. 141.

by the mere proof that the property was purchased or stood in the name of a single member, since the evidence in such cases must prove the source of the purchase money; though the purchaser is not bound to prove particularly as regards each item of property that it had been purchased out of his separate fund. Such proof may be supplied by the acts of his exclusive ownership, if acquiesced in by the other co-parceners, ⁽¹⁾ when he has merely to prove generally his case without being required to trace the very fund with which each purchase was made from the time of its acquisition in a given year to the moment when it was paid to the seller of the property. But the claimant must adduce evidence of his possession of separate funds ⁽²⁾ which is the criterion for determining whether the purchase was a self-acquisition or for the joint family. ⁽³⁾ No doubt evidence as to the source of the purchase money is generally the most satisfactory, but it is not indispensable. ⁽⁴⁾

1149. But where the joint family is itself of an anomalous character, then

No presumption. the presumption arising in the case of a normal family would be correspondingly modified. The Privy Council had to consider the case of one such family where the two brothers had separated their transactions by a mutual agreement. Years afterwards one branch sued the other for partition and the question that exercised the courts was whether the property acquired by the defendant's branch was out of the joint property. It was shown that though the properties were so acquired, for 16 years the defendants had openly treated them as their exclusive properties to which the plaintiff's branch took no exception. It was held that the plaintiff had precluded themselves by their conduct from claiming the properties as joint which they had for so many years suffered the defendant to treat as separate. ⁽⁵⁾

1149. Again such presumption being founded on the fact of union, there can be no presumption where any property stands in the name of a non-co-parcener, such as son-in-law ⁽⁶⁾ or a female member of the family. ⁽⁷⁾ As observed in a case: "Where a family lives in co-parcenary, the presumption which exists in the case of male members arises from the circumstance that they are co-parceners. On the other hand, the ladies are not in an undivided family co-parceners; whatever property they acquire by inheritance or gift is their separate estate, and although it is not unusual for property to be transferred to the name of a female member to protect it from the creditors of the male members, or to place it beyond the risk of extravagance on the part of the member, such dealings are exceptional and can afford no ground for a general presumption". ⁽⁸⁾

(1) *Bippro Pershad v. Kena*, 3 W. R. 165 (167, 168); 5 W. R. 82, *Gane Bhive v. Kane Bhive*, 4 B. H. C. R. (A. C.) 169; *Kanhia Lal v. Debi Das*, 22 A. 141.

(2) *Dhurm Das v. Shama Soondri*, 6 W. R. 49 (44) P. C.; *Pran Kishen v. Mothoora*, 5 W. R. 11 P. C.; *Gopi Krist v. Ganga Pershad*, 6 M. I. A. 53; *Parbati v. Baikunth Nath*, 18 C. W. N. 428 P. C.

(3) *Bissessur v. Luchmessur* 5 C. L. R. 477 (479) P. C. following *Gopee Krist v. Ganesh Persaud* 6 M. I. A. 58; *Cheetha v. Miheen Lal* 11 M. I. A. 869; *Yanumala v. Yanumala* 13 M. I. A. 888; *Pran Nath v. Kashi Nath* (1864) W. R. 169; *Deela Singh v. Toofanee Singh* 1 W. R. 806; *Nilmoney v. Gunga Narain* 1 W. R. 884; *Beharee v. Madho Pershad* 6 W. R. 69; *Gopee Lal v. Bhagwan Dass*, 12 W. R. 7;

Bodh Singh v. Ganesh 19 W. R. 356; *Jugodamba v. Rohinee* 23 W. R. 422; *Nursingh v. Narain Dass* 6 W. R. 17 P. C. (O. A.) from 3 N. W. P. H. C. R. 217; *Narain v. Asaji* 5 B. 130; *Balaran v. Ramchandra* 22 B. 922; *Subhagya v. Chellamma* 9 M. 417; *Subhagya v. Surajya* 10 M. 251; *Ramphul v. Dagnarain* 8 C. 517; *Kanhia Lal v. Debi Dass* 22 A. 141

(4) *Dhurm Dass v. Shama Soondri* 3 M. I. A. 229. *Dhunoorkhari v. Gunpat Lal* 10 W. R. 122; *Bhola Nath v. Ajoodhia* 20 W. R. 85.

(5) *Narsingdas v. Narain Das* 26 W. R. 17 P. C. affirming O. A. 3 N. W. P. H. C. R. 217.

(6) *Dossee Monee v. Ramchand.* 7 W. R. 249.

(7) *Narayana v. Krishna*, 8 M. 214.

(8) *Id.* p. 218.

1150. The presumption of law that, while a family remains joint, all property including acquisitions made in the name of individual members is joint property has no application to a **Dayabhag** family in which the father reigns supreme, and the other members have no vested interest in the family property during his life-time. The presumption could only arise, it was said, when all members of the family have equal rights, and if the presumption were extended to the Dayabhag family, it would destroy its very fabric, since the presumption would equally apply to the father and any acquisition made by him would be presumed to be for the benefit of the joint family, whereas the father's acquisitions are exclusively his own and his sons take no interest in the father's property until his death, when the rights arise by inheritance. (1) But the Privy Council observed no such distinction and they have held that the presumption applies equally to all joint families whether subject to the Mitakshara or the Dayabhag schools of law. (2)

Co parcenary manager

104. Except in the case of a trading family, the father and in his absence, the next senior male relation is the rightful manager of a co-parcenary.

1151. Analogous Law.—The right of the father to manage his family stands above the right of any other relation. (3) It is the survival of his *patria potestas*. After the father, its management devolves upon the eldest male member of the family, especially the eldest brother. This is the normal rule, but where the person qualified to be the manager of his family lacks the qualification to manage it, its management devolves upon one better qualified. (4) The nature of business of the family often points to the member best fitted to act as the manager. In a banking business, for instance, the father may be superseded by a younger son more adept in the business; while in a trading partnership with several branches, it is usual for a relative to manage each branch subject to or independently of the supervision of the head manager.

But such management is not to be confused with the rights and powers of the *karta* who manages the orthodox household owning its ancestral lands. He owes his selection to his seniority, not as a matter of co-parcenary discretion, for if any co-parcener should disagree, his remedy lies in partition.

105. The manager possesses the following powers:—

(1) He is entitled to be in physical possession of the joint property, and perform in respect of it, all acts of management.

(2) As such, he may realize and expend its income at his discretion.

(1) *Sarada Prasad v. Mahananda*, 81 C. 448 (461).

(2) *Chand Huree v. Narendro Narain*, 19 W.R. 231 P.C. *Dhurm Das v. Shama Sundari*, 8 M.I.A. 229; *Gopee Kristi v. Ganga Prasad*, 6 M.I.A. 53; *Parbati Dasi v.*

Baikuntha Nath, 18 C.W.N. 428 P.C.; 22 I. C. 61 P.C.

(3) *Surja Prasad v. Golab Chand* 27 C. 724 (748); *Gajindra v. Harihar*, 12 C. W. N. 687.

(4) *Udit Narayan v. Ranglal*, 29 C. 797.

(3) He is not accountable to his co-parceners for his management, nor liable to them for his negligence or mismanagement.

(4) He is, however, liable if he has fraudulently misappropriated any of its income, or spent it on purposes not binding on the family.

(5) He is entitled to contract debts and alienate or charge the joint estate for family necessity, or for its benefit.

(6) He is entitled to represent the co-parcenary in all suits and proceedings affecting its interests, to make contracts, give discharge, pass receipts, acknowledge debts, refer to arbitration, compromise any claim or dispute affecting it, and generally to do all such acts as he may consider necessary or to its benefit.

(7) He is the *de facto* guardian of the co-parcenary interest of minor members of the family.

Synopsis.

- | | |
|---|---|
| (1) <i>Texts on the powers of a manager</i> (1152). | debt (1167). |
| (2) <i>Legal position of a manager</i> (1153-1156). | (13) <i>Alienation for family necessity</i> (1168-1169). |
| (3) <i>Rights of manager</i> (1157-1159). | (14) <i>Consent of other co-parceners if essential</i> (1170). |
| (4) <i>Individual capacity of manager</i> (1155). | (15) <i>Grounds for setting aside alienation</i> (1170-1171). |
| (5) <i>Manager's right to possession</i> (1157-1158). | (16) <i>Manager's contracts</i> (1172). |
| (6) <i>Manager not accountable for income</i> (1159). | (17) <i>Right to discharge debtor from liability</i> (1173). |
| (7) <i>Unless guilty of fraud</i> (1160). | (18) <i>Power to compromise or refer to arbitration</i> (1174-1176). |
| (8) <i>Liability to account under agreement</i> (1161). | (19) <i>Acknowledgment of debts</i> (1177). |
| (9) <i>Liability to account for admitted assets</i> (1162). | (20) <i>Barred debts, cannot be acknowledged</i> (1178-1180). |
| (10) <i>Debts contracted by manager</i> (1163-1164). | (21) <i>Exception in the case of the father</i> (1178). |
| (11) <i>Proof of binding character of the debts against co-parcenary</i> (1165-1166). | (22) <i>Right of manager to sue on behalf the family</i> (1181-1183). |
| (12) <i>Liability of other members for</i> | (23) <i>Manager, de facto guardian</i> (1184). |

Texts.

1152. Analogous Law.—The following texts bear on the powers of the manager :—

Manu :—After the death of the father and the mother, the brothers being assembled, may divide among themselves the paternal and maternal estate : but they have no power over it, while their parents live, unless the father choose to distribute it.

The eldest brother may take entire possession of the patrimony ; and the others may live under him, as they lived under their father, unless they choose to be separated.

By the eldest, at the moment of his birth, the father, having begotten a son, discharges his debt to his own progenitors; the eldest son therefore, ought before partition, to manage the whole patrimony.

That son alone by whose birth he discharges his debt, and through whom he attains immortality, was begotten from a sense of duty; all the rest are considered by the wise as begotten from love of pleasure.

Let the father alone support his sons; and the first born, his younger brothers; and let them behave to the eldest according to law, as children should behave to their father. (1)

Gautam :—After the father's death, let the sons divide his estate.

Or, during his life time, when the mother is past child bearing, if he desires it.

Or the whole estate may go to the first born; and he shall support the rest as a father. (2)

Narad :—Or the senior brother shall maintain all the junior brothers, like a father, if they wish it, or even the younger brother, if able; the well being of a family depends on the ability of its head. (3)

One who being authorized to look after the affairs of the family charges himself with the management (of the family property) shall be supported by his brothers with presents of food, clothing and vehicles (4)

1153. The *karta* of a Hindu family has been variously described and likened to the manager of an estate, a trustee, or managing director of a corporation or company. But his position is in some respects unique, for while as manager he must and does necessarily possess some of the attributes of a manager and trustee, his status and powers are the result of combined necessity and ancient privilege. They are stated in the several clauses which may now be taken as settled by the preponderance of precedents; (5) and their full effect will now be discussed.

1154. Position of manager.—The position of the manager in the joint family has been already set out.

When the father is alive, he is naturally and by right, the manager of the joint family and guardian of its infant members. In his absence, or if he resigns, the eldest male member takes his place and is vested with similar rights. The position of the manager is naturally honorary in that he is *loco parentis*

(1) Manu-IX-104-108.

(2) Gautam XXVIII-1-3 : 2 S. B. E. 29.9

(3) Narad XIII-5.

(4) Narad XIII-34.

(5) Cl. (a)—Baldeo v. Shamlal 1 A. 77 fol. 102 in *Jallidar v. Ram Lal* 4 C. 723; *Dharm Das v. Amulyadhar* 32 C. 1119 (1181, 1182); *Bhiku v. Buttu* 8 Bom. L. R. 99; as to trust property see *Sri Ram v. Sri Gopal* 19 A. 428; *Ramanathan v. Murnagappa* 27 M. 193 (201); *Bhaskari v. Bhaskaram* 31 M. 218; *Thandavaraya v. Shunmugam* 32 M. 167.

Cl. (b)—*Damodar Das v. Uttamram* 17 B. 271; *Narayan v. Nathaji*, 28 B. 201 (208); *Balkrishna v. Mathusami*, 32 M. 271 contra *Abhaychandra v. Pyari Mohan*, 5 B.L.R. 347;

Cl. (c)—*Shookmoy v. Monoharri* 11 C. 684 (694) P. C.; *Setrucherla v. Setrucherla*, 22 M. 470 P. C.; *Tara v. Reele*, 3 M. H. C. R. 177; *Balakrishna v. Muthusami*, 32 M. 271; *Bhowani v. Juggernath*, 13 C. W. N. 309; *Parmeshwar v. Gobind* 43 C. 459 (464, 465);

Nonerra v. Gurrav, 5 B. 589; *Narayan v. Nathaji*, 28 B. 201.

Cl. (d)—*Abaychandra v. Pyari Mohan*, 13 W. R. 75 F. B.; *Parmeshwar v. Gobind* 43 C. 459; *Balakrishna v. Muthusami* 32 M. 271; *Danudhar Das v. Uttamram* 17 B. 271; *Narayan v. Nathaji* 28 B. 201 (208.)

Cl. (e)—*Dwarka Nath v. Bungshi* 9 C. W. N. 879 *Moheshur v. Kishun Singh* 34 C. 184;

Cl. (f)—*Kishen Pershad v. Har Narain* 33 A. 272 P. C. overruling *Alagappa v. Velian* 18 M. 33; *Bal Savani v. Narayan* 7 B. 467; *Bali v. Keshwaji* 37 B. 340; *Gopal Das v. Badri Nath* 27 A. 361; *Durga Prasad v. Damodar Das* 32 A. 183; *Girwar v. Makbunessa* 1 Pat. L. J. 468; *Pitamingsh v. Ujagar Singh* 1 A. 651; *Ram Kuber v. Ram Dasi* 35 A. 428; *Ram Das v. Chabildas*, 12 Bom. L. R. 621; *Jagam Nath v. Manudal* 16 A. 231 (family arrangement) *Balaji v. Nana*, 5 Bom. L. R. 95 (reference to arbitration).

to the other members. He cannot charge for his services ; though if his duties are onerous, the family may by a special agreement allow him to charge for his services.⁽¹⁾ Such a charge might be justified where the estate or business is large and calls for the display of special talent in its management. The manager does not owe his position to the presumed consent of his co-parceners, who cannot eject or supersede him or curtail his powers without his consent. When it has been customary in a family to have two or more managers, on the death of one of them, his son would as of right take his place.⁽²⁾ Where the family holds any property on trust, the manager of the family is entitled to manage the trust property.⁽³⁾ The other members have no right to manage the joint property by rotation.⁽⁴⁾

1155. The fact that a person is a manager, does not create any presumption that all his acts are performed in that capacity since in becoming the manager, he does not cease to act in his individual capacity. As such, he continues to possess all the rights of a co-parcener.⁽⁵⁾ Where, therefore, all members of a joint family were to have executed a mortgage, which was in fact only executed by the manager, the question was held to be one of intention, whether he had executed it on behalf of all or only as a co-executant. The question is one of fact to be decided upon the circumstances of each case : "If the parties intended that all the members of the family should execute the document, it cannot take effect by reason that the person who alone executed the document, happens to be the managing member, and that the debt is recited to have been incurred for the benefit of the family."⁽⁶⁾ In one such case the court held the mortgage incomplete so that it was held to be inoperative even against the individual share of the manager who executed it.⁽⁷⁾ This view is justifiable on the ground that a person who undertakes a joint liability cannot be burdened with undivided liability which he never undertook.

1156. If the manager is also the administrator of the estate he cannot exercise power as manager which he is prevented from doing as administrator.⁽⁸⁾

So Lord Westbury said : "According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a definite share. No individual member of an undivided family could go to the place of the receipt of rent and claim to take from the Collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with ; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has

(1) *Krishnasami v. Raja Gopala*, 19 M. 79 (86).

(2) *Peruappavanalingam v. Nallasivan*, 1 M. H. C. R. 415.

(3) *Thandavaroya v. Shunmugam*, 32 M. 167 (169).

(4) *Sri Raman v. Sri Gopal*, 19 A. 428; *Ramanathan v. Murugappa*, 27 M. 193 (201);

Thandavaroya v. Shunmugam, 32 M. 167 (169).

(5) *Damodhar v. Damodhar*, 1 B. H. C. R. 182.

(6) *Sivasami v. Sevugam*, 25 M. 389 (938)

(7) *Id.*

(8) *Osier in Banjil Singh v. Amullya Prasad*, 9 C. W. N. 928.

not been actually severed and divided." (1) So where the plaintiff as manager granted a lease to the defendant and the plaintiff's son subsequently sold his undivided half-share to the defendant whom the plaintiff sued for the full rent and the defendant pleaded his purchase as entitling him to deduct the moiety of the rent, the court decreed the full claim holding that the defendant could not claim to be in possession of any particular land until partition. (2)

1157. Manager's right to possession.—It being clear that no co-parcener has any right to separate possession of the co-parcenary

Cl. 1 (a) Possession. estate, and all alike being entitled to joint possession and enjoyment, its actual possession and management must vest in the manager. He is entitled to physical possession of the entire joint estate and can consequently eject a co-parcener if he have taken exclusive possession of any portion of the joint estate. (3) So where the son had removed himself from the family dwelling house as he objected to live with his mother-in-law and taken up a separate residence in a house which used to be rented, the father was held entitled to eject him on the ground that a co-parcener was not entitled to exclusive possession of any portion of the joint property. (4) But of course the manager cannot eject any one from the joint occupation of the family-house (5) though where the co-parcener disturbs by his conduct the peace of the family he may even exclude him therefrom if necessary, by an injunction restraining the co-parcener from entering upon any portion of the property without the consent of the manager (6) who "has a recognised position of superiority with well defined rights of management and possession independent of the consent of the other members of the family." (7) The court will protect his possession even under S. 145 of the Code of Criminal Procedure.

1158. But where a co-parcener's possession has been acquiesced in for some time by the manager, he cannot be permitted to disturb it in the mere assertion of his right to exclusive possession. Such was the case of a co-parcener's possession of a garden which he had beautified at his expense, but from which the other co-parceners wished to eject him out of spite. The court refused to assist them adding:—"To do that would be to take away from the defendant the whole advantage of that which he had been allowed so long a time to occupy, and would in fact, have the effect of constituting the courts a source of annoyance rather than giving plaintiffs any reasonable and necessary relief." (8) The same principle guided the court in maintaining the *status quo ante* in a case where different co-sharers had been for a considerable time allowed to hold separate portions of the bank of a tank. (9)

1159. The manager of a co-parcenary is not accountable to the co-parcener for his income and expenditure in the same way as if

Cl. (2) Manager not accountable for current income. he were their agent. As previously remarked, he has in the family a position of superiority, and he is left to his own judgment to act according to what he considers best

(1) *Appoovier v. Rama Subba Aiyar*, 11 M. T. A. 75 (89) cited with approval per Sir Barnes Peacock in *Girdhari Lal v. Kantoo Lal*, 14 B. L. R. 187 (194, 195) P. C.

(2) *Padala v. Madavarapa*, (1911) 2 M. W. N. 382 following *Iburamsa v. Thirumalai*, 20 M. L. J. 743 F. B.; 7 I. C. 559.

(3) *Baldeo v. Shamlal*, 1 A. 77 followed in *Jallidar Singh v. Ram Lal*, 4 C. 728 (724); contra *Raghoba v. Ziboo*, 7 N. L. R. 82 overlooks the law of co-parcenary.

(4) *Badri Das. v. Ratan Lal*, (1892) A. W. N. 75.

(5) *Dharma Das v. Amulyadhan*, 82 C. 1119 (1181, 1182); *Bhiku v. Puttu*, 8 Bom. L. R. 99.

(6) *Bhaskari v. Bhaskaran*, 31 M. 818 (320).

(7) *Ib.*, p. 320.

(8) *Collector v. Debnath*, 21 W. R. 222.

(9) *Surbessur v. Gossain Doss*, 17 W. R. 210.

in the interest of the family. As observed by Holloway, J., "The father is not bound to account for all sums in excess of what a frugal man would have expended. The passage in the Mitakshara stating the right of the sons to prohibit excessive expenditure by no means involves the logical consequence, that, if that right of prohibition has not been or from the minority of the sons could not have been exercised, there would be after the lapse of any period how long so ever, a right of restitution. It may be said that the case of a minor requires a different consideration; the law counter-balances his disabilities with many privileges, and it may well be that he might be entitled to restitution although a son of full age would not be. It may also be that the absence of the power of interposition would be a loss attendant upon his disability from which no law could relieve him." (1) Where the discretion of the managing member is exercised *bona fide* and for the benefit of the estate and the family has the benefit, such discretion should not be narrowly scrutinized. (2) He cannot be held liable for his negligence. (3) He manages the joint estate for the benefit of the family and so long as he does this, he is not under the same obligation to economize or to save as would be the case with a paid agent or trustee:—"It is now well settled that when accounts have to be taken with a view to a partition of joint family properties, the account which has to be taken of the entire family property in the hands of the different members is mainly an enquiry into the existing assets. The head of the family cannot in general be called upon to defend the propriety of the past transactions of the family." (4) This view is supported by the fact that, apart from fraud or misappropriation by the manager, unless something is shown to the contrary, every adult member of an undivided family living in commensality with the manager must be taken to be a participator in and authorizer of all that has been done in the management of the property. (5) This is now agreed to by all the courts except that in a full bench case of the Calcutta High Court decided in 1870 the contrary has been laid down. (6) But this case was recently referred to as by no means striking a discordant note. (7) At all events, its contrary view is now sufficiently overruled by the Privy Council. (8)

1160. But of course, the manager cannot escape his liability for fraud or gross negligence, nor can he saddle its effect upon his coparceners, unless they have profited by his wrong. (9) This

Cl. (3) Fraud excepted. was emphasized by Phear, J. in the Full Bench case, last referred to, in the following words:—"The principle that I understand the English courts of equity to act upon in these matters is simply this, that a person who has the control of and management of another's property upon the footing of anything which amounts to a confidence or trust reposed in him by this other shall not be allowed to abuse that confidence and to make a profit out of the management without the owner's consent, and inasmuch as the question whether or not a profit has been made of what has been done, is under the circumstances, solely within the knowledge of the manager himself, the court

(1) *Tara Chand v. Reeb Ram*, 8 M. H. C. R. 177 (180).

(2) *Ratnam v. Gobindrajulu*, 2 M. 889 (841).

(3) *Raya v. Gopal*, 11 I. C. (M) 686.

(4) *Shookmoy v. Monoharri*, 11 C. 684 P. C.; *Bhowani v. Juggernath*, 18 C.W. N. 309; 8 I. C. 241 following *Jug Mohan v. Mangal Das*, 10 B. 528 (561, 581); *Narayan v. Nathaji* 28 B. 201; *Babu v. Dadjirao* (1898) B. P. J. 160; *Haridas v. Narokam*, 14 Bom. L.R. 287;

Parmeshwar v. Gobind, 43 C. 459 (464, 465).

(5) *Balakrishna v. Muthusami*, 27 M. (278, 274)

(6) *Abhoy Chunder v. Pearee Mohun*, 18 W. R. 75 F. B.

(7) *Parmeshwar v. Gobind*, 43 C. 459 (464)

(8) *Shookmoy v. Monoharri*, 11 C. 684 (694) P.C.; *Ramabhadra v. Virabhadra*, 22 M. 470 (475, 476) P. C.

(9) *Some v. Dhondu*, 28 B. 300.

of equity will make him disclose what he has done, in other words, will make him account for his administration of the property." (1) The manager's accountability for fraud or misappropriation is reserved even in cases in which he is held to be generally unaccountable. (2) But even in such a case no co-parcener can sue for account of a portion of joint property or for one or two items. Where he has the right to call for accounts, he must do so of the whole joint property. (3)

1161. Again, it is no exception to the general rule that the manager has to account where he has agreed to. Such was the case of the defendant who managed the family banking business in Calcutta where the other co-parceners used to come to examine his accounts which were maintained on the basis of partnership. Markby, J., held that though in an undivided family the manager was not liable to account, there is nothing in law to prevent the parties from modifying the manager's immunity by an agreement, and in the case under reference, the learned Judge held that the banking business was being carried on more in the nature of a partnership than a joint business in the strict sense of the term, upon the understanding that the profits when realized, should be divided amongst the individual members in certain proportions. The defendant consequently rendered himself liable to account which was ordered. (4)

1162. The manager is, of course, liable to account for all assets of the joint family existing at the time of partition. (5) For this purpose the co-parceners are not bound to accept the manager's *ipse dixit* as to the extent and value of the property. That would be no account at all. He must show what has become of the family property, and if any is alienated, for what purpose and to whom it has been sold, and in fact he must not only state what the family property is but explain what has become of the rest. So where the manager admitted the existence of certain estate family jewels which were worn by members of the family on special festive occasions, he was held primarily responsible and accountable for them and could not charge the other co-parcener with possession of them. (6)

1163. The manager possesses the power to borrow money for a family purpose in his capacity as manager so as to bind the other members to the extent of their interest in the joint property. (7) But there is no presumption that any loan contracted by a manager in his own name is or has been contracted on behalf of the family (8) or is within his authority (9) or that it is for a family purpose. (10) It is, therefore, on the plaintiff who seeks to bind the other member of the joint family to prove that it is a debt contracted for their benefit, or with their consent or that there was an urgent family necessity therefor. (11) It has been held that

Gl. (4) Contract debts (1) *Obhoy Chunder v. Pearee Mohun*, 18 W. R. 75 (79) F. B.

(2) *Parmeshwar v. Gobind*, 48 C. 459 (465); *Balakrishna v. Muthusami*, 35 M. 271 (273); *Bhuvani Prasad v. Juggernath*, 13 C. W. N. 309; *Narayan v. Raja Ram*, 28 B. 201

(3) *Nowlase v. Laloe*, 22 W. R. 202.

(4) *Rungun v. Kassimath*, 13 W. R. (F.B.) 75 N.; 3 B. L. R. (O.C.) 1.

(5) *Parmeshwar v. Gobind*, 48 C. 459 (465).

(6) *Venkata v. Bhashya Karlu*, 25 M. 337 (379) P. C.

(7) *Chelamayya v. Varadayya*, 22 M. 166;

Bimala v. Tarasundari, 14 W.R. 480; *Aghora Nath v. Gurish Chunder*, 20 C. 18; *Baldeo Moharak Ali*, 29 C. 588.

(8) *Sunkur v. Goury Pershad*, 5 C. 321

(9) *Nayendra v. Ama Chandra*, 7 C. W. N. 726; *Ganpat Rai v. Munni Lal*, 84 A. 185.

(10) *Soiru v. Narayan* 18 B. 520; *Krishna v. Vasudev*, 21 B. 808.

(11) *Ganpat Rai v. Munni Lal*, 84 A. 185; *Soiru v. Narayan*, 18 B. 520; *Krishna v. Vasudev*, 21 B. 808; *Narayan v. Political Agent*, 7 Bom. L. R. 172; *Dwarka Nath v. Bungshi*, 9 C. W. N. 879.

all the members may be sued on a promissory note executed by the manager for a family necessity, (1) but apart from the liability of a trading firm for such a note drawn in its name, (2) there does not seem to be any reason why the liability of the co-parceners should be enlarged by reason of the nature of the security offered. (3) Of course, in any case, the joint family cannot be held liable on a promissory note executed by the manager for the business of a toddy shop carried on by him as an agent for a third party from whom he received a monthly salary. (4) Where the manager contracts a debt it is open to the creditor to hold him personally liable (5) or to sue him in his representative capacity (6) or to sue the whole family as liable to him. (7) Where he elects to sue the manager personally as liable on a contract, he will obtain only a personal decree in execution of which he is not entitled to bring to sale the right, title and interest of any member except his own judgment-debtor's. If, however, he elects to sue him in his representative character and has obtained a decree in that capacity, he would be entitled to sell the right, title and interest of all or any of the members of the joint family at his discretion.

1164. Lastly, the creditor may implead all members as jointly liable, in which case a decree might be passed so as to bind them all, should the debt be held recoverable from their estate. The creditor can only choose the first alternative where he has no proof of legal necessity, for in a suit based on the manager's contract, the question of legal necessity would be immaterial and would not affect his liability. It is only when he adopts the second or the third course that he has to adduce proof of the legal necessity or *bona fide* enquiry. In this respect there is no difference between the Mitakshara and the Dayabhag schools. (8)

1165. There remains the question whether the other co-parcener's liability can be enlarged by their subsequent acquiescence. That this is possible has been observed in several cases. (9) The acquiescence of the co-parcener is evidence of necessity. (10)

1166. Where, however, it has to be otherwise proved, it does not appear to be either necessary or in many cases possible that the creditor should prove the necessity of each item in a long series of borrowings. "If it were, it would be impossible for a Hindu Saokar keeping a running account with the manager of a family to succeed in proving his account against the family.

(1) *Krishna v. Nagamani*, 89 M. 915; *Subramania v. Arumuga*, 26 M. 380; *Nagendra v. Amar Chandra*, 7 C. W. N. 725; *Bajnah v. Ramdhan*, 11 C. W. N. 139.

(2) *Raghunathji v. Bank of Bombay*, 34 B. 72.

(3) *Krishna v. Krishnasami*, 28 M. 597 (601); *Kutti Ammu v. Ragyi Seth*, 21 M. L. J. 526; 8 I. C. 951.

(4) *Palukavandy v. Periakaruppa*, 2 I. C. (M.) 208.

(5) *Deen Dayal v. Jugdeep Narain*, 3 C. 198 P. C.; *Jumoon Pershad v. Dignarain*, 10 C. I. (7, 8).

(6) *Bissessur v. Luchmessuri*, 5 C. L. R. 477 P. C.; *Deva Singh v. Ram Manohar*, 2 A. 746.

(7) *Sundar Lal v. Chhitar Mal*, 29 A. 1; *Dwarka Nath v. Bungshi Chandra*, 9 C.

W. N. 879; *Arumugam v. Sabapathi*, 5 M. 12; *Subramaniayyan v. Subramaniayyan*, 5 M. 125; *Dasaradhi v. J. d. m. m.*, 5 M. 193; *Guruswappa v. Thimma*, 10 M. 316; *Maruti v. Lalachand*, 6 B. 564; *Kisan Singh v. Moreshwar*, 7 B. 91; *Babaji v. Dhuri*, 9 B. 805; *Abilak Roy v. Rubbi*, 11 C. 298; *Balbo v. Moharakh Ali*, 29 C. 588; *Dwarka Nath v. Bungshi Chandra*, 9 C. W. N. 879; *Ranjit Singh v. Amulya*, 9 C. W. N. 928; *Ram Ratan v. Lachman Das*, 30 A. 460.

(8) *Dwarka Nath v. Bungshi Chandra*, 9 C. W. N. 879 (882).

(9) *Ranjit Singh v. Amulya*, 9 C. W. N. 928; *Kandasami v. Somaskanta*, 7 M. L. J. 165; 5 I. C. 922.

(10) *Gariibullah v. Khalak Singh*, 25 A. 407 (417) P. C.; *White v. Bisto Chunder Bose*, 2 Hay 567.

It will, we apprehend, be sufficient for the creditor to show that the family was in chronic need of money for the current outgoings of the family life or its trade necessities, and that the moneys were advanced on the representation of the manager that they were needed for such objects. And if the fair inference to be drawn from all the circumstances of the case leaves no doubt in the mind of the court that the moneys were borrowed for family reasons the plaintiff is entitled to succeed, although he is not able to indicate the particular purpose for which each sum has been borrowed." (1)

1167. Where the members are liable, their liability would be unlimited and not necessarily limited to their interest in the joint family. This is the necessary consequence of the rule that the manager may acknowledge the liability of the family for the debts which he has properly contracted. (2) The contrary has been held since the utmost capacity of the manager is to sell the joint estate and he could not by his act bind the co-parceners indirectly so as to involve property which he could not have sold directly under any circumstances. (3)

1168. Not only is the manager entitled to contract debts, but he is equally entitled to alienate the joint property for family necessity without the consent of the other co-parceners. Whether the manager be the father or some other co-parcener his alienation is subject to the following principles:—

- Alienation for family necessity.**
- (a) The power must be exercised only in case of need.
 - (b) The matters to be considered are :
 - (i) the existence of the pressure,
 - (ii) the means of averting it, and
 - (iii) the benefit to be conferred.
 - (c) If the lender or purchaser be a party to the mismanagement, he cannot take advantage of his own wrong.
 - (d) The lender or purchaser, however, unless he acts *mala fide* is not affected, though better management might have preserved the estate from debt.
 - (e) If there is no necessity, the lender or purchaser must have enquired, but
 - (f) If he does enquire and acts honestly, the real existence of necessity is not a condition precedent to the validity of the transaction, provided the necessity alleged is sufficient and reasonably credited.
 - (g) The lender or purchaser is not bound to see to the application of the money advanced. (4)

1169. These rules are deducible from the leading case of Hanuman Pershad Pandey's (5) in which the Privy Council have laid down the powers and the limits of the manager's authority to alienate or charge a co-parcenary estate.

(1) *Krishna v. Vasudev*, 21 B. 808 (815).
 (2) *Bhaskar v. Vijalal*, 17 B. 512; *Gosai v. Amarchand*, 9 Bom. L. R. 1289 (1292) dissenting from *contra* in *Chilamayya v. Varadayya*, 22 M. 166.

(3) *Chalamayya v. Varadayya*, 2 M. 166 (169).

(4) *Per Batty. J. in Nathaji v. Sata Ram*, 4 Bom. L. R. 587 (591, 592); *Kalu v. Barsu*, 19 B. 808; *Krishnaji v. Sakharani*, 8 Bom. L. R. 243; *Sheikhchand v. Hiratal*, 9 Bom. L. R.

1114; *Chinna v. Sada Barka*, 12 Bom. L. R. 811; *Jogrup v. Ram Sunder*, 6 M. L. T. 249; *Joharra v. Sree Gopal*, 1 C. 470; *Sham Narain v. Raghoobar*, 8 C. 508; *Bemala v. Mohun*, 5 C. 792; *Piari v. Ghasi Ram*, (1881) C. P. S. C. Pt. 8 No 21; *Ramlall v. Lakhmi-chand*, 1 B. H. C. R. (App) 51; *Trimbak v. Gopalshet*, 1 B. H. C. R. (A. C.) 27; *Tanda varayya v. Valli Ammar*, 1 M. H. C. R. 898.

(5) *Hanuman Pershad v. Mt. Eabooee*, 6 M. L. A. 593.

These principles have since been enacted as a part of the more general statute which protects a *bona fide* transferee for value who takes a transfer from the manager after reasonable enquiry into its necessity. (1)

1170. The question whether the manager has the right to transfer the joint estate or any portion of it in case of necessity on his own authority without consulting his co-parceners has been answered in unequivocal terms by the Mitakshara which states both the rule, and an exception—the rule being that no man should make a sale or gift of anything without consulting all the sons, (2) and the exception being that he may sell or gift it in a season of distress, for the sake of the family and especially for pious purposes. (3) In the early cases however, the courts enforced the rule against the manager's power to alienate the family property without the consent of the co-parceners. Even the Privy Council were not quite sure what was the correct rule on the subject; for in *Suraj Bansi's* case (decided in 1881) they said:—"The right of co-parceners to impeach an alienation made by one member of the family without their authority, express or implied, has of late been frequently before the Courts of India, and it cannot be said that there has been complete uniformity of decisions respecting it. All are agreed that the alienation of any portion of the joint estate, without such express or implied authority may be impeached by the co-parceners, and that such authority will be implied at least in the case of minors, if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled whether, in order to bind adult co-parceners, their express consent is not required; but this is a question which does not arise in the present case." (4) The Indian Courts were equally uncertain as to what was the rule and cases could be found to support any view since there were cases in which the express consent of the co-parceners was held essential, (5) and those in which it was opined that such consent might be either express or implied, (6) while there were others in which though the necessity of any consent was not insisted on, still the courts were careful to add that no hard and fast rule could be laid down, but that in such cases the conclusion as to the consent of the adult member must depend upon their own special circumstances. (7) Lastly, there were cases in which the manager's power of alienation without the consent of the co-parceners was affirmed. (8) This view now accords with the later decisions of the Privy Council who referring to the powers of a manager, observe: "The general principle in regard to that matter is that he is at liberty to affect or dispose of the joint property in respect of purposes denominated necessary purposes. The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or muth, or of the guardian of an infant family. In all the cases where it can be established that the estate itself that is under administration demanded, or the family interests justified, the expenditure, then those entitled to the estate are bound by the transaction. It is not accurate to describe this as either inconsistent with or an

(1) S. 88 Transfer of Property Act, for which see *Gour's Law of Transfer* (4th Ed.) § 828-836.

(2) Mit. 1-1 27

(3) *Ib.* 1-1-28

(4) *Suraj Bansi v Shao Pershad*, 5 C. 148 (1881) P. O

(5) *Upooroop v. Bandhes* 6 C. 749 (758).

(6) *Miller v. Runga Nath*, 12 C. 389 (399).

(7) *Chhotiram v. Narayan Das*, 11 B. 605 (608).

(8) *Bishambhar v. Sudasheeb*, 1 W. R. 96; *Sadabart v. Foolbush*, 12 W. R. 1 F. B.

(8) *F. B. Juggernath v. Doobo* 14 W. R. 80; *Bunsee Lall v. Actadh* 22 W. R. 552; *Phulchand v. Man Singh*, 4 A. 309; *Chandradeo Singh v. Mata Pershad*, 31 A. 176 F. B.

exception to the fundamental rule of the Mitakshara. For where estate or family necessity exists, that necessity rests upon the co-parceners as a whole, and it is proper to imply the consent of all of them to that act of the one which such necessity has demanded." (1)

1171. In a later case their Lordships explained that an alienation by the manager may be equally supported by a benefit to the estate,⁽²⁾ while as regards the transferee they laid down the principle which accords with the general law as enacted in S. 38 of the Transfer of Property Act. It is true that that section does not directly affect any rule of Hindu Law to the contrary; but the tendency of recent cases is to regard the manager as entitled to transfer the joint estate, either with the consent of the co-parceners, or without their consent for legal necessity or benefit of the family. And this appears to be the rule in consonance with the text and spirit of Hindu Law.

1172. The right of the manager to enter into contracts on behalf of the co-parcenary is also settled by the Privy Council who said: "The Indian decisions as to the powers of the managing members of an Indian joint family are somewhat conflicting. It is, however, clear that where a business like money lending has to be carried on in the interest of the family as a whole, the managing members may properly be entrusted with the power of making contracts, giving receipts and compromising or discharging claims ordinarily incidental to the business. Without a general power of that sort it would be impossible for the business to be carried on at all."⁽³⁾ This power is not affected by the fact that the other co-parceners are minors,⁽⁴⁾ and in such cases the test to be applied is rather the apparent authority of the manager than the actual necessity of the family.⁽⁵⁾

1173. The power to make contracts necessarily implies the power to discharge it, and the Privy Council have in the case last cited ruled that he has the power to pass receipts as a necessary incident of management.

1174. Such are also the powers to compromise claims or refer them to arbitration.⁽⁶⁾ So where a person sued the joint family for a share therein, and the father as manager compromised his suit by giving him a share, the court held that in the absence of collusion or fraud, the compromise bound the joint family,⁽⁷⁾ and this case was followed in another case in which it was held that it was competent to the father in his capacity of manager to refer to arbitration the partition of the joint family property and the award made on such a reference, would, if in other respects valid, be binding on the sons.⁽⁸⁾ The same rule applies equally to a manager other than the father; and it is immaterial

(1) *Sahu Ram v. Bhup Singh*, 39 A. 487 (443) P. C. followed in *Jogi Das v. Ganga Ram*, 21 C. W. N. 957 P. C.

(2) *Palaniappa v. Sreemath*, 40 M. 70, P. C.

(3) *Kishen Prasad v. Har Narayan Singh*, 33 A. 272 (276) P. C.; *Raghunathji v. Bank of Bombay*, 34 B. 72.

(4) *Raghunathji v. Bank of Bombay*, 34 B. 72 (87).

(5) *Ib.*, p. 86.

(6) *Kishen Prasad v. Har Narayan Singh*, 33 A. 272 (276) P. C.; *Pitam Singh v. Ujagar Singh*, 1 A. 281; *Jaganath v. Madulal*, 16 A. 281 (288).

(7) *Pitam Singh v. Ujagar Singh*, 1 A. 281 (283).

(8) *Jaganath v. Madulal*, 16 A. 281 (288) followed in *Ram Dayal v. Moti Ram*, 10 N. L. R. 74 (76); *Jaganath v. Kanhialal*, 6 I. C. (A) 123; *Pulliah v. Varadarajulu*, 81 M. 474 (compromise by reversioner).

that some of the members were minors, provided the reference was to their benefit. (1) But, of course, where a reference is made to arbitration during the pendency of the suit to which any party is a minor, then the provisions of the Civil Procedure Code relating to minors must be adhered to. Consequently, where a suit is compromised and the court has not expressly sanctioned it as required by O. 32, R. 9 of the Code of Civil Procedure, no decree passed thereon is of any force against the minor who may avoid it, (2) though it is binding upon other parties.

1175. A compromise otherwise good, cannot be impugned by a party on the ground that he had made it under a misapprehension as to his rights⁽³⁾ since it is of the essence of a compromise that the dispute is settled without examining its merits. (4)

1176. The manager may settle a dispute by the special oath of his adversary administered under the provisions of the Oaths Act. (5)

1177. The power of the manager to contract debts carries with it the necessary power to acknowledge them. As such, it has been held that the manager is an agent for the purpose of S. 19 of the Limitation Act, and may as such acknowledge debts on behalf of the joint family whether consisting of adult or minor members; (6) and any payment by a manager would be a payment by an agent duly authorized within the meaning of S. 20 of the Limitation Act. (7) But of course, the manager can only enlarge limitation in respect of debts contracted by him for the joint family. He cannot do so in respect of the debts contracted by the members individually. (8)

1178. Acknowledgment of barred debt.—Though the manager, as such, has no power to revive a debt by an agreement to repay it after it has become barred by time, such power is possessed by the father when he is the manager as against his sons, who are bound to pay their father's debts, only if they are not illegal or immoral, a liability which does not extend to any other relation beyond the point of necessity and benefit to the family. (9)

(1) *Balaji v. Nana*, 27 B 287; *Chinna v. Ganga*, 9 M. L. T. 84; *Romon v. Hurrololl*, 19 C. 334; *Jai Nath v. Kamala* 7 I. C. (C) 31

(2) *Ganesh Row v. Ujjaram Row* 86 M. 295 P. C.

(3) *Venkatagiri v. Subharayadu*, 34 I. C. (M.) 491.

(4) *Pulliah v. Varadarajulu*, 31 M. 474.

(5) *Samu v. Swaminatha*, 16 M. L. J. 163; 25 I. C. 221 followed in *Tijamba v. Saginram*, 22 M. L. J. 45; 14 I. C. 374 holding *Thim appaya v. Lakshminarayana* 6 M. 284 as no longer good law.

(6) O 32 R. 7 C. P. C. *Jamna Bai v. Vasantha*, 39 M. 409 P. C.

(7) See S. 21 C. (1) added in Act IX of 1908: *Chennaya v. Gurunaiham* 5 M. 169 F. B.; *Sobhanadri v. Sriramulu* 17 M. 221; *Kailasa v. Ponnukannu* 18 M. 456; *Sutramania v. Arumuga* 26 M. 380; *Chidambaram v. Ramaswami* 26 I. C. (M.) 911; *Bhasker v.*

Vijalal 17 B. 512, *Ranmakingshi v. Vadilal*, 20 B 61; *Annapagouda v. Sangadiggyapa* 26 B. 221 F. B. (acknowledgment by a certified guardian); *Narendra v. Raicharan* 29 C. 647; *Sarada Choran v. Durgoram*, 37 C. 461; *Har Prasad v. Bakshi* 31 I. C. (C.) 30; *Ramcharan v. Gaya Prasad*, 30 A. 422 F. B.; *contra Kumarasami v. Palanayappa* 1 M. 385; *Wajibun v. Kadir Buksh* 13 C. 292; *Chhato v. Bilto* 26 C. 53 is no longer good law in view of the amended section.

(8) *Jagan Nath v. Manu Lal*, 16 A. 231 (239) followed in *Ram Dayal v. Moti Ram*, 10 N. L. R. 74 (76).

(9) S. 21, Cl. (1) added in Act IX of 1908; *Sukhamoni v. Ishan Chunder*, 25 C. 844 (852) P. C.; *Saroda charan v. Durga Ram*, 37 C. 461; *Ramcharan v. Gaya Prasad*, 30 A. 422 F. B.; *Chidambaram v. Ramaswami* 26 I. C. (M.) 911.

1179. The manager has, however, no authority to acknowledge except as **Manager cannot** against himself, a debt already barred by time. ⁽¹⁾ This **acknowledge barred** view is supported by the view that since the manager can **red debts.** only bind the family by his act which is necessary or beneficial to its interest and the acknowledgment of a barred debt cannot be so regarded, his acknowledgment of such a debt is beyond his power.

1180. The manager is competent to give a valid discharge within the meaning of S. 7 of the Limitation Act of a claim on behalf **Manager can give** of himself and his co-parceners, whether adults or minors, **discharge.** without the concurrence of the minor members so as to set limitation in motion against them. ⁽²⁾

1181. Manager's right of suit.—That the manager may possess the right to represent the family in a suit affecting the joint family has been now conceded by the Privy Council who said: "Is there any principle of law, or any custom applicable to a case like this, according to which the managing member of a Hindu jointly family entrusted with the management of a business must be held incompetent to enforce at law the ordinary business contracts they are entitled to make or discharge in their own names. The defendant is, of course, entitled to insist on all the persons with whom he expressly contracted being made parties to the suit". ⁽³⁾ And in another case they said: "There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions, including foreclosure actions, when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound." ⁽⁴⁾

1182. The question then arises what are these occasions. It appears to be agreed that in respect of all contracts made by the manager he has unquestionably the right to sue by himself, though the contract may have been made by him in his capacity as manager of the joint family. In such a case there is a privity of contract between him and his obligee entitling him to sue. But though this is his right, it is equally the right of the defendant to insist upon the joinder of all persons who are entitled to enforce the contract and the court should then implead them. There is no question of limitation, since the manager alone is competent to act and other members are merely joined *ex majore causa*.

1183. But if the defendant does not object, the decree will bind the joint family, and junior members cannot complain that they were not parties to the suit, since they were sufficiently represented by the manager. ⁽⁵⁾ But in certain courts, *e.g.*, in Bombay, as a matter of practice the manager joins

(1) *Narayana v Venkata Ramano*, 25 M 220 (234) F B.

(2) *Surju Prasad v. Khwahish Ali*, 4 A 512; *Vigneswara v. Bapayya*, 16 M. 496; *Sadulla v. Bhana Mal* (1882) P. R. 58; *Harihar Pershad v. Bholi Pershad*, 6 C. L. J. 388 (333); *Banwarilal v. Sheo Shankar*, 8 I C (C.) 670.

(3) *Gopal Narain v. Kuddomuttly*, 14 B. L. R. 21; *Chinnaya v. Gurunatham*, 5 M. 169 F. B.; *Kumara v. Pala*, 5. M. 885; *Kondappa v. Subba*, 18 M 189; *Dinkar v. Appaji*, 20 B.

155; *Naranji v. Bhagvandas* (1881) B. P. J. 288; *Wajibun v. Kadir* 18 O. 292; *Indar Singh v. Sarju Singh*, 8 A L. J. 1099; *Dalip Singh v. Kundan Lal*, 35 A. 207.

(4) *Kushan Prasad v. Har Narayan Singh*, 83 A. 272 (276, 277) P.C. overruling *Alagappa v. Vellianchet* it, 18 M. 38.

(5) *Sheo Skanhar v. Jai* 86 A. 888 (886 387) P.C. affirming O. A. *Jaido v. Sheo Shankar*, 83 A. 71; *Jogendro v. Purnindro*, 11 M. L. A. 367 (376) *Bessesur v. Luchmessur Singh*, 5 C. L. R. 477 P.C.

all his co-parceners in suits affecting the co-parcenary, ⁽¹⁾ and until recently there was a conflict of opinion as to the power of the manager to maintain a suit in his own name without impleading his co-parceners, some courts holding such suits as incompetent ⁽²⁾ while others holding them as maintainable. ⁽³⁾ In some cases the courts seek to distinguish the case of the father and any other manager, holding that while the former may, the latter cannot bind the family by any decree passed against him ⁽⁴⁾ but the Privy Council have held that apart from certain textual powers possessed by the father, such distinction has no legal support. ⁽⁵⁾

1184. Manager de facto guardian.—It has already been seen that the manager of a joint family is the *de facto* guardian of all minor co-parceners for the protection of whose interest no guardian can be appointed either under the Guardians and Wards Act, ⁽⁶⁾ or by the High Court in the exercise of its inherent power. ⁽⁷⁾ The only cases in which the appointment of another guardian is possible have already been considered (§ 855). In all other cases the manager of the joint family is the *de facto* guardian of all minors and is as such entitled to all the rights as he is subject to all the liabilities of a guardian.

Powers of other managers.

106. The provisions relating to the power of the manager of a joint family generally apply to—

(1) A manager whether subject to the Mitakshara or the Dayabhag law.

(2) The widow managing property inherited by her minor son.

(3) Guardian of a minor's estate.

(4) Manager of a religious endowment.

(5) Manager of the estate of a lunatic.

Synopsis.

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|--|---|
| (1) <i>Powers of manager under Dayabhag and Mitakshara law</i> (1185). | (2) <i>Position of guardian of a minor's estate, manager of religious endowment and of the manager of a lunatic</i> (1186). |
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1185. Analogous Law.—The powers set out in the preceding section apply to a manager both of a Mitakshara and of a Dayabhag family. ⁽⁸⁾ They extend equally to the manager of an infant's estate, whether the infant be a real or a juridical person such as an idol or a shrine. ⁽⁹⁾ In each case the powers of the manager must necessarily vary according to the nature of the property and the incidents attaching to it. So again, while the manager of the Mitakshara family

(1) *Kashi Nath v. Chinnaoji*, 30 B. 477 (186).

(2) *Kuttusheri v. Vallotil* 3 M. 284; *Alagappa v. Vellian* 18 M. 33 (36) overruled in *Kishan Prasad v. Har Narayan Singh*, 33 A. 272 P. C.; *Angamutu v. Kolandavelu* 23 M. 190; *Hari Gopal v. Gokaldas* 12 B. 168, *Balkrishna v. Moro* 21 B. 154.

(3) *Arunachalla v. Vythialinga* 6 M. 27; *Ramanaya v. Venkatesnam* 17 M. 221; *Girwar v. Makbunessa* 1 Pat. L. J. 168.

(4) *Madusudan v. Bhan* 15 Bom. L. R. 36 (40); *Laxman v. Vinayak*, 40 B. 329.

(5) *Suroi Buns v. Sheo Persad*, 5 C. 148 (165) P. C.

(6) *Gharibullah v. Khalak Singh*, 25 A. 107 P. C.; *Virupakshappa v. Nilganga* 19 B. 309; *Bindaji v. Methurabai*, 30 B. 152; *Shankar v. Mohananda* 19 C. 301; *Jhabbu Singh v. Ganga Bhashan* 17 A. 529.

(7) *Manlal (In re)* 25 B. 353; *Jairam (In re)* 16 B. 681; *Jagannath (In re)* 19 B. 96.

(8) *Hanuman Pershad v. Mt. Babooee*, 6 M. I. A. 398.

(9) *Doorganath v. Ramchander*, 2 C. 841 P. C.; *Sheo Shanker v. Ram Shewak*, 24 C. 77.

possesses the same powers as the manager of a Dayabhag family, his position approximates more closely to that of a trustee than in the case of a family governed by the Mitakshara law. ⁽¹⁾

1186. The manager of a lunatic is indistinguishable from the manager of a family of infant co-parceners,⁽²⁾ and so is the guardian of a minor or the manager of a religious endowment. As the Privy Council observed:—‘The law of the Mitakshara has, however, given to the father in his capacity of manager and head of the family certain powers with reference to the joint family property. The general principle in regard to that matter is that he is at liberty to effect or to dispose of the joint property in respect of purposes denominated necessary purposes. The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or muth or of the guardian of an infant family. In all of these cases where it can be established that the estate itself that is under administration demanded, or the family interests justified, the expenditure, then those entitled to the estate are bound by the transaction’.⁽³⁾ But though the powers of the joint family manager and of other managers are analogous, they are not identical, as will be seen in the sequel where the powers of the latter are set out.

107. (1) The manager is entitled to make such gifts or presents either to the members of the family or strangers as are usual or customary.

Gift by the manager.

(2) And the father and in his absence, the mother, has in this respect even a larger discretion, being entitled to make it at any time to a reasonable extent.

Synopsis.

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|---|---|
| (1) <i>Texts on manager's right to make gifts</i> (1187). | <i>all co-parceners</i> (1190). |
| (2) <i>Limits of the power to make gifts</i> (1188). | (6) <i>Gifts by other co-parcener</i> (1191). |
| (3) <i>Parent's gift</i> (1189). | (7) <i>Gift for maintenance</i> (1192). |
| (4) <i>Gift of manager's share of the property in favour of one co-parcener</i> (1190). | (8) <i>Quantum of gift</i> (1193). |
| (5) <i>Gift by manager with consent of</i> | (9) <i>Gift to be reasonable</i> (1194). |
| | (10) <i>Gift when set aside</i> (1195). |
| | (11) <i>Formalities of a gift</i> (1196). |
| | (12) <i>Restriction of manager's powers by agreement</i> (1197-1198). |

1187. Analogous Law.—This section is supported by the following texts:—

Brihaspati.—Even a single individual may conclude a donation, mortgage or sale of immoveable property during a season of distress for the sake of the family and especially for pious purposes. ⁽⁴⁾

Mitakshara.—Therefore, it is a settled point that property in the parental or ancestral estate is by birth; although the father have independent power in the disposal of effects other than immoveables for indispensable acts of duty, and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth, he is subject to the control of the sons and the rest in regard to the immoveable estate whether acquired by himself or inherited from his father or other predecessor.

(1) *Balkrishna v Muthusamy* 32 M. 271; *Annamalai v Murugesu* 5 Bom. L. R. 494.

(2) *Annapurnabai v. Duragapa* (1896) B P. J. 371.

(3) *Sahu Ram v. Bhup Singh* 89 A 437 (443) P. C

(4) *Brihaspati* cited in *Ratnakar and Mitakshara* 1.1.28

"The meaning of this text is this :—While the sons and grandsons are minors and incapable of giving their consent to a gift or the like : or while brothers are so and continue unseparated, even one person who is capable may conclude a gift hypothecation or sale, of immoveable property if a calamity affecting the whole family require it or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like make it unavoidable". (1)

Viramitrodaya :—Gifts by the parents out of favour or affection should be guided by propriety but not by caprice. (2)

1188. The manager's power to make a gift is necessarily limited and circumscribed by the requirements of religious or customary necessity. Though he has the power to make ordinary gifts or presents on suitable occasions either to the members of the family or to strangers, this power must be confined to such occasions as are usual and to such presents as are customary. (3) For example, though a gift may be justified if made at the time of the marriage, the same gift cannot be upheld if its making is deferred for so long as to suggest that it was merely an excuse. (4) No gift can be made unless it is justified by necessity or the performance of any pious duty obligatory on the family or its co-parceners. If it is so justified, the mere fact that the members were minors would be no ground for invalidating it. (5) But, of course, the gift must be commensurate with the object and purpose of the gift and the means of the family. So where the father as head of a joint family owning property worth about ten to fifteen lakhs made a gift of Rs. 20,000 to his only daughter out of the income of the property as her marriage dowry two years after the marriage, Tyabji, J., disallowed it on the ground that it should have been made at the time of the marriage, but on appeal, it was held that as the gift was comparatively small and made out of the income, it should be upheld as a parental gift made through affection, such a gift being allowed by the texts, and this view was upheld by the Privy Council. (6)

But no co-parcener is bound to submit to a gift made for an illegal purpose, as where the father gave Rs. 8,000 to the mother of the adopted boy to induce her consent to his adoption. (7)

1189. Parents' gift.—The father, as the senior head of the family, possesses larger powers of gift than any other manager. He is entitled to make "gifts through affection" to his children, or to the son-in-law (8) and where such gifts are inconsiderable the courts uphold them even though they might consist of ancestral immoveable property. On this ground gifts of land made to the son-in-law on the occasion of the daughter's marriage, by the father (9) or the mother (10) have been upheld as in consonance with the spirit of Hindu Law. In one of these cases it was argued that the gift of land was opposed to the express texts, to which the court replied, "When the necessity of the gift is recognized, it seems unreasonable in these days to make its validity depend upon" the nature of the

(1) Mit. 1-1-27, 28, 29; Mayukh IV-VII 11-18.

(2) Ch. VII S. 5.

(3) *Bachoo v. Khushaldas*, 4 Bom. L. R. 888 (890) reversed O. A. *Bachoo v. Mankorebai*, 29 B. 51 affirmed O. A. 81 B. 378 P. C.

(4) *Ganga v. Pirithi Pal*, 2 A. 685 (689); *Bachoo v. Khushaldas* 4 Bom. L. R. 888 (889, 890); *Perumal v. Ramalinga*, 3 M. H. O. R. 76 (81) (gift made five years after the marriage).

(5) *Kalu v. Barsu*, 15 B. 803.

(6) *Bachoo v. Khushaldas*, 4 Bom. L. R. 888 reversed O. A. *Bachoo v. Mankorebai*, 29 B. 51 affirmed O. A. 81 B. 378 (380) P. C.

(7) *Sita Ram v. Harihar*, 85 B. 169.

(8) *Ramasami v. Vengidusami*, 22 M. 118; *Sundram v. Krishnasami*, 28 I. C 992.

(9) *Sundararamayya v. Siamma*, 85 M. 628; *Kudalamma v. Narasimha*, 17 M. L. J. 528.

(10) *Churaman v. Gopi*, 37 C. 1

property, upon the question whether it is moveable or immoveable." (1) This case was followed in another case in which the court upheld the father's alienation not only upon the ground that it was reasonable but further on the ground that as the daughter was living with her father in old age taking care of him, it was an alienation supported by consideration. (2)

1190. A gift by a father of all his interest in the family property in favour of his only son, being supported by natural love and affection, may be upheld as a relinquishment which may be effective, though it may not be in favour of all co-parceners. It need not, of course, be supported by any consideration. (3) The gift of family property with the consent of the then existing co-parceners, of course, stands on an altogether different footing. So where the undivided paternal grandfather of a minor gave a portion of the family property (about 30 per cent. in value of the whole) to his third wife and daughters with the consent of his grandson's widowed mother, the court held the gift binding on the grandson, adding: "It is clear that it was open to the grandfather if he had chosen and without any one's consent, to effect a partition and leave the whole of his half share to his third wife and her daughters, and it was in our opinion clearly for the benefit of the minor and his guardian to avoid an eventuality so injurious to his interests by consenting to the alienation effected by Exhibit I." (4)

1191. Gifts to female relations on the occasion of their marriage are supported even when made by a co-parcener other than the father. Such was the case of a gift made by the brother to his sister who had been married during the life-time of the father who gave her or her husband no property at the time of marriage. The father had made no promise of any gift. It was held however, that there was a strong moral obligation on the father to make a gift out of the joint family property on the occasion of the marriage either to the daughter or son-in law as a provision for them, and the gift which in the circumstances of the case was an eminently reasonable one, was not in excess of the powers of the brother, though he was not even the managing member at the time of the marriage. (5)

1192. Though the section deals with religious and ceremonious gifts, it would not be amiss to mention that the manager may equally transfer a small portion of the joint estate for the maintenance and marriage of a female relation. So where the manager transferred land measuring 3'22 acres of land valued at Rs. 1,000 to his step sister for her maintenance and marriage and it was contended that such an alienation was beyond the capacity of the manager, the court overruled the contention holding that it was within the competence of the manager to transfer by an outright gift a small portion of the family property by way of a provision for maintenance. (6)

(1) *Sundaramayya v. Sitamma*, 35 M. 628 (680); *Narayana v. Ramalinga*, 39 M. 587 (591) *contra* *Kamakshi v. Chakrapany*, 30 M. 462.

(2) *Narayana v. Ramalinga*, 39 M. 587 (590, 591); *Kilambi v. Tirumala*, 5 M. L. T. 40; 4 I. C. 1094.

(3) *Thangavelu v. Doraisami*, 27 M. L. J. 272; 26 I. C. 211.

(4) *Arunachala v. Sampurnathachi*, 27 M. L. J. 485 followed in *Patra v. Srinivasa*,

40 M. 1122 (1126).

(5) *Mit 1-VII-6-14* cited and followed in *Ramaswami v. Venguduswami*, 22 M. 218; *Kudatamma v. Narasimha*, 17 M. L. T. 528; followed in *Sundaramayya v. Sitamma*, 35 M. 628 (680); *Churaman v. Gopi*, 37 C. 1; *Kilambi v. Tirumala*, 5 M. L. T. 40; 4 I. C. 1094.

(6) *Seenil v. Angamuthu*, (1912) 1 M.W.N. 99; 13 I. C. 802.

1193. Quantum of gift.—Though Hindu law allows religious and charitable gifts, it also takes care to prescribe that the giver must be just to his people while he is generous to the donee.

As a matter of fact the gift the court allows, must be small and reasonable and it must not cripple the co-parcenary estate. In a Calcutta case the court upheld the gift of about a third of the father's estate by his widow to her daughter on the occasion of her *gowna* ceremony. (1) But this is probably an extreme limit. Ordinarily, such gifts relate to much smaller properties. So where two of the three brothers gifted their land to the plaintiff "as worshipper of the God Shri Sadguru" the court set aside the gift as invalid and unsupported by the purpose for which joint family property might be alienated. It was in effect the alienation of a co-parcenary interest without consideration which is not permissible by law. (2) The question cannot be reduced to a set formula as it must necessarily depend on the nature and extent of the *corpus*, the nature and extent of the gift, and whether it is made out of the *corpus* or only out of the current income. Where it is made out of the income, it is a strong ground for upholding it. But even where it is carved out of the *corpus*, the court will uphold it, if due regard being had to all the circumstances of the family, it is not unreasonable. So the court in one case upheld a grant of 3'22 acres of land valued at Rs. 1,000 out of 22 acres of the family lands and no debts (3) in the circumstances already stated. In another case the managing father had increased the family estate out of his own acquisitions valued at Rs. 17,000 and a business which yielded Rs. 2,000 annually. Finding great difficulty in getting his daughters married, he negotiated for the marriage of one of them to his sister's son and conveyed to his daughter and his sister two shops and a house worth Rs. 1,500. The court upheld the gift as inconsiderable in view of his own additions to the family estate and the necessity which prompted the gift. (4)

1194. In another case the court upheld the gift of 8 acres of ancestral land to the daughter after her marriage, out of 200 acres possessed by the family, (5) while the manager's gift of a tenth of the family lands to the daughter of a co-parcener was upheld by the same court as binding upon all the co-parceners. It was contended that the gift was unduly large and that, however justifiable when made by the father, it could not be made by any other manager but the court overruled both contentions. (6)

1195. Where gift set aside.—It must be remembered that the manager's power to make customary gifts is a curtailment of the co-parcenary rights which is only tolerated because such gifts besides being usual and customary, are inconsiderable. The manager cannot in the guise of such a gift transfer a considerable portion of the joint estate to his wife and daughters. Such a transfer would be a serious encroachment on the rights of other co-parceners and an abuse of power which may be impeached by any co-parcener. (7) Such was the gift by the two brothers of their land to the plaintiff as worshipper of the God "Shri Sad Guru" which the court set aside as the gift was

(1) *Churaman v Gopi*, 37 C 1 (12).

(2) *Kalu v. Barsu*, 19 B. 808 (806, 807).

(3) *Seení v. Angamuthu*, 13 I. C. (M) 802.

(4) *Sabapathy v. Ponnuswamy*, 28 I. C. 865.

(5) *Sundaramayya v. Sitamma*, 35 M. 628 followed in *Patra v. Srinivasa*, 40 M. 1122

(1126); *Subba Naicker (In re)* 2 M. L. W. 754; 30 I. C. 781.

(6) *Subba Naicker (In re)* 2 M. L. W. 754; 30 I. C. 781.

(7) *Kamakshi v. Chakrapany*, 30 M. 452; *Chinnaya v. Collector*, 8 M. L. T. 290.

invalid and unsupported by the purpose for which joint family property might be alienated. It was in effect an alienation of a co-parcenary interest without consideration which is not permissible by law. (1)

1196. Of course a gift of immoveable property must be made in writing registered in conformity with the requirements of S. 123 of the Transfer of Property Act ; otherwise, it might be set aside as invalid in law. (2)

1197. Manager's power otherwise limited.—With the exception of the father who has an almost absolute right to be the manager of his household, the right of any other relation depends in the first instance upon his seniority, but for its continuance upon the consent or acquiescence of the other co-parceners, who may supersede him or limit his powers. But the exercise of his ordinary power does not depend upon any assent or acquiescence of the co-parceners. His position is independent of the will of the co-parceners. (3) As observed by Mr. Cowell : “ When, therefore, we come to define the relation of each member, especially of the managing member, to the joint family and the joint estate, we are brought into contact with a relationship which has no counterpart in English law. Neither the term partner, nor principal, nor agent nor even a co-parcener, will strictly apply.” (4) Consequently, while the family remains joint, the powers of the manager cannot be altered by contract so as to affect the very constitution of the co-parcenary. This was the *ratio decidendi* of the case in which three brothers separated from their nephew, the son of their eldest brother, themselves agreeing to remain joint for twelve years after which they were to effect a partition. The eldest of them was to manage the estate and maintain an account of the profits and loss accruing up to that date which was also to be then divided with the *corpus*. This arrangement was adhered to for the stipulated term of twelve years after which, the youngest brother sued for a partition and profits of his share during the twelve years' term. The manager resisted the claim for accounts pleading that he was not accountable for past profits, as the family was joint, but the Privy Council held that the agreement was not a simple agreement to postpone the partition, but had put the family upon a new footing and that his position during the term, though not that of a trustee, was that of an agent which made him accountable for his receipts and expenditure. (5) The same view was taken in another case in which by a family arrangement the head of the family, a Taluqdar, was alone to hold the estate by primogeniture, but was accountable to the junior members for their shares of the profits. The Privy Council held this kind of managership entirely unknown to Hindu Law, and observed : “ The Taluqdar here in question was in a very peculiar position ; the family were living together as a joint family and in commensality, Anant acting as head and not accounting for the profits, which is the case with an ordinary Hindu family ; but still they were living under the most distinct agreement that they were entitled not as an ordinary joint family, but in specific and definite shares. Their Lordships consider that if the

(1) *Kalu v Barsu*, 19 B. 803.

(2) *Visalakshi v Mahalinga*, (1911) 1 M.W. N. 434; 7 I. C. 800.

(3) *Ramanathan v Murugappa*, 27 M. 198 (201); *Thandavaraya v. Shunmugam*, 32. M. 167 (169, 170) ; *Sri Raman v. Sri Gopal*, 19. A. 428.

(4) Tagore Lectures 1870 P. 108; cited and followed in *Muhammad Askari v Radhe Ram*, 22 A. 307 (817, 818, 820, 821); to the same effect *Thandavaraya v. Shunmugam*, 32 M 167 (169).

(5) *Seitrucherla v. Seitrucherla*, 22 M. 470 (475) P. C.

enjoyment of those shares is in any way disturbed, the right to sue for profits will arise, as well as a right to partition". (1)

1198. The manager, as such, is not entitled to any remuneration for managing the estate of which he is the joint owner, though there is nothing in law to prevent him from receiving a remuneration if the co-parceners agree to pay him. (2) The co-parceners cannot limit his authority to manage the family estate by rotation (3) though the family may place another member in joint management of their estate; and where this has been the practice, the son will as of right, succeed to the joint managership on the death of his father. (4)

108. (1) The father is entitled to alienate the co-Father's additional parcenary property to satisfy his antecedent debt contracted by him for a purpose which is neither illegal nor immoral.

(2) In other respects, he possesses the same power as any other manager.

Explanation.—A debt may be imprudent or improper without being illegal or immoral.

Synopsis.

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| (1) <i>Texts on the father's powers</i> (1199). | (6) <i>Father's illegal or immoral debts</i> (1212). |
| (2) <i>Liability of sons for father's debts</i> (1200-1202). | (7) <i>What is an illegal debt</i> (1213-1216). |
| (3) <i>Nature and extent of the liability</i> (1202). | (8) <i>What are immoral debts</i> (1217-1218). |
| 4) <i>Additional powers of father acting as manager</i> (1203-1207). | (9) <i>Father's promise to pay barred debts</i> (1219-1220). |
| (5) <i>Antecedent debts</i> (1208-1211). | (10) <i>Father's suretyship</i> (1221). |

Texts.

1199. Analogous Law.—The following texts bear on the subject of this section :—

Manu:—158. The man, who becomes surety for the appearance of a debtor in this world, and produces him not, shall pay the debt out of his own property.

159. But money due by a surety, or idly promised to musicians and actresses, or lost at play, or due for spirituous liquors, or what remains unpaid of a fine or toll, the son of the surety or debtor shall not in general be obliged to pay. (6)

Brihaspati:—47. If the father is no longer alive, the debt must be paid by his sons.

48. The father's debt must be paid first of all, and after that a man's own debt; but a debt contracted by the paternal grandfather must always be paid before these two even.

49. The father's debt, on being proved, must be paid by the sons, as if it were their own; the grandfather's debt must be paid (by his son's sons) without interest, but the son of grandson need not pay it at all.

50. When a debt has been incurred for the benefit of the household by an uncle, brother, son, wife, slave, pupil or dependant, it must be paid by the head of the family. (6)

(1) *Shankar v Hardeo*, 16 C 397 (412, 413) P. C.

(2) *Krishnasami v. Rajagopala*, 18 M. 73 (86).

(3) *Sri Raman v Sri Gopal*, 19 A. 428; *Ramanathan v. Murugappa*, 27 M. 193 (201);

Thandavaraya v Shunmugam, 32 M. 167 (169).

(4) *Purappavanalingam v. Nullasivan*, 1 M. H. C. R. 415.

(5) VIII—158, 159; 25 S.B.E. 282.

(6) XI-47-50; 33 S. B. E. 328, 329.

Vishnu:—He (the father) throws his debt on him (the son); and the father obtains immortality, if he sees the face of a living son.

Ib.—The father's debt must be first paid, and next a debt contracted by the man himself; but the debt of the paternal grandfather must be paid before either of them. The sons must pay the debt of their father, when proved, as if it were their own, or with interest; the son's son must pay the debt of his grandfather, but without interest; and his son shall not be compelled to discharge it. (1)

Narad:—What is left (of the father's property), when the father's obligations have been discharged, and when the father's debts have been paid, shall be divided by the brothers, in order that the father may not continue a debtor. (2)

When a devotee, or a man who maintained a sacrificial fire dies without discharging his debt, the whole merit of his devotions, of his perpetual fire, belongs to his creditors. (3)

A father must not pay the debt of his son, but a son must pay a debt contracted by his father, excepting those debts which have been contracted from love, anger, for spirituous liquor, games or bailments. (4)

Yajnavalkya:—A debt evidenced by writing is binding only on three generations. A pledge can be enjoyed as long as the debt is not returned. (5)

Ushana:—A fine or the balance of a fine, likewise a bribe or a toll or the balance of it are not to be paid by the son; neither shall he discharge improper debts. (6)

1200. The section is supported by the authority of the Privy Council, who said: "The rights of the co-parceners in an undivided Hindu family governed by the law of the Mitakshara which consists of a father and his sons, do not differ from those of the co-parceners in a like family, which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts which the Hindu Law imposes upon sons (a question to be hereafter considered), and the fact that the father is in all cases naturally, and in the case of infant sons, necessarily, the manager of the joint family estate." (7)

1201. Then as to the sons' liability to pay the father's debts they formulated the two following propositions:—

Firstly,—that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree on the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and

Secondly,—that the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings. (8)

1202. In another case Lord Hobhouse said:—"Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time, established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditor's

(1) XV-45; 7 S. B. E. 65.

(2) III-10.

(3) Narad XIII 32; 33 S. B. E. 197.

(4) I-10; 33 S. B. E. 45.

(5) II-90 (Mandlik) 210.

(6) Quoted in the Mitakshara Ch. VI-II.

48. The word "improper" is not a correct translation of the original "Avyavharik"

which means "Unusual or not sanctioned by law (usage)." See per *Curiam* in *Durbar v. Khachar*, 32 B 848 (851); *Prayag v. Kasi*, 14 C. W. N. 659, 6 I. C. 253.

(7) *Suraj Bunsai v. Sheo Persad*, 5 C. 148 (165) P. C.

(8) *Ib.* p. 171.

remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority."⁽¹⁾

Referring to this passage, Lord Shaw in a later judgment of the same Board said: "In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate . . . In short, it may be said that the rule of this part of the Mitakshara law is that the joint family estate is in this position: under his management he can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain and, it might be, a deliberate breach of trust. The Mitakshara law does not warrant or legalize any such transaction."⁽²⁾

It is needless to add that this *obiter dictum* has taken the whole Hindu world by surprise, as it places a limitation upon the paternal powers of pledging the family estate which appear to be wholly out of keeping with his position and powers in Hindu society. This case will have, again, to be examined presently.

1203. Father's additional powers.—The liability of one person to pay the debt of another may be legal, or it may be moral or religious. In the primitive age when the divorce of law from religion had not taken place, religious obligation was indistinguishable from legal obligations, with the result that the son's obligation to pay his father's debt was absolute and independent of any assets of the father received by him by inheritance. This qualification was, however, taken as implied in determining his obligation by all the courts, ⁽³⁾ except in Bombay, where the obligation was literally enforced ⁽⁴⁾ till it was similarly limited by an Act passed in 1866. ⁽⁵⁾ The course of decisions in all the courts has since been uniform ⁽⁶⁾ except that in Bombay it appears to be still maintained that the creditor is entitled to obtain a decree against the son, without reference to the assets, though if the son had inherited no assets, the decree cannot be executed against him. ⁽⁷⁾ In other words, the want of assets is a good defence to recovery, but not to a decree. But if the son is only liable if he has assets, no decree seems justifiable without proof of assets.

1204. The father as manager possesses all the powers of any other manager, added to which he possesses, as father an additional power of transferring the

(1) *Nanomi v. Modhun Mohun*, 13 C. 21 (85) P. C.

(2) *Sahu Ram v. Bhup Singh*, 39 A. 437 (147, 148) P. C.

(3) *Ponnappa v. Pappuvayyanagar*, 4 M. 9 (21, 4b); *Rayappa v. Ali Shaib*, 2 M.H.C.R. 886; *Karuppan v. Veriyal*, 4 M. H. C. R. I.; *Jamoonah v. Mubben*, Montr. 227; *Aga Hajee v. Jagget*, Montr. 272; *Dyamonee v. Brindabun* (1866) S D A. B. 97; *Kunhya v. Bukhtawar*, 1 S D A N.W.P. 8; *Unnoporna v. Gunga*, 2 W.R. 296.

(4) *Pranbullabh v. Deocrastian* (1824) B.S. R. 4; *Hurbojee v. Hurgobind Bellasis*, 76; *Narasimharav v. Ambaji*, 2 B.H.C.R. 64

(5) *Hindus' liability for ancestor's debts Act* (Bom. Act VII of 1866).

(6) *Sakharam v. Govind*, 10 B.H.C.R. 861; *Udaram v. Ranu*, 11 B.H.C.R. 76; *Keval Bhagvan v. Ganpati*, 8 B. 220; *Girdhar Lal v. Shiv ib.* p. 309.

(7) *Bapuji v. Umedbhar*, 8 B. H. C. R. (A. C.) 245; *Lallu v. Tribhuvan*, 13 B. 658.

estate for his own debt. As Chandavarkar, J. said : " Under Hindu Law a father has the right to sell or mortgage ancestral property including the interests therein of his sons, in satisfaction of his antecedent debts, provided those debts were not contracted for immoral or illegal purposes. This right to dispose of the ancestral property so as to include and affect the shares of the sons arises, according to Hindu Law, in virtue of the pious obligation of the sons to pay the debts of the father, which were not illegal or immoral. In other words, when the father alienates the property, he exercises the power of alienation which the sons would have exercised in discharge of their pious duty which they owed to him ; he is virtually alienating the property on their behalf in discharge of their duty in accordance with the power given to him by Hindu Law. "(1) This is the prevailing view and has been expressed (2) or implied (3) in several cases, including those decided by the Privy Council.

1205. But in a recent case Lord Shaw has described the father's powers in terms which call for examination.

In this case the mortgagee sued the mortgagor, his sons and grandsons on foot of his mortgage and the defence of the sons and grandsons was that the mortgage was neither for legal necessity nor for an antecedent debt so as to bind their interest. As these were not proved, and as according to the Allahabad view, a co-parcenary interest cannot be conveyed without the consent of the other co-parceners, both the courts in India dismissed the suit and on an appeal being preferred to the Privy Council, these findings were upheld which concluded the suit, but nevertheless, and even though the appeal was heard *ex parte*, Lord Shaw stated certain principles to settle the point upon which there had been according to his Lordship "a certain conflict of decisions in the courts in India". He then referred to the Allahabad Full Bench case (4) with evident approval and recognized the distinction there made between cases of sale in which the property has passed out of the joint family and one of mortgage where the joint property is mortgaged.

1206. In the former case, that is to say, in the case where the property has already passed out of the family whether in execution of a decree or in pursuance of a private sale by the father, the sons and grandsons can only recover the property so lost to the family, if they show in the former case that the transfer was made for a debt contracted for an illegal or immoral purpose of which the purchaser had notice, and in the second case, subject to the further rule that the purchaser being a stranger to the suit, if he has not notice that the debt was so contracted, he is not bound to make inquiry beyond what appears on the face of the proceedings. (5)

1207. Their Lordships had not to consider the case of legal necessity, as it was abandoned—the only point pressed before them being that the mortgage was executed for an antecedent debt, which too was found against the plaintiff, even on the old interpretation of that term, but his Lordship defined it to mean a debt contracted "wholly apart from the ownership of the joint estate or of the

(1) *Subraya v. Nagappa*, 88 B. 264 (266) ; *Biswanath v. Jagdip Narain*, 40 C. 842 (858).

(2) *Chandra Deo v. Mata Prasad*, 81 A. 176 F.B. ; *Purshottam v. Sheo Shanker*, 6 I. C. (A) 168 ; *Dharjit v. Siria*, 9 I. C. (A) 484.

(3) *Biswanath v. Bindesri*, 40 C. 842 ; *Bidya Prasad v. Bhup Narain*, 42 C. 1058.

(4) *Chandradeo Singh v. Mata Prasad*, 81

A. 176 (196) F.B.

(5) *Sahu Ram v. Bhup Singh*, 89 A. 487 (446) P.C. citing and following *Girdhari Lal v. Kantoo Lal*, 14 B.L.R. 187 P.C. ; *Suroj Bansi v. Sheo Pershad Singh*, 5 C. 148 P.C. To the same effect *Nanomi v. Modhun Mohan*, 18 C. 21 (85, 86) P.C. ; *Bhagbut v. Giriya*, 15 C. 717 (724) P.C.

security afforded or supposed to be available by such joint estate," (1) in other words, a purely personal debt of the father.

But it is doubtful if this is what their Lordships intended in view of their reference with approval to the following enunciation of the rule in the judgment of Sir John Stanley:—"The true rule is that the son cannot impeach an alienation of ancestral joint family property made by a father *for which the consideration is an antecedent debt of the father* not tainted with immorality or the object of which is to pay such debt.....The doctrine has no application to a case in which no antecedent debt of the father, that is, a debt antecedent to the alienation in question, is concerned as the consideration or object of the alienation." (2) If this is all their Lordships intended, then the term "antecedent debt" means that the debt must be one not only antecedent in point of time to the transfer but also independent of it. If the mortgagor received Rs 200 into his hands and then executed the mortgage as a security therefor, it could not be construed to be an antecedent debt, though such was the contention made before their Lordships. (3)

1208. Antecedent debt:—The liability of the son and the grandson to pay the father and the grand father's antecedent debt is both declared by the texts and enforced by the authorities. And the question is what is an antecedent debt. At one time that term was understood at least in three senses—(i) as meaning a debt merely anterior to the father's security though not independent of it; (4) (ii) a debt anterior merely to the suit in which it was sought to be recovered; (5) and (iii) lastly as a debt which was both anterior to and independent of the father's security sought to be enforced. (6)

1209. The last view has now received the *imprimatur* of the Privy Council. Antecedent debt, must then, mean a debt which was incurred not only prior to the security sought to be enforced but must be quite apart from and independent of it. If for instance, the father borrows Rs. 100 today and executes a bond therefor six months later, the question of its antecedency must depend upon the intention. If the father borrowed the sum agreeing to give the creditor a bond therefor six months later, the bond so given would not be for an antecedent debt because the two form part of the same transaction. If on the other hand, the father borrowed the money as a parol debt, promising to pay it six months later and on his failure to pay it then, he gave him the bond as a security, then it would be a bond given for an antecedent debt.

1210. Of course, a bond may be partially for an antecedent debt and

(1) *Sahu Ram v. Bhup Singh* 39 A 437 (447) P. C.

(2) *Chandradeo Singh v. Mata Prasad* 31 A. 176 (189) F. B. followed in *Sahu Ram v. Bhup Singh* 39 A. 437 (449) P. C.

(3) *Sahu Ram v. Bhup Singh* 39 A 437 (448) P. C.

(4) *Manbahalal v. Gopal* (1901) A. W. N. 57; *Debi Das v. Jadu Rai*, 24 A. 459; *Babu Singh v. Bihari Lal*, 30 A. 156; *Ram Dayal v. Ajudhia* 23 A. 323; *Chinnayya v. Perumal* 13 M. 51; *Sami Ayyangar v. Ponnammal*, 21 M. 28; *Chithambara v. Koothaperumal*, 27 M. 346 followed in *Sheopal Singh v. Basant Singh*, 12 O. C. 248 overruled in *Venkatramanaya v. Venkatramana*, 29 M. 200 F. B.

(5) *Luchmun v. Giridhar*, 5-C. 855 F. B. (First question referred to the F. B.);

Hanuman v. Daulat, 10 C. 528; *Khalilul Rahman v. Gobind Pershad*, 20 C. 328; *Surja Prasad v. Gulabchand*, 27 C. 762; *Maheswar v. Kishun Singh*, 34 C. 184; *Kishen Prasad, v. Tipan Pershad*, 34 C. 735 (747); *Jagannath v. Tulsi Das*, (1898) P. R. 72.

(6) *Jamna v. Nain Sukh* 9 A. 493; *Badri Prasad v. Mudanlal*, 15 A. 75 F.B. (in which however the term was not defined), *Manbahal Rai v. Gopal*, (1901) A. W. N. 57; *Ram Dayal v. Ajudhia*, 28 A. 328; *Chandra Deo Singh v. Mata Prasad* 31 A 176 F. B. approved in *Sahu Ram v Bhup Singh*, 39 A 437 (449) P. C. *Lachman Prasad v. Sarnam singh*, 39 A. 500 P. C. ; *Sami Ayyangar v. Ponnammal*, 21 M 28; *Hiraram v. Udharan* 9 N. L. R. 74; 19 I. C. 861.

partially for a debt presently advanced. In that case the son's liability will be limited to the extent of the debt which is antecedent, or is supported by legal necessity, or benefit.

1211. An antecedent debt must of course, be itself not tainted with illegality or immorality. If A borrow money from B for an illegal purpose and he then borrows from C to pay off B, the fact that C has lent money to A to discharge his antecedent debt is not sufficient to validate his claim. He must further show either that he had made enquiry and was satisfied that the antecedent debt was legal or that it was in fact so. ⁽¹⁾

1212. Father's illegal or immoral debts.—The son is not liable to pay off his father's debts incurred for illegal or immoral purposes. Consequently, where the father's transfer has been made for a consideration tainted with illegality or immorality ⁽²⁾ the son is entitled to impugn it on that ground, and in that case the alienee may forfeit his property unless he is able to protect his alienation by appealing to some equity in his favour.

But since the right of the son to impeach his father's unwarranted alienation rests on the ground that he was a co-parcener on that date and that the father could not convey away his co-parcenary interest for a consideration not binding upon him, it follows that such a plea is not open to a son not born at the date of that transfer. ⁽³⁾

1213. Where, however, the son was in existence at the date of the debt he is entitled to repudiate it if he can shew that it was incurred for a purpose which Hindu law regards as illegal or immoral. But here again though Hindu law may treat a transaction as illegal, if it is legal under the general law then it would not be open to the son to impeach the loan on the ground of its illegality. Such a plea was overruled in a case in which the plaintiff had lent money to the uncle and nephew being two members of a joint family, for the latter's marriage, being the cost he had to pay for his bride which law denounces as illegal and the marriage so brought about as the *Asur* marriage which it disapproves. It was pleaded for the defendants that the plaintiff had lent money for an illegal object and that, therefore, it could not be sued for. But the court held that the *Asur* form of marriage, though disapproved was not illegal, and was in fact quite customary and that, therefore, the loan could not be repudiated as made for an illegal purpose. ⁽⁴⁾

1214. The illegal purposes which Hindu law enumerates afford a fair index of the character of the debt for which the son is not liable. Such are the debts incurred by the father for "spirituous liquors, for losses at play, for idle gifts, for promises made under the influence of love or wrath, or for suretyship or for the balance of a fine or toll liquidated in part by the father." ⁽⁵⁾ "Put into decent English, the texts amount to this: that the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred. He is answerable for the debts legitimately incurred by his father; not for those attributable to his failings, follies, or caprices." ⁽⁶⁾

(1) *Baran Deo v. Rupnaram* 11 I. C. 654.

(2) *Sheo Dayal v. Jagannath*, 8 A. L. J. 992; *Pokhpal Singh v. Chhidu Singh*, 9 A. L. J. 658; *Jokharmal v. Eknath*, 21 B. 348.

(3) *Raja Ram v. Luchmun*, 8 W. R. 16; *Bholanath v. Kartick*, 84 C. 872; *Hazarimal v. Abani Nath*, 17 C. L. J. 88 (48); *Fazulbhou v. Sadanund*, 5 Bom. L. R. 678; *Sitaram v. Varihar*, 12 Bom. L. R. 910; *Chattarpal*

Singh v. Natha 8 A. L. J. 88; *Mahesh v. Goswami Banwari Lal*, 18 O. C. 162; 81 I. C. 717; *Yekeyamian v. Agniswarian*, 4 M. H. C. R. 307; *Contra Tulshi Ram v. Babu*, 88 A. 654.

(4) *Bhagirathi v. Jokhu Ram*, 82 A. 575.
(5) *Brihaspati*, XI-51; 88 S. B. E. 829 quoted *supra*.

(6) *Per Curiam in Durbar v. Khachar*, 82 B. 348 (851).

The act of the father may not be illegal in that it may not have contravened any express provision of law, but if it was wrongful and one *contra bon mores* then the son would not be liable. Such was the case of the father who had dammed up the plaintiff's watercourse for which the latter obtained damages against the father on whose death the decree was sought to be executed against the son, but the court held him not liable holding that though the father's obstruction of the watercourse may not have been illegal in the usual sense of the term, in that it may not have contravened any express provision of law, still since his act was wrongful sounding in damages, the son was not liable as the estate which he had inherited had received no benefit from that act.⁽¹⁾ For the same reason the son is not liable to pay a fine imposed upon the father,⁽²⁾ or the costs saddled upon him in a false suit instituted by him as the next friend of his minor son to establish his alleged adoption.⁽³⁾

1215 But this was a false suit and not merely a suit not proved. In any case, the Calcutta Court holds the son liable for the cost of an unsuccessful litigation, however imprudent or illadvised it may have been, provided the father was not guilty of any criminal offence or of a breach of civil duty.⁽⁴⁾ The Madras Court would exonerate the son even in the latter case⁽⁵⁾. In one case a decree had been passed against the father for dishonest misappropriation of the plaintiff's money, and yet the sons were held liable, the court observing: "No doubt this was a dishonest transaction on defendant's father's part, but the dishonesty is not of such a nature as absolves defendants from their pious obligation to discharge their father's debts. Much has been said in the course of the arguments as to the peculiar notions of Hindus as to what would amount to immorality or illegality in the origin of a debt, and allusion has been made to the exceptions to the rule of the pious obligation recognized by the commentators in the case of such liabilities as a toll or a fine. Without discussing the origin of these exceptions or the exact meaning that the words 'immoral' and 'illegal' bore to the minds of commentators on the Hindu law, it seems to us that there can be no question that debts of the nature of those found by the decree against defendant's father to be justly due by him to plaintiff, are not of an immoral or illegal nature, upon any reasonable view of the meaning of these words as used in the rule of Hindu law under consideration. That rule, as we understand it, is that sons are under a pious obligation to discharge the just debts of their father, because otherwise he would be liable to be punished in a future state for non-discharge of these debts. Upon any intelligible principle of morality, a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation, and for the non-discharge of which punishment in a future state might be expected to be inflicted, if in any. The son is not bound to do anything to relieve his father from the consequences of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, *viz.* to restore to those lawfully entitled the money he has unlawfully retained."⁽⁶⁾

1216. But in another case the very contrary was laid down. There the father who was a cashier in a firm had given security to the extent

(1) *Durbar v. Khachor*, 32 B. 348 (351, I C 258 352.)

(2) *Nhane v. Hureeram*, 1 Borr. 90 (101.)

(3) *Ramiengar v. Secretary of state*, 20 M. L. J. 89.

(4) *Khalial Rahman v. Gobind Pershad*, 20 C. 828; *Prayag v. Kasi*, 14 C. W. N. 659; 6

(5) *Natasayyan v. Ponnusami*, 16 M. 99;

Mc Dowell v. Raghava Chetty, 27 M. 71;

Kanewar v. Krishna, 31 M. 161; *Erasala v. Addepally*, 31 M. 172.

(6) *Natasayyan v. Ponnusami*, 16, M. 99 (104.)

of Rs. 6,000. He misappropriated Rs. 8,000 of the firm's money and the firm obtained a decree against him for the amount of his security. The father died and the son was called upon to discharge his father's indebtedness, and the court refused to decree relief holding that the son was not liable to make good his father's defalcations which were clearly an illegal debt. (1) This case in its turn was sought to be distinguished in other cases in which two divisional Benches reaffirmed the previous view. (2) Both were cases of misappropriations of moneys entrusted to the father, and in both cases, the court held that the father was guilty of mere breaches of trust as distinct from criminal breaches of trust and that, therefore, being a mere violation of a civil duty, the son could not evade his liability for his father's debts. But in exactly similar cases the Calcutta (3) and the Allahabad (4) courts exonerated the sons holding that, in the first place, the father's liability did not amount to a "debt" and that even if it did, it was clearly tainted with either illegality or immorality. "The origin of this debt, if debt it was, was a theft committed by those persons who were sued." (5) But even these courts are by no means consistent with themselves; since a Calcutta case has upheld the son's liability to discharge a decree for mesne profits passed against the father (6) and the Allahabad Court decreed the father's liability incurred as surety for another against his son (7) on the authority of both the Madras (8) and Bombay precedents (9) though in such a case the Calcutta Court would disallow the claim. (10)

1217. The next question remains. What debt of the father must be deemed to be immoral? It is, of course, obvious that the father

Immoral debts.

may borrow money for debauchery from *A* and then borrow more money from *B* to pay off *A*. Here *B*'s debt cannot be repudiated by the son as immoral because it was advanced to satisfy an antecedent debt. But in such a case it will still be a question whether the debt was an "antecedent debt" within the meaning of law, which the son is under the legal duty to repay. Reserving this question for future consideration, the question of immorality must be considered in the light of Brihaspat's text already cited. According to him if the father incurs debt for drink or debauchery or reckless display or for any improper purpose it is immoral. "Neither sins nor the expiation of them are hereditary". (11) In order to be immoral, a debt must promote immorality. Any loan made to an immoral man does not become immoral. And regard must be had to the character of the loan. In one case a somewhat novel contention was made that the son was not liable to pay for the cloth purchased by the father who was a habitual drunkard. It was pointed out that there was no connexion between the two and the son could not evade his liability on the ground of his father's general immorality. (12)

1218. But this view has not been accepted in Allahabad, where however,

(1) *Mc Dowell & Co : v Ragava*, 27 M 71 (75, 76) following *Pareman v Bhattu*, 24 C. 672; *Mahabir v. Basdeo*, 6 A. 234.

(2) *Kanema v. Krishna*, 81 M. 161. *Erasila v. Addepally*, 81 M. 472; *Tirumala-yappa v. Veerabudra*, 19 M. L. J. 759.

(3) *Pareman Dass v. Bhattu*, 24 C. 672.

(4) *Mahabir v. Basdeo*, 6 A. 234.

(5) *Pareman Dass v. Bhattu*, 24 C. 672.

(6) *Peary Lal v. Chandicharan*, 11 C. W. N. 168.

(7) *Maharaja of Benares v. Ram Kumar*,

26 A. 611.

(8) *Silaramayya v. Venkatramanna*, 11 M. 378; *Alamelu v. Mangamma*, 27 M. 445.

(9) *Tukarambhat v. Gangaram*, 28 B. 454; *Narayan v. Venkatacharya*, 28 B. 408; *Gopal Rao v. Berar Manufacturing Co.*, 1 N.L.R. 178.

(10) *Hiralal v. Chandrabali*, 13 C. W. N. 9; 1 I. C. 158.

(11) *Nhance v. Huseram*, 1 Borr. 84 (90.)

(12) *Hurnarain v. Arur Singh*, (1872) P. R. 44; *Sri Narain v. Raghubans Rai*, 17 C. W. N. 124 P. C.; 17 I. C. 729.

the question of pious obligation was not considered. (1) It is submitted that the real question is not one of the subsistence of the liability as held by the Madras court, or one of legal necessity as held by the Allahabad Court but rather one whether the acknowledgement of a barred debt should not be treated as "an idle gift" within the enumeration of Brihaspati's illegal debts. (2) But the question does not admit of a general answer. Suppose such an acknowledgment was necessary to obtain further credit which saved the family property from forfeiture or sale, could the son be heard to repudiate the debt merely on the ground that it had been revived after it had become barred by time? Such an acknowledgment might be supported even on the ground of necessity.

1219. It has been already stated that the co-parceners are not bound to pay a debt acknowledged by the manager after it is barred by time. It is, however, said, that though this is the rule, the fact that the son is under a pious obligation to pay his father's debt renders him liable to pay his barred debts if duly revived by an acknowledgment. It is conceded that without an acknowledgment the son would not be under any obligation to pay his father's barred debt. (3) But a barred debt is a good foundation for a written promise to pay signed by the party liable to be charged therewith. (4) The question then arises whether, if the father makes such promise, the son is bound to pay the debt. That he is, has been held in a case (5) in which the court observed: "The fact that the debt was barred by the Act of Limitation did not affect the existence of the debt and there was nothing illegal or immoral in the action of the father promising to pay it. The new note operated as a renewal of the obligation. It was a good debt and the son is bound to pay it from any assets of his father." (6) The Limitation applicable to a suit against the son depends upon the nature of the claim laid. Such a claim may be instituted—(i) against the son as a member of the joint family, or—(ii) by reason of his pious obligation or—(iii) because he is the heir and legal representative of the father. In the first case, if the suit is on a mortgage executed by the father and the suit is to enforce the mortgage, then the limitation would be as prescribed by article 132 and the starting point of limitation would be the accrual of the cause of action. (7) But if the suit be not on the mortgage, and if it is not binding on the son because the debt secured was neither antecedent nor supported by family necessity or benefit, then the courts hold the suit against him as still maintainable on the ground of his pious obligation to discharge his father's debt, and in that case it has been held, that as regards limitation, the suit would be subject to article 120 (8) from the date when the debt became payable.

1220. But these cases lie on the borderland between crimes and delicts upon which there is room for a difference of opinion. But there can be no doubt that where the father is clearly guilty of embezzlement (9) or forfeits a bond for keeping the peace, or for his good behaviour (10) the son is not bound to discharge his father's obligation.

(1) *Indar Singh v. Sarju Singh*, 8 A. L. J 1099; *Dalipsingh v. Kundan Lal*, 35 A. 207 contra *Hari Har Baksh v. Bharat*, 16 O. C. 485; 20 I. C. 590.

(2) *Brihaspati XI 51*: 38 S. B. E. 329

(3) *Subramanya v. Gopala*, 33 M. 308; *Srinivasa v. Municipal Council*, 22 M. 342

(4) *Ss. 25 (8) and 60 Contract Act*. *Subramani v. Gopala* 33 M. 308 (309).

(5) *Narayanasami v. Samidas*, 6 M. 298

(6) *Narayanasami v. Samidas*, 6 M. 298.

(7) *Brijnandan v. Bidya*, 42 C. 1068 (1092) F. B.

(8) *Surja Prasad v. Golab Chand*, 27 C. 762.

(9) *Mahabir v. Basudeo*, 6 A. 284.

(10) *Hiralal v. Chandrabali*, 13 C. W. N. 9; 1 I. C. 158.

1221. But the courts are not agreed on the subject of the son's liability to pay for his father's suretyship. The question cannot be answered in a general way without reference to the nature of the security given by the father, which though variously classed by other Smritikars, are thus classified by Brihaspati into four heads:—(i) for paying the debts of another; (ii) for delivery of the debtor's effects; (iii) for appearance; (iv) for honesty. (1) The son is expressly declared liable for the first two (2) and the only question is whether he is equally liable for the other two. The texts on the subject cannot all be reconciled, and the Bombay High Court holds the son actually bound in respect of the latter two kinds of security, holding that being an antecedent debt of the father, the son is *prima facie* bound, unless the son can shew it to be illegal or immoral. (3) But if he shows this, he will be exonerated from all liability without reference to the fact whether the surety is of the former or of the latter kind. In a later case in which the son's liability to discharge his father's liability as a surety is reaffirmed, it is held to extend no further to his grandson unless the grandfather had in becoming a surety received some consideration for it. (4) But it is submitted, that there is no distinction in principle between the liability of the son and that of the grandson, and the other courts do not discriminate between their liability. (5) In one case the father had executed a surety bond stipulating that the mortgagee could realize his claim from his land if he failed to realize it from the land of the debtor mortgaged to him. It was found that this bond was recklessly given without any necessity or benefit and though it was one reason given for dismissing the claim, the other and more substantial reason was that the creditor's remedy had become barred by time. (6)

109. Subject to any law for the time being in force and the nature of the estate, every co-parcener other than the father and the manager possesses the following rights in respect of the co-parcenary property:—

(1) He is, subject to the provisions hereinafter contained, entitled to call for the partition of his share.

(2) Until partition he is entitled to joint possession.

(3) He may restrain any illegal or improper acts of the other co-parceners in respect of the co-parcenary.

(4) He and his wife and children are entitled to be maintained out of the co-parcenary funds.

(5) He may alien his share with the consent of his co par-

(1) See texts collected in Mandlik's H. L. 107. 108.

(2) Brihaspati IX 40, 41. Gautam II 41. Yajnyavalkya II 55; Vyas cited in Virmitrodaya I. 100 P. 2; *Trikaram Bhat v. Ganga Ram*, 28 B. 454 (456), *Moolchand v. Krishna Bellasis*, 54.

(3) *Trikaram Bhat v. Ganga Ram*, 28 B. 454 (459, 460)

(4) *Narayan v. Venkatacharya*, 28 B. 408 (411).

(5) *Maharaja of Benares v. Ramkumar*, 26 A. 611; *Sitaramayya v. Venkatramanna*, 11 M. 378; *Chetti Kulam v. Chetti Kulam*, 28 M. 377; *Raghunath v. Natesa*, 17 M. L. J.; 288; *Kameswaram v. Venkata*, 38 M. 1120; *Rasik Lal v. Singewar*, 39 C. 843; *Gopal Rao v. Berar Manufacturing Co.*, I. N. L. R. 173; *Bhagwan Das v. Satig Ram*, (1886) P. R. 60;

(6) *Hiralal v. Chandrabali*, 13 C.W.N. 9; 19 I. C. 158.

ceners or for family necessity but in Bengal he may do so as of right, and he may do the same in Bombay and Madras for a valuable consideration.

(6) His interest is liable to variation with the members of the co-parcenary, but in Bengal it is fixed.

(7) Except in a suit for partition a co-parcener cannot recover the profits of his share or separate possession of any portion of the joint property.

(8) His power over his separate and self-acquired property is in no way affected by his interest in the co-parcenary.

Synopsis.

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| (1) <i>Rights of co-parceners interse</i> (1223). | (12) <i>Madras view</i> (1236-1239). |
| (2) <i>Right of partition</i> (1223). | (13) <i>Bombay cases</i> (1240). |
| (3) <i>Right to joint possession</i> (1224-1225). | (14) <i>C. P. cases</i> (1241). |
| (4) <i>Building on common land</i> (1226). | (15) <i>Bengal. U. P. and the Punjab</i> (1242). |
| (5) <i>Injunction to restrain, when granted</i> (1227-1228). | (16) <i>Equities on setting aside alienation</i> (1243-1244). |
| (6) <i>Separate allotment for convenience</i> (1229). | (17) <i>Transfer of co-parcenary interest</i> (1245-1250). |
| (7) <i>Power to restrain improper acts of manager or other member</i> (1230-1231). | (18) <i>Present state of the law</i> (1251). |
| (8) <i>Right to impeach alienations of joint family property</i> (1232). | (19) <i>Involuntary transfer</i> (1252-1253). |
| (9) <i>Maintenance</i> (1233). | (20) <i>Transfer with consent of co-parceners</i> (1254-1255). |
| (10) <i>Right of alienation</i> (1234). | (21) <i>Cancellation of alienation</i> (1256). |
| (11) <i>Texts on the subject</i> (1234). | (22) <i>Interest of co-parcener variable</i> (1258). |
| | (23) <i>No right to share of profits</i> (1259). |
| | (24) <i>Self-acquisition, right to</i> (1260). |

1222 Analogous Law:—The opening words “subject to any law for the time-being in force” save for instance, the Malabar Law under which members of a tarwad have no right of partition. It would save impartible estates and other property in respect of which there is no room for the existence of co-parcenary rights. For the rest, the section sums up the rights of the co-parceners *interse*. These rights are equally possessed by the manager *qua* co-parcener.

All the clauses are supported by the authorities undernoted. (1)

(1) Cl. (1) *Secretary of State v. Kamachee*, 7 M. I. A. 476 (587); *Suraj Bansi v. Sheo Prasad*, 5 O. 148 (165) P. C.; *Shankar v. Hardeo*, 16 C. 897 (105) P. C.; *Hemadari v. Ramani*, 24 O. 575 F. B. approved in *Bhagwat v. Bipin Behari*, 37 C. 918 (927) P. C.; *Jugmohandas v. Mangaldas* 10 B. 528.

Cl. (2) *Ramchandra v. Damodar*, 20 B. 467; *Laluchand v. Girjappa*, 20 B. 469; *Narandhai v. Ranelod*, 26 B. 141.

Cl. (3) *Suraj Bansi v. Sheo Prasad*, 5 O. 148 (165) P. C.; *Narain Das v. Har Dayal*, 85 A. 571.

Cl. (4) *Manu*, IX-108; *Nared*, IX 26-28;

Ayyavu v. Niladatchi, 1 M. H. C. R. 45; *Yaj. Bk. II. Ch. V—124 A*

Cl. (5) *Vasudev v. Venkatesh*, 10 B H C R. 139; *Pikarapa v. Chanapa*, 10 B. H. C. R. 162 F. B.; *Lakshman v. Ramchandra*, 5 B 48 P. C.; *Muthooru v. Bootun Singh*, 18 W. R. 81; *Juggurnath v. Doobo*, 14 W. R. 80; *Balgobind v. Narainlal*, 15 A. 889 P. C.; *Jamuna v. Ganga*, 19 C. 401; *Chandar Kishore v. Ganpat*, 16 A. 369.

Cl. (6) *Subramanya v. Siva*, 17 M. 316 (827)

Cl. (7) *Pirithi Pal v. Jowahir*, 14 C. 493 P. C.

1223. Co-parceners' Rights:—So long as the family remains joint, every co-parcener must necessarily possess certain rights both against the manager as well against his co-parceners with reference to enjoyment of the joint property. These rights, however, must be necessarily subject to other laws and to the nature of the estate. Where, for instance, the property is impartible, members of the joint family have no right beyond the customary right of maintenance. So under the Dayabhag law, the sons have no right of partition against their father.

(1) **Right of partition.** Partition is commended by the *Smritikars* as multiplying religious rites:—

Manu :— Either let them live together, or, if they desire separately to perform religious rites, let them live apart : such religious duties are multiplied in separate houses, and their separation is therefore legal and even laudable. (1)

Partition, is, therefore, the birth right of every co-parcener. But as will be seen hereafter (2) though partition is commended and every co-parcener is *prima facie* entitled to enforce the partition of his share, certain restrictions upon the enforcement of that right have become established which limit the right of the Mitakshara member in the two following cases, namely:—

(1) A minor co-parcener of a Mitakshara family has no right of partition because it is not to his advantage unless it is shown that it would be for his benefit. This may be shown by proving that the manager or the co-parceners are wasting his property, or are acting in a manner hostile to his right, or that they refuse to provide him with maintenance ; or that otherwise, partition would protect his property and be to his advantage. (3)

(ii) The son has the right of partition only as against his immediate ancestor if he is alive, so that if the father is alive he has no right of partition against his father's father, and if the latter is alive he has no such right against his father's father's father. (4)

Then under the Bengal school the son has no right of partition against his father at all, though it is open to the father to make a partition if he so chooses. Otherwise, every co-parcener, whether male or female, is entitled to enforce partition of co-parcenary property. (5) So the widow of a deceased coparcener under the Dayabhag law has the right to claim by partition her husband's share. (6)

These are merely the broad principles which will have to be more closely examined in the chapter on Partition.

1224. The co-parcener is *prima facie* entitled to joint possession of all and every portion of the joint property. This right
(2) **Joint possession.** flows from the very fact of his jointness. No co-parcener is as of right entitled to specific possession of any portion of the joint property. His right is to obtain and maintain joint

(1) 1X-111.

(2) Ch. on Partition post.

(3) *Damodur v. Senabuttu*, 8 C. 537; *Mahadev v. Lakshman* 19 B 99; *Thangam v. Suppa*, 12 M. 401; *Bhulanath v. Ghasi Ram* 29 A. 878.

(4) *Nagalinga v. Subhiraanaya*, 1 M. H. C. R. 77.

(5) *Cossinaut v. Hurro Sundari*, (1826)

Clarke's R. & O. (App) 91; Biswanath v. Khantamani, 6 B. L. R. 747; *Soudaminy v. Jogesh Chunder*, 2 C 262; *Janaki v. Mohura*, 9 C. 580; *Bepin Bihari v. Lal Mohun*, 12 C. 209; *Durga Nath v. Chintamani*, 81 C. 214 (219); *Salimullan v. Probhat Chandra*, 48 C. 1118.

(6) *Kumud Lal v. Jogendra*, 18 C W. N. 609.

possession, not necessarily joint enjoyment, for it may not be possible. In the case of co-parcenary property joint possession does not imply the assertion of any right beyond those incident to his co-parcenership. As against the manager, he with his wife and children are entitled to be maintained and educated and married, and as against the other co-parceners he is entitled to retain joint possession.

1225. Where, however, any of them is allowed separate possession of the property he cannot disturb the *status quo* if such possession is not in denial of his right but in the enjoyment of his property. As Sir Barnes Peacock delivering the judgment of the Privy Council said: "It seems to their Lordships that if there be two tenants in common, and one *A* be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant in common *B* attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which *A* is engaged and the profitable use by him of the said part, and *A* resists and prevents such entry, not in denial of *B*'s title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of *A* would not entitle *B* to a decree for joint possession. Their Lordships are further of opinion that the decree of the District Judge so far as it orders an injunction to be issued, ought to be reversed. In India a large proportion of the lands, including large estates, is held in undivided shares, and if one share-holder can restrain another from cultivating a portion of the estate in a proper and husbandlike manner, the whole estate may, by means of cross-injunctions, have to remain altogether without cultivation until all the share-holders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected, a work which, in ordinary course, in large estates would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the courts of justice, in cases in which no specific rules exist, are to act according to justice, equity, and good conscience, and if, in a case of share-holders holding lands in common, it should be found that one share-holder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any share-holder to appropriate to himself the fruits of others' labour or capital".⁽¹⁾ But as pointed out in another case, such exclusive possession by a co-owner can only be tolerated so long as it is not adverse, that is to say, amounts to dispossession of the other co-owners. His possession must be "in a way quite consistent with the continuance of joint ownership and possession".⁽²⁾ He must not usurp separate possession, but must take it consistently with the rights of other co-parceners if they acquiesce in it. If when he takes it, any other co-parcener objects, he is entitled to sue for restoration of the *status quo ante* by obtaining an injunction or joint possession.⁽³⁾ But if he has acquiesced in it his only remedy

(1) *Watson & Co. v. Ramchand*, 18 O. 10 (21, 22).

(2) *Lachmeshwar Singh v. Manowar*, 19 C. 258 (268) P. C.

(3) *Rohin Singh v. Hodding* 21 C. 840; *Surendra v. Hari Mohon*, 38 C. 1201; *Bhairon v. Saran Rai*, (1904) A. W. N. 106 F. B ;

Ramcharan v. Kauleshor, 27 A 158; *Phani Singh v. Nawab Singh*, 28 A. 161 (166) following *Rahmat v. Salamat*, (1901) A. W. N. 48 in which the court merely passed a declaratory decree, but it is submitted, it was not sufficient.

is by a suit for partition.⁽¹⁾ A co-parcener cannot sue another for the profits of his separate possession. ⁽²⁾ The separate possession of one co-parcener is not adverse to another unless his possession was in assertion of a hostile title or where his possession is from its nature, inconsistent with joint ownership. The fact that one erects a building on joint land does not necessarily constitute an ouster of the other co-parceners entitling them to a decree for joint possession. Ouster means dispossession of another in the assertion of a hostile title. ⁽⁸⁾

1226. But this implies that the building was acquiesced in, or a least there was a standing by. Where one co-parcener commences to

Building on common land. build and the other objects, he is entitled to have the building pulled down and the land restored to the *status quo ante*. ⁽⁴⁾ In some cases the courts go into the question

whether the defendant had appropriated more of the common land than would have come to him on partition ⁽⁵⁾ but it is submitted, that this is immaterial, since no co-parcener can be permitted to appropriate any specific part of the joint property without a partition in which all the co-parceners will get their full *quantum* of the common land, having regard to possession, quality and the amount of their shares. ⁽⁶⁾ "The law provides a legitimate means by which any co-sharer may obtain partition. The law does not favour one co-sharer, adversely to the other co-sharers, making a partition in his own favour, and selecting the portion of the land he likes by erecting a building upon it". ⁽⁷⁾ But even where the co-parceners have objected at the very start it does not necessarily follow that the court would decree demolition as a matter of course. Before it will do so it must be satisfied not only that there has been an encroachment on the common right, but that the co-parcenary rights have been injured and that they cannot be otherwise compensated for. ⁽⁸⁾

1227. So where a co-sharer had excavated a tank on the joint land which the other co-sharer sued for filling up in order to restore the *status quo ante* the court held that before ordering it must be satisfied that the plaintiff had suffered some injury from the encroachment. The term "injury" in this connexion means "something substantial, something that materially affects the position of the parties." ⁽⁹⁾ The land in this case was described as "fit for cultivation" but the court held it no ground for ordering the refilling of the tank. But the result would probably have been different if the land had been actually under cultivation. In granting or withholding an injunction, the courts exercise a judicial discretion and weigh the amount of substantial mischief done or threatened to the plaintiff, and compare it with that which the injunction, if granted, would inflict upon the defendant. ⁽¹⁰⁾ Such was held to be the case where the defendant had converted a common staircase room to his own use and barred the plaintiff's

(1) *Madan Mohun v. Rajch Ali*, 27 C. 228 (227).

(2) *Ittappan v. Manavikrama*, 21 M. 153 (165, 166).

(3) *Basanta v. Mohesh*, 18 C. W. N. 828 (331); *Durjendra v. Purnendra*, 11 C. L. J. 859; *Israel v. Shamsher*, 41 C. 486 (441, 442) in which there is a discussion as to when the court should grant temporary injunction.

(4) *Shadi v. Anup Singh*, 12 A. 486 F. B. overruling *Paras Ram v. Sherjit* 9 A. 661.

(5) — *Paras Ram v. Sherjit*, 9 A. 661.

(6) *Shadi v. Anup Singh*, 12 A. 486 (487) F. B.

(7) *Hajickhen v. Imitea Juddin*, 10 A. 115 (116).

(8) *Mocury v. Brindaban*, 8 C. 708; *Biswambhar v. Rajaram*, 16 W. R. 14 N.

(9) *Joy Chunder v. Bippro Churn*, 14 C. 286 (238).

(10) *Shamnugger Jute Factory v. Ram Narain*, 14 C. 189 (198); *Soshi v. Ganesh*, 29 C. 500 (502).

right of access there through to his own part of the house, (1) though in a similar case while decreeing the removal of obstruction, the court remarked that it would not have interfered if there had been acquiescence, abandonment or non-user of the common way. (2) The same view was taken in another case in which the court ordered restoration of the common verandah which the defendant had pulled down, and which interfered with the plaintiff's enjoyment of the family dwelling house. (3)

1228. So the court will prevent building on joint lands, (4) but it will not interfere after the building is completed. (5) In suits for an injunction relating to joint property the courts in this country follow the practice of a court of equity in England limiting the exercise of their jurisdiction to acts of waste, illegitimate use of the family property, or acts amounting to ouster. (6) The same view was taken in another case in which the court ordered restoration of the common verandah which the defendant had pulled down and which interfered with the plaintiffs' enjoyment of the family dwelling house. (7)

1229. The manager may, of course, permit any member to occupy any portion of the joint property. (8) And it is usual and consistent with joint possession that some of the joint owners should be permitted exclusive possession of the joint property for their mutual convenience. Such possession is necessarily permissive and cannot be disturbed during the continuance of joint property. So it was observed in a case: "In our judgment, as we understand joint possession under Hindu Law, that peculiar exclusive possession of a plot of common dwelling house, or set of dwelling houses, which one member of a joint family obtains very commonly without an actual partition having come to between the members of the family, is a possession which must be referred to the continuing consent of his co-sharers. So long as no actual partition is come to, either as a result of a suit, or formally between the parties themselves, or evidenced by long acknowledgments on the part of the members of the family, the possession is merely that which for convenience sake, is conceded by all the members jointly to each one of them: and it may be put an end to, and a completely new arrangement come to at any time by the members of the family, if they think fit to make the change." (9)

1230. Every co-parcener possesses the right of restraining the other co-parceners including the manager, from doing any act which is

(3) He may restrain improper acts.

illegal or improper and prejudicial to their joint interests. So where the manager had contracted to sell the right to cut wood in a forest for Rs. 4,000, secretly stipulating for payment of a like sum to himself, the court cancelled the whole contract holding that it was the right of a person defrauded by a contract between a manager and a third party to have the contract altogether rescinded. Even as between the parties who have entered into the contract to defraud a third party, the court will not enforce performance. (10)

(1) *Soshi v. Ganesh*, 29 C. 500 (502);
Chunder Kant v. Nund Lal, 16 W.R. 277.

(2) *Chunder Kant v. Nund Lal*, 16 W.R. 277 (278).

(3) *Gopee Kishen v. Hemchunder*, 18 W.R. 812.

(4) *Gooroodass v. Bejoy*, 10 W. R. 171.

(5) *Dwarkanath v. Gopee Nath*, 16 W.R. 14

(6) *Anani v. Gopal*, 19 B. 269 (270).

Bapuji v. Mansukhram, (1938) B. P. J. 552;
Sheo Pershad v. Dedab Singh, 20 W. R. 160.

(7) *Gopee Kishen v. Hemchunder*, 18 W. R. 312.

(8) *Romesh Chunder v. Soorjo Coomar*, 5 W. R. 90; *Srivirada v. Sri Brozo*, 1 M. 69

(81) P. C.

(9) *Sheo Pershad v. Leelab Singh*, 20 W. R. 160.

(10) *Ravji v. Gangadhar*, 4 B. 29 (83) following *The Panama Telegraph Co. v. The India Rubber Co.* L. R. 10 Ch. 515.

1231. But apart from covin or fraud, the court will not interfere with the discretion of the manager, or an act of a co-parcener unless it is done on purpose to create a hostile title against the plaintiff. It was so held by Norman, J. who said: "Cases which show that courts of equity will not interfere where a tenant-in-common acting reasonably for the purpose of enjoying the property held in common, in any way in which an owner would enjoy such property without injury to his co-parcener—cases where such co-parcener either cuts down a tree, pulls down a wall, or builds up doors in a portion of the property held beneficially by him alone—are not analogous to that now before us. It is one thing to say that a court of equity will not interfere in such cases unless a substantial injury has been occasioned to the rights of the co-parceners, and another to say that it will hold its hand where there has been a direct infringement of a clear and distinct right of the plaintiff, such as the destruction of the verandah in dispute, which appears to us to have been a wilful and deliberate act on the part of the defendant for the purpose of creating a right as against the plaintiffs or injuring them." (1)

1232. As regards the right of co-parceners to impeach alienations of the joint property, the courts are now bound by the rules which they have laid down for their own guidance. They will be set out under the section where the subject of improper alienations will also be considered.

1233. The right of the co-parcener to his own maintenance as well as the maintenance of his wife and children has already been the subject of discussion in a previous chapter (Ch. VII). The joint family is bound to maintain not only the co-parcener and his family but also those who would have a legal or moral claim upon him for maintenance. Such are his parents and widowed daughters and unmarried sisters. Even co-parceners who are disqualified from inheritance are entitled to assert this right. Co-parceners' concubines if exclusively and continuously kept, become entitled to maintenance out of the joint estate on the death of their paramour. (2)

The illegitimate sons are also entitled to maintenance (3) which might be secured by a charge on the father's property. (4) While the co-parcener is entitled to maintenance for himself and his dependants, he cannot sue for it if he is entitled to a share. (5) Consequently, a suit for maintenance would be maintainable only by a minor or a disqualified co-parcener or in respect of property which is impartible. (6)

But in Madras a member of a tarwad is held entitled to claim separate maintenance where there is substantial inconvenience in living in the family house either on account of want of room there, or because there are quarrels which make it uncomfortable to a member to live there, where there are several houses belonging to the tarwad and a member lives in one of them, and where the karnavan's conduct has afforded a valid excuse for a member living away

(1) *Gopee Kishen v. Hemchunder*, 18 W. R. 812.

(2) *Mit II 1 28*; *Khemkar v. Umia*, 10 B. H. C. R. 381; *Vranjibandas v. Yamauna*, 12 B. H. C. R. 229.

(3) *Mit. I-xii-3*; *Muttusamy v. Venkata*, 2 M. H. C. R. 298 affirmed O. A. 12 M. I. A.

(228); *Coomara v. Venkateswara*, 5 M. H. C. R. 405.

(4) *Ananthaya v. Vishnu*, 17 M. 160.

(5) *Per Westropp, C. J. in Himmat Singh v. Ganpat Singh*, 12 B. H. C. R. 94 note (a).

(6) *Himal Singh v. Ganpat Singh*, 12 B. H. C. R. 94

from the tarwad house. (1) The same principle governs a member of a tavazhi. (2)

1234. Right of alienation.—The following texts bear on the subject of this clause:—

Texts. **Vyas**—A single co-parcener ought not, without the consent of his co-parceners, to sell or give away immoveable property of any sort which the family hold in co-parcenary. (3)

Dayabhag—It should not be alleged that by the texts of Vyas (4) . . . one person has not power to make a sale or other transfer of such property. For here also (in the very instance of land held in common) as in the case of other goods, there equally exists a property consisting in the power of disposal at pleasure. (5)

1b.—It is not true that in the instance of re-union (and of subsisting co-parcenary) what belongs to one, appertains also to the other parcener. But the property is referred severally to unascertained portions of the aggregate. Both parcneners have not a proprietary right to the whole, for there is no proof to establish their ownership of the whole . . . (6).

1235. Neither the Mitakshara nor the Mayukh contains any reference to the subject under reference. They both of course allow (7) and so does Vyas, (8) the disposal of the family estate in case of necessity; but such disposal is quite apart and is not a disposal of a co-parcenary interest at the co-parcener's pleasure for his own private benefit.

1236. As Vyas is a sage of the Mitakshara school it is clear from the above texts that there is a radical difference of views between the Mitakshara and the Dayabhag school on the co-parcener's power of disposal of his undivided share. The Mitakshara prohibits it, the Dayabhag permits it. But the rigid orthodoxy of the Mitakshara denying the co-parcener any exercise of right over his property was impossible in practice. Consequently, even Jagannath had to admit that the words "ought not to sell" were merely hortatory and not imperative. (9) Moreover, the precept is merely limited to voluntary disposal. It does not extend to compulsory alienation, as for instance, in execution of a decree against the co-parcener. Such a decree might be passed for a debt or a delict but his personal law could not make him immune against his civil liability. Consequently, from the earliest times the Judges felt that "equity would require redress to be afforded to the purchaser by enforcing partition of the whole or of a sufficient portion of it, so as to make amends to the purchaser out of the vendor's share." (10) This was Colebrooke's personal opinion which Sir Thomas Strange adopted in his book and in his judgments (11) though his view was modified by his successors who prohibited such transfers except for emergency; (12) but later on in 1863 it was followed by Scotland, C. J., in a case (13) in which one of two brothers, members of an undivided family, had mortgaged one of their two houses for his own personal debt. Later on, another creditor sued and obtained damages against the mortgagor for trespass. In execution the sheriff seized the two houses and sold all the

(1) *Peru v. Ayyappan*, 2 M. 282; *Nallakandiyil v. Chatu*, 4 M. 169; *Raman v. Ittimayamina*, 9 M. L. J. 158; *Mahadevi v. Pamakkal*, 36 M. 303 (212); *Kunchi v. Ammu*, 36 M. 591; *Muthu v. Gopalan*, 26 M. 593.

(2) *Naku v. Raghava*, 38 M. 79.

(3) Dig. 455 cited in Dayabhag Ch. II-27.

(4) Here the text cited is omitted.

(5) Dayabhag Ch. II-27.

(6) Dayabhag XI. 1. 26.

(7) Mit. 1-27, 32; Mayukh, IV. 1. 3, 6.

(8) 2 Dig. 189.

(9) 1 Dig. 456.

(10) Colebrooke's opinion quoted in 2 Str. H. L. 344, 349, 433, 439.

(11) 1 Str. H. L. 200, 202; (1813) *Sasha Chella v. Ramasamy*, 2 Str. N. C. 234 (240).

(12) *Ramkutti v. Kallaturaiyan*, Mad. Dec. of 1859, p. 270; *Kanakasabharaya v. Seshachella*, Mad. Dec. of 1860 p. 17; *Sundara v. Tegaraja* ib. p. 67.

(13) *Viraswami v. Ayyaswami*, 1 M. H. C. R. 471.

debtor's right title and interest therein to the plaintiff who sued the two brothers and the mortgagee for possession. The defence was that a co-parcenary interest was untransferable and the previous seven cases were relied upon. Scotland, C J., however, overruled the objection, holding both the mortgage and the execution good to the extent of the alienor's share, adding: "What the purchaser or execution creditor of the co-parcener is entitled to is the share to which if a partition took place, the co-parcener himself would be individually entitled, the amount of such share, of course, depending upon the estate of the family." (1)

1237. This settled the right of alienation both voluntary and involuntary for value in Madras and it has since been followed in several cases, (2) in which however, the same view was supported on the ground that the alienee had his alienor's right of partition but this raised another question, what was the alienee's remedy if the alienor should die before he obtained his share. It was held that the death of the alienor did not destroy the alienee's rights. (3) This raised still another question. Since the co-parcener's interest is variable, what date must be taken as fixing the amount of his interest available to his alienee. There are at least three dates possible—the date of the conveyance, the date of suit, and the date of the alienor's death. It has been held that the interest available at the time of alienation is all that would pass to the alienee (4) though it was at one time held that the interest which the alienee was entitled to was that possessed by alienor at the date of suit. (5)

1238. It is also held that since the co-parcener is entitled to no specific portion of the joint property what he should alien is his undivided interest in the joint property or in the particular property which is the subject of alienation. (6) He has no right to alien any specific property. (7) But if this rule is violated the alienee may still claim that on a partition, the specific property transferred to him should, as far as possible be allotted to his alienor's share for his benefit. (8) But the right which the purchaser obtains is not a right in *rem*. It is merely a personal right which he is equitably entitled to enforce in the manner stated. The transferor does not by his transfer cease to be a co-parcener and till the transferee obtains a specific share in lieu of his right he has no interest in the land of his transferor, (9) Consequently a purchaser from a co-parcener must as a rule sue for a general partition of the entire family property. (10)

1239. It will be thus seen that the right of alienation conceded to the co-parcener was necessitated by the equity of the purchaser. Accordingly it has been held that the co-parcener is not entitled to alien his share by gift (11) or devise (12) except that a co-parcener may renounce his share in favour of another. (13)

(1) *Virasvami v. Ayyasvami*, 1 M. H. C. R. 471 (477).

(2) *Peddammuthulaty v. Timma*, 2 M. H. C. R. 270; *Palanivelappa v. Mannaru*, *ibid* p. 416; *Rayacharlu v. Venkataramaniah*, 4 M. H. C. R. 60; *Paddayya v. Ramalingam*, 11 M. 406.

(3) *Alamelu v. Rangasami*, 7 M. 588 (590); *Rangasami v. Krishnayyan*, 14 M. 408; *Aiyagari v. Aiyagari*, 25 M. 690.

(4) *Aiyagari v. Aiyagari*, 25 M. 690; (716) F.B.; *Chinnu v. Kalimuthu*, 35 M. 470 F.B.; *Subbarao v. Ananihanarayana*, 28 M. L. J. 64; 14 I. C. 524.

(5) *Rangasami v. Krishnayyan*, 14 M. 408.

(6) *Venkatachella v. Chinmaya*, 5 M. H. C. R. 166; *Vittla v. Yamunamma*, 8 M. H. C.

R. 6.

(7) *Davvur v. Kakuturu*, 38 M. 1187.

(8) S. 43 Transfer of Property Act.

(9) *Nanjaya v. Shanmuga*, 38 M. 684 (692); *Maharaja of Bobbili v. Venkataramarajulu* 39 M. 265.

(10) *ib. following Iburamsa v. Theruvenkalasami*, 34 M. 269 (274) dissenting from *Subba Row v. Ananihanarayana*, 28 M. L. J. 64 (70); *Iburamsa v. Theruvenkalasami*, 34 M. 269 (270).

(11) *Baba v. Timma*, 7 M. 357; *Ponnusami v. Thatha*, 9 M. 278; *Ramanna v. Venkata*, 11 M. 246; *Pottala v. Pulicat*, 27 M. 162.

(12) *Villa v. Yamenamma*, 8 M. H. C. R. 6.

(13) *Peddayya v. Ramalingam*, 11 M. 406.

And as the right of alienation is evolved out of the right to enforce a partition, it follows that where a co-parcener had no right of partition, he has no right of transfer. Such is the position of co-parceners under the Malabar law: "The purchaser could not be permitted to stand in their shoes for the purpose of representing the joint family, or enforcing its right because he is a stranger to the family, and because the right of the family was not the interest that was sold or that is sought to be realized. If a similar sale by a co-parcener is upheld under Hindu Law to the extent of the vendor's share, it is upheld not by virtue of the right of interdiction, which he has as a representative of the family under Part II, Ch. 1. S. 1 § 28 of the Mitakshara, but because the co-parcener is at liberty to convert his interest into specific separate property by partition, and a purchaser for value has an equity to stand in the shoes of the vendor to that extent. This equity which rests on the partibility of ordinary Hindu property has no place in the Aliyasantana law which forbids compulsory partition altogether." (1) Then as regards the co-parcener's right of devise the same court said in another case: "We are of opinion that the will in the case referred to can take no effect. At the moment of death the right of survivorship is in conflict with the right of devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise." (2) The law of wills is evolved out of the law of gifts and as a gift of co-parcenary interest is invalid, so is the will.

1240. This view has been followed in Bombay where cases have followed a similar course. At first the right was altogether denied in cases decided upon the opinion of the Shastris, (3) then it was conceded, (4) and the whole case law was passed in review by Westropp, C. J. in 1873 in a case (5) which held it as the settled law of that Presidency, not only that one of several co-parceners in a Hindu family may, before partition, and without the assent of his co-parceners, sell, mortgage, or otherwise alien for valuable consideration his share in the undivided family estate, moveable or immovable, but also that such a share may be taken in execution under a judgment against him at the suit of his personal creditor. (6)

The case of gift had already been excluded in an earlier case (7) since affirmed in other cases.

C. P. cases. **1241.** The same view has been followed in the Central Provinces, (8) where the court would even specifically enforce a contract to convey an undivided co-parcenary interest. (9) Other courts also recognise the rights of the transferee to this extent. (10)

(1) *Byari v. Putanna*, 14 M. 88 (48)

(2) *Vitla v. Yamenamma*, 8 M. H. C. E. 6

(3) *Ballojee v. Venkapa*, S. D. A. Bom. 248; *Bajee v. Pandurang* S. C. Morris (Pt 2) 98

(4) *Maceandas v. Ganpatrao Perry's O. Case* 148; *Sadashev v. Bapooji* 4 Morris S. D. A. R. 145; *Jiwan v. Gunoo*, 9 Morris S. D. A. R. 555; *Gundo v. Rambhat*, 1 B. H. C. R. 39; *Damodar v. Damodar*, ib. p. 182; *Tukaram v. Ramchandra* 6 B. H. C. R. (Ac) 847.

(5) *Vasudev v. Venkatesh*, 10 B. H. C. R. 189.

(6) *Vasudev v. Venkatesh*, 10 B. H. C. R. 189 (160).

(7) *Gangubai v. Ramanna*, 3 B. H. C. R. (Ac) 66 followed in *Vasudev v. Venkatesh*, 10 B. H. C. R. 189 (157, 160)

(8) *Gujanan v. Godarao*, (1879) C. P. S. C. Pt. VIII No. 17; *Megonath v. Molich*, (1881) C. P. S. C. Pt. VIII No. 90; *Bina v. Brja Mohan*, 8 C. P. L. R. 126; *Amirchand v. Lkenath*, 4 C. P. L. R. 189; *Ram Pershad v. Deokaran*, 6 C. P. L. R. 60; *Mulund Ram v. Ram Ratan*, 2 N. L. R. 52; *Mohan Lal v. Tekchand* 9 N. L. R. 18.

(9) *Rawa Singh v. Hardayal*, 8 N. L. R. 160.

(10) *Shamacharan v. Kumed Dasi*, 42 I. C. (O) 878; *Dawur v. Kakketuri*, 38 M. 1187; *Rungayya v. Subramania*, 40 M. 965.

1242. The same question applicable to the Mitakshara country subject to Bengal, U. P., Oudh and the Punjab. Calcutta High Court in 1869 who decided against the right of transfer, on the ground of *stare decisis*, holding that it had been the rule of property long and consistently acted upon in the courts of the Presidency. (1) In so holding Sir Barnes Peacock, C. J. said: "We are called upon to decide this case according to the Mitakshara law as we find it, and not according to our own views of policy. Whatever our opinions might be, in the absence of decided cases to which I have referred, I am of opinion that we should not be justified in unsettling the law by overruling that current of authorities by which, for nearly half a century, the law appears to have been settled, and in accordance with the principles of which it appears to have been gradually understood and acted upon." (2) This decision was approved by the Privy Council in a case decided by their Lordships in 1893 (3) in which it was held that the co-parcener was incompetent to alien his interest by treaty, with or without consideration. The Privy Council (4) have thus laid down the law for the Mitakshara and Mithila Provinces of Bihar, the United Provinces, (5) and Oudh (6) and the same view has been adopted in the Punjab. (7) Of course, it is a logical corollary from this view that what a co-parcener cannot alien to a stranger, he cannot equally alien it to one of his co-parceners, since even if such transfer be regarded as a surrender, it must be in favour of the general body of co-parceners, and not in favour of any one of them. (8)

As regards the co-parcener's disability to transfer his interest, these cases are then conclusive.

1243. But in such cases is the purchaser to lose his property and his money too? It was not long before this question forced itself to the forefront in a case decided in a divisional Bench in 1873 upon the following facts: The father of a joint family as its head, had taken a lease of certain villages, and to pay a part of the premium for it he mortgaged the family estate. The mortgagee sued on the mortgage, obtained a decree and in execution purchased the estate himself and entered into possession. His two sons, one a minor, sued the mortgagee for the cancellation of his mortgage and possession.

(1) *Nandram v. Kashee*, (1822) 3 B. S. R. 232; *Sheo Churn v. Sheo Sahay* (1826) 4 B. S. R. 158; *Jivan Lal v. Ram Gobind*, (1882) 5 B. S. R. 163; *Sheo Churn v. Jumnun Mall* (1887) 6 B. S. R. 176; *Roopud v. Roy Qoolce* (1853) S. D. A. B. 344; *Joynarain v. Roshun Singh*, (1860) 2 S. D. A. N. W. P. 162.

(2) *Sadabari v. Foolboss* 3 B. L. R. (F. B.) 31 (46); 12 W. R. F. B. 1 O. A. *Foolbus v. Jogeshwar*, 1 C. 226 P. C. in which the general question mentioned in the text was not considered, their Lordships adding that they "abstained from pronouncing any opinion upon the grave question of Hindu Law involved in the answer of the Full Bench to the second point referred to them, a question which the appeal coming on *ex parte* could not be fully or properly argued. That question must continue to stand, as it now stands upon the authorities unaffected by the judgment on this appeal." *Ib.* p. 243.

(3) *Balgobind v. Narainlal*, 15 A. 339. (850, 851) P. C.

(4) *Balgobind v. Narainlal*, 15 A. 339 P. C.

(5) *Joynarain v. Roshun*, 2 S. D. A. N. W. P. 162; *Goor v. Shenden*, 4 N. W. P. H. C. R. 110; *Ballabh Das v. Sunder Das*, 1A. 429; *Ram Nand Singh v. Gobind Singh*, 5 A. 884; *Bal Gobind v. Narain Lal*, 15 A. 339 P. C.; *Chandlar Kishore v. Dampat*, 16 A. 369; *Bhagirathi v. Sheebhik*, 20 A. 325; *Amolak Ram v. Chundlan*, 24 A. 183; *Chandrika Deo v. Moti Prasad*, 31 A. 176 F. B.; *Kali Shankar v. Navab Singh*, 31 A. 537; *Tulsi Ram v. Babu* 33 A. 654; *Brojbas v. Gopal*, (1908) A. W. N. 900; *Kali v. Namale*, 6 A. L. J. 762; *Jamua v. Jugdeo*, 1 I. C. (A) 88; *Barandeo v. Rupanarain*, 11 I. C. (A) 654.

(6) *Saiyed Itifat v. Sanwal Singh*, 10 O. C. 289; *Bhagannah v. Chandis* 14. O. C. 295.

(7) *Zahre v. Lallu*, (1879) P. R. 21; *Banke Rai v. Madh Ram*, (1883) P. R. 153; *Kaluchand v. Surb Dial*, (1898) P. R. 109; *Dharomchand v. Karm Devi*, (1898) P. R. 61; *Piare v. Ram*, (1911) P. W. R. 112; 11 I. C. 458. *contra Nainakchand v. Dayan*, (1894) P. R. 108.

(8) *Chandlar Kishore v. Dampat*, 16 A. 369.

The mortgagee-purchaser pleaded necessity which was found wanting. The mortgagor then had no power as manager to mortgage the estate. His mortgage was then the mortgage by a co-parcener for his own benefit. It was found that the adult plaintiff was instrumental in carrying out and completing the mortgage transaction. He was, therefore, out of court. There still remained the minor son who was unquestionably entitled to a decree. But what decree? "For the moment then, let us reflect upon the consequence of allowing the property to be recovered by the minor unconditionally. The property is still family property; and it is recovered at the instance of the minor solely, because the father who affected to mortgage it, and the elder son, who acted with him and aided him in the transaction, could neither singly nor together, pass any title to the entirety or to any share in it. Consequently, the property, on going back, will come to be enjoyed by the joint family as it was before the mortgage and sale; and of necessity, by virtue of the provisions of the Mitakshara law, will return to the management of the very defendant second party, who obtained Rs. 3,000 from defendant first party on the pretended security afforded by the mortgage of it. This does not seem to accord very well with equity and good conscience." (1) Then referring to the Full Bench case, the court said that it did not fetter its discretion, and continued to observe that the father had unquestionably the right of enforcing a partition of his share and on partition, he could, of course, mortgage it. Even as the father could have obtained the separation of his share for delivery to his creditor to whom he was equitably bound to make good the representation he had made that he had the power to mortgage it, and that being clearly the equity to which the mortgagee was entitled, the court charged the mortgage money with interest upon the shares of the father and his consenting son.

Referring to this decision, the Privy Council said: "There appears to be substantially little difference between the law thus enunciated and that which has been established at Madras and Bombay, except that the application of the former may depend upon the view the judges may take of the equities of the particular case, whereas the latter establishes a broad and general rule defining the right of the creditor". (2)

1244. The difference between the Bengal and the Bombay views are thus reduced to a minimum, but they are still of considerable importance. In the first place, while under the Bombay and the Madras views the equity of the alienee has established a positive right in favour of alienation for value, the equity in Bengal does not affect the invalidity of alienation but places the plaintiff upon terms which postulate that the alienee was a *bona fide* transferee without notice of the defect in his alienor's title. Again, since it is merely an equity against the alienor by reason of his erroneous representation, it follows and has been held, that it dies with the death of the alienor, upon which his share passes by survivorship to persons who are not liable for the debts and obligations of the deceased. (3)

1245. But nevertheless these decisions left the matter in an unsatisfactory state, and referring to them Sir James Colville said:

(5) **Transfer of co-parcenary interest.**

"The right of co-parceners to impeach an alienation made by one member of the family without the authority, express or implied, has of late years been frequently

(1) *Mahaboor v. Ramyad*, 12 B. L. R. 90; 20 W. R. 192 approved in *Madho Pershad v. Mehrban Singh*, 18 C. 157 (163) P.C. followed in *Jammuna Pershad v. Ganga Pershad*, 19 C. 401.

(2) *Deen Dyal v. Jugdeep*, 3 C. 198 (206) P. C.

(3) *Madho Pershad v. Mehrban Singh*, 18 C. 157 P. C.

before the courts of India, and it cannot be said that there has been complete uniformity of decision respecting it". (1)

1246. In another case decided in the following year the same high tribunal said: "Their Lordships are not disposed to extend the doctrine of the alienability by a co-parcener of his undivided share without the consent of the co-sharers beyond the decided cases. In the case of *Suraj Bansi Koer v. Sheo Pershad Singh* (2) above referred to, they observed: "There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided family (governed by the Mitakshara law), and the law as established in Madras and Bombay, has been one of gradual growth, founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition. The question, therefore, is not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence." (3) This was a case where the father had bequeathed his undivided share by will which according to the view of the Madras court could not be upheld, since at the time of death the right of survivorship is in conflict with the right by devise; and the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise. (4)

1247. The recognition of the co-parcener's right to alienate his share for value without the consent of his co-parceners, is thus a right which finds no support in the texts. Strictly speaking, as remarked by the Privy Council, it is inconsistent with the law of co-parcenary.

1248. In Bengal the alienation of such right was, however recognized from early times. But as regards the other provinces the courts were divided (5) some holding the alienation valid if made for value, while others adhering to the orthodox view that co-parcenary right was in any case incapable of transfer. The former view was forced on the court by the equity in favour of the purchaser for value without notice. Such purchaser received an added strength to his claim by reason of his being a purchaser at a court sale held in execution of a decree against the joint family.

1249. It was agreed and it is the law that the manager has the power to transfer the joint family property for legal necessity. But if suppose such necessity was only partial or such as bound only the immediate party to the contract, then justice requires that the innocent transferee should be protected, and the only means of protecting him was to sell the manager's own share in the co-parcenary property. Again, a co-parcener might commit a tort in which case he could not escape his liability to pay damages. In that case the party wronged is entitled to bring his co-parcenary interest to sale which could not be refused. (6) This was then the thin end of the wedge. The right was at first conceded to the auction purchaser, then to all purchasers and lastly extended to all transferees for value.

(1) *Suraj Bansi v. Sheo Pershad*, 5. C. 148 (185) P. C.

(2) 5 C. 148 P. C.

(3) *Lakshman v. Ramchandra*, 5 B. 48 (62) P. C.

(4) *Vasudev v. Venkatesh*, 10 B.H.C.R. 139; *Udaryam v. Ranu*, 11 B.H.C.R. 76; *Villa v. Yemanamma*, 8 M. H. C. R. 6; *Goroosa v*

Narainswamy, ib., p. 18 approved in *Laxman v. Ramchandra*, 5 B. 48 (62, 68) P.C.

(5) See Colebrooke's note on *Ramaswamy v. Sashachella*, 2 Str. N.C. 74; *Vira vami v. Ayyaswami*, 1 M. H. C. R. 471 (474) F. N.

(6) *Viraswami v. Ayyaswami*, 1 M.H.C.R. 471.

1250. But this last development has not influenced the courts in Calcutta⁽¹⁾ and Allahabad,⁽²⁾ which have resisted all efforts to extend the power of transfer beyond a compulsory sale in execution of a decree against a co-parcener. And as the Privy Council do not favour any extension of the right of transfer of his undivided interest by a co-parcener beyond the decided cases, there is no prospect of any further development of law in the direction of alienability.

1251. Present state of law.—The present state of the law is then as follows :—

Both in Bombay and in Madras a co-parcener is entitled to sell, mortgage or otherwise alienate for valuable consideration his share in the undivided family estate, whether moveable or immovable, without the assent of his co-parceners. It is also settled law in the same two presidencies that a share in the undivided estate of a Hindu family may be taken in execution under a judgment against the co-parcener to whom such share belongs at the suit of his personal creditor.⁽³⁾

Under the Bengal system a co-parcener being absolutely free to alien his share for value or without, the question of consideration does not arise.

But in Bombay and Madras where such transfers are only allowed for valuable consideration, it will be for the court to consider in each case whether the consideration is real or illusory. If it is the latter, the court may treat the transfer as valid.

In the Mitakshara territory other than the Central Provinces, since a direct transfer is not legal, the only right which the purchaser possesses, is equitable and the court will mould the remedy according to his equity.

1252. Involuntary transfer.—These variations only refer to voluntary alienations. They have no application to an involuntary transfer which stands on higher ground, and is governed by a different set of rules. So the Privy Council said: "But however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does exist between them. It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-parceners, but the purchaser at the execution sale acquires the interest sold with the right to have the partnership accounts taken in order to ascertain and realize its value. It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate, and that it might be so applied without unduly interfering with the peculiar status and rights of the co-parceners in such an estate, if the rights of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place".⁽⁴⁾ In other words, a co-parcenary interest may be attached and sold in execution of a decree against the co-parcener and the purchaser thereupon acquires the same right to enforce a partition as his vendor had in the joint property. But this he can only do

(1) *Sadabart Prasad v. Foolbush Koer*, 4 B. L. R. (A. C.) 15; 12 W. R. 447; *Malabir Persad v. Ramyad Singh*, 12 B. L. R. 90; 20 W. R. 192; *Chunder Coomer v. Hurbun Sahai* 16 C. 187.

(2) *Kali Shankar v. Nawab Singh*, 81 A. 507; *Bal Gobind Das v. Narain Lal*, 15 A. 888

(351) P. C.

(3) *Tukaram v. Ramchandra*, 6 B.H.C.R. (A.C.) 247; *Vasudev v. Venkatesh*, 10 B.H.C.R. 139; *Fakirapa v. Chanapa ib.*, p. 162 F. B.

(4) *Deen Dyal v. Jug Deep*, 8 C. 198 (209) P. C.

during the life-time of the judgment-debtor, (1) unless he died after the attachment, (2) or was the father, in which case the pious obligation of the sons to pay their father's debt will entitle the purchaser to work out the rights which he has acquired by means of a partition. (3) But in any other case the purchaser will, on the death of his vendor, lose the property and his money too. (4)

1253. The question whether such purchaser takes subject to any prior incumbrance created by the debtor depends upon the personal law of the debtor. In Bengal, Bombay, Madras and the Central Provinces where a co-parcenary interest may be mortgaged, the purchaser would be naturally bound whether he had or had no notice of the incumbrance, which being valid, creates a right *in rem* enforceable against all subsequent transferees. But in the other Mitakshara country since such mortgages are invalid it follows that they create no charge which can have priority over purchases at execution sales made *bona fide* and without notice of it. (5)

In such a case the mortgagee's remedy is to obtain a decree upon his mortgage and to attach the interest in execution of his decree. Of course, in such cases the mortgagee will only rank as an attaching creditor but that is a contingency which he should have been prepared for when he took the mortgage. (6)

1254. Transfer with consent of co-parceners.—Both according to the text as well as precedents, it is open to any co-parcener subject to the Mitakshara restriction to alien his share with the consent of the other co-parceners. (7) The restriction only applies to a transfer without consent (8) and without legal necessity or benefit to the family. (9)

Since a member of a joint family cannot validly mortgage his undivided share in ancestral property held in co-parcenary on his own private account without the consent of his co-parceners, it follows that a mortgage by a father of joint family property not made to satisfy an antecedent or for a legal necessity or benefit of the family, is not binding even as to his share in the ancestral property comprised in it, and no decree can be passed for the sale of his share under the mortgage. (10) The only course open to the mortgagee is, of course, to sue for the mortgage money and then to attach the property in execution.

1255. Valuable consideration.—The question what constitutes valuable consideration must be decided with reference to the general law. Past and future services may amount to sufficient consideration. (11)

1256. Cancellation of alienation.—It is the right of the other co-parceners to sue for a cancellation of an alienation made by a co-parcener, if it is invalid and prejudicial to their co-parcenary rights. A co-parcener born at the time of the

Limitation.

(1) *Deen Dyal v. Jug Deep*, 3 C 198 (209) P. C. explained in *Suraj Buns v. Sheo Pershad*, 5 C 148 (167) P. C.

(2) *Subrao v. Mahadevi*, 15 Bom L.R. 848: 21 I. C 380; *Murugappa v. Ayyadorny*, 9 M. L. T. 96; 9 I. C. 286; *Thadi v. Moola*, 16 M. L. T. 123; 24 I. C. 667. In *Banwari Lal v. Sheo Sanker*, 13 C. W. N. 815; 1 I. C. 670 the death of the co-parcener during the pendency of the suit was held to preserve the purchaser's equity.

(3) *Suraj Buns v. Sheo Pershad*, 5 C 148 P. C.

(4) *Madho Pershad v. Mehrban Singh*, 18 C. 157 (163, 164) P. C.

(5) *Bal gobind v. Narainlal*, 15 A. 389 P. C.

(6) *Bal gobind v. Narainlal*, 15 A. 389 (351) P. C.; *Bhaganmal v. Chandi Singh*, 140 C. 295; 13 I. C. 465.

(7) *Madho Pershad v. Mehrban Singh*, 18 C. 157 (P. C.)

(8) *Natesa v. Nathai*, 19 M. L. J. 62; 4 I. C. 1104.

(9) *Sundarlal v. Brijlal*, 85 A. 543; *Thakur Din v. Seetla Sahai*, 12 A. L. J. 59.

(10) *Juggurnath v. Doobo*, 14 W. R. 80.

(11) *Kali Shanker v. Nawab Singh*, 31 A. 507.

alienation as well as one born subsequently to it, are both equally entitled to sue to set it aside. But the court will grant relief subject to the equities of the purchaser. Where therefore, the alienation is set aside, the court should order that the property should be possessed in defined shares and the shares of the transferee should be subject to the lien of the transferee for the return of the purchase money, on the ground that the co-parcener must make his share available for payment of his just dues and fulfilment of his obligations (1) Where a member of a joint Mitakshara family executes a deed of sale in respect of a joint property, his co-parceners who were not parties to the deed, would be entitled to maintain a suit for recovery of possession within 12 years from the time when the alienee took possession of the property. (2)

1257. The head of a joint Mitakshara family mortgaged in 1886 property be'longing to the joint family, but neither for legal necessity nor to pay an antecedent debt. In 1888 the mortgagor sold the same property to a third person. The purchaser remained in possession for more than twelve years, when the mortgagees instituted a suit for sale on their mortgage. It was held that in view of the fact that the purchaser had acquired title to the property by adverse possession as against all the members of the family, it was open to him, notwithstanding that his title was originally acquired from the mortgagor alone, to set up as a defence the invalidity of the mortgage. (3)

1258. The co-parcener's interest is either variable or invariable according to the law to which he is subject. In Bengal where co-parceners hold in *quasi* sevaralty as tenants in common with no right of survivorship, the interest of each member is determined on the death of the father and remains fixed till partition. Under the Mitakshara, however, since co-parcenary interest is the birthright of every male member of the family, that interest is necessarily subject to increase or decrease according to the births, deaths and other circumstances elsewhere set out.

1259. So long as the family is joint, a coparcener is necessarily precluded from appropriating any specific portion of the joint property or of its profits, as he has no definite share until partition. (4) But a co-parcener may obtain possession in common with a purchaser who has obtained separate possession without partition of specific undivided property in which such co-parcener has an undivided and unascertained share. (5)

1260. All schools now recognize the right of separate ownership. A co-parcener is not disqualified by reason merely of his possession of an interest in joint property from obtaining or acquiring any property of his own.

(1) *Banwari v. Sheo Shankar*, 13 C. W. N. 815; 1 I. C. 670; *Ram Sundar v. Barham Deo*, 14 C. W. N. 552; 2 I. C. 986.

(2) *Banwari v. Sheo Shankar*, 13 C. W. N. 815; 1 I. C. 670.

(3) *Muhammed v. Mithu Lal*, 33 A. 788 F. B.

(4) *Piethi Pal v. Jowahia*, 14 C. 498 P. C.

(5) *Bhiku v. Puttu*, 8 Bom. I. R. 99 (105) following *Pandurang v. Bhaskar*, 11 B. H. C.

R 72; *Udaram v. Ramu*, 11 B. H. C. R 76; *Mahabalaaya v. Timmaya*, 12 B. H. C. R 138; *Babaji v. Vasudev*, 1 B. 95; *Kallappa v. Venkatesa*, 2 B. 676; *Dugappa v. Venkataramaya*, 5. B. 498; *Ramaachandra v. Damodhara*, 20 B. 467; *Parashram v. Monari*, 20 B. 569; *Nana v. Appa*, 20 B. 627; *Naranbhai v. Ranchod*, 26 B. 141; *Wahid v. Safet*, 12 A. 556.

Manager's fraud.

110. No manager can exercise his power in fraud of the co-parceners.

1261. Analogous Law.—This principle is deducible from the texts already cited (1152). Even the father cannot defraud his son under the mask of a pious gift to an idol. (1)

111. (1) An ancestral family trade devolves upon members of a joint undivided family and the partnership is not dissolved by the death of any of the members, nor can any one of the partners when severing his connection with the business, ask for an account of past profits and losses.

(2) Where a joint Hindu family carries on an ancestral trade, it becomes a trading family and is then governed—not by the rules of co-parcenership—but by the co-parcenary rules as modified by the incidents and exigencies of trade.

(3) In particular and without prejudice to the generality of the foregoing principle, the rules applicable to them are as follows :—

(1) Any member may be appointed the accredited manager and agent of the firm.

(2) Such manager or agent may carry on the trading business of the firm :

(3) And for that purpose, he may pledge the credit of the joint family :

(4) He is not accountable to them for past profits and losses :

(5) Though, whether major or minor, all members are equally liable to the extent of their shares for payment of such debts irrespective of whether they were incurred for necessity of the firm or whether the creditor had not inquired into the purpose and necessity of the loan—

(6) And even if the manager had incurred loans with intent to defraud the family.

(7) The manager may sue or be sued on behalf of firm without being under the necessity of impleading its other members.

Explanation.—The rules here in before stated are equally applicable whether the trading business be an ancient family business or one started by the joint family; or whether it be carried on by the family alone or in partnership with an outsider, provided that where the business is not ancestral the

(1) *Baghunath v. Gobind*, 8 A. 76.

share of the minor co-parcener is not liable without reference to legal necessity or benefit of the family.

Exception.—But nothing herein before contained applies to a trading partnership composed only of certain members of a joint family with or without outsiders.

Synopsis.

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|---|---|
| (1) <i>Law governing trading families</i> (1262). | (8) <i>Manager not accountable for past profits</i> (1273). |
| (2) <i>Liability of members inter se</i> (1263-1264). | (9) <i>Major and minor members equally liable</i> (1274-1275). |
| (3) <i>Representation by manager</i> (1265). | (10) <i>Fraud of manager</i> (1276). |
| (4) <i>Right to manage</i> (1267). | (11) <i>Manager's right of suit</i> (1277). |
| (5) <i>Powers of manager</i> (1268-1269). | (12) <i>Exception where only some members trade</i> (1278). |
| (6) <i>Right to pledge family credit</i> (1270-1271). | (13) <i>Rule of Hindu Law applicable to Kutchi memons</i> (1279). |
| (7) <i>Liability of family assets for</i> | |

1262. Analogous Law.—A joint Hindu family carrying on an ancestral trade may be regarded as a trading firm, and as such, is subject to the ordinary law of partnership, or it may still continue to possess all the rights and incidents of a joint Hindu family. It may again be that such a family may carry on its trading business in partnership with a stranger, or that only some of its members might with capital, which is not family property, embark upon such an enterprise on their own account, or in partnership with others. But it is clear that in such cases the rules of joint family cannot apply to the exclusion of the law of partnership. (1) It is only when the family as a whole or through any of its members, continues an ancestral trade out of its joint family funds, that it is subject to the law of joint family necessarily accommodated to that of partnership.

If the law were otherwise, the birth of a son (2) or the death of any member of the family (3) would have had the effect of dissolving the partnership and if it was to continue, it could only be by a fresh agreement made each time that there was a birth or death in the family.

1263. But the very contrary is expressly laid down in the Mitakshara as applicable to trading partnerships:—“When one of those who trade in partnership goes abroad and dies, then his share shall be taken by his descendants such as sons, etc., Bhandhus and Sapindas, and in default of them all by the King.” (4) Then again, while partners as such are mutually accountable to one another for past profits and losses (5) partners under the rule are not so accountable. (6) Under the Hindu Law a joint family which carries on its trade handed down from its ancestors, becomes a trading family, trade being one of its *Kulachars* or family practice, which attracts to itself all the necessary incidents of trade, (7) without which the trade may not be able to continue. It is indeed

(1) *Vedilal v. Shah Khushal*, 27 B. 157 (180); *Sawammal v. Punnammal*, 2 S. L. R. 13; *Rupchand v. Basanta*, (1889) P. R. 102; *Honda Ram v. Desu Ram*, (1898) P. R. 162; *Ram Prasad v. Rattan Chand*, 10 P. L. R. 321.

(2) S. 258 (6), Contract Act.

(3) *Ib.*, S. 258. (10).

(4) Cited in *Sakrabai v. Maganlal*, 26 B.

206 (218) F. B. This fact was overlooked in *Lutchman v. Swaprokasa*, 26 C. 349 (354) which was moreover decided on the question whether an infant member should not join as a co-plaintiff.

(5) S. 258 Contract Act.

(6) *Ganpat v. Annaji*, 23 B. 144.

(7) *Raghunathji v. Bank of Bombay*, 34 B. 72.

evident that a trading business must enter into many transactions, purchase and sell property and borrow money which cannot all confirm to the narrower rules applicable to the management of a joint family. They cannot possess all the facilities of a trader and yet be not subject to the rules which make those facilities possible. They cannot be permitted to contract with the outside public in the course of that trade and then refer to their personal laws for evading their liabilities. Where therefore, a minor was the sole survivor of such partnership, his guardian is entitled to carry on an ancestral trade on behalf of the minor who will be bound by all acts of the guardian necessarily incidental to or flowing out of the carrying on of the trade. ⁽¹⁾ So while in the case of a normal family, the managing member can only contract debts for the necessity or benefit of the joint family and the creditor is bound to enquire into the purpose of the loan, ⁽²⁾ no such limit can be placed on the borrowing power of the managing member of a family trade and the rule is, that he possesses an implied authority to contract debts for its purpose and the creditor is not bound to enquire into the purpose of the debt in order to bind the whole family thereby because that power is incidental to and is necessary for the very existence of the family trade.

1264. Where any co-parcener is a minor the ordinary rule is that his share in the family property is liable for debts contracted by his managing co-parcener for any family purpose or any purpose incidental to it. If the family is a trading firm, that rule is varied and his share becomes liable for debts incurred for trading purposes and any purpose incidental to it. Consequently, where the manager drew Hundis in the name of his firm without the knowledge of other members of the firm and without any advantage to the firm, it was held that the drawee and his endorsee were entitled to hold the firm liable and bind its minor member's share without proof of any necessity or benefit to the minor. ⁽³⁾ Persons dealing with the manager of a trading firm are not affected by his dishonesty and the fact that the co-parcener affected is a minor, is immaterial. ⁽⁴⁾

1265. It is not even necessary that the junior member should be impleaded in the suit, ⁽⁵⁾ but of course a suit on behalf of the firm must be instituted by or against its manager. Any other member cannot sue without impleading all the members. ⁽⁶⁾ In the ordinary joint family, the father, and in his absence, the senior member is the manager. But in a trading partnership this is unnecessary, since the family may authorize any one of its members to act as their agent in any business transaction subject to the same rule that when a joint family or any members of it carry on trade in partnership and contract with the outside public in the course of that trade, they have no greater privileges than any other traders. If they are really partners they must be bound by the

(1) *Raghunathji v. Bank of Bombay*, 34 B. 72 (79); *Ram Partab v. Foolhat*, 22 B. 767 (778); *Ramlal v. Lakmichand*, 1 B. H. C. R. (App.) 51; *Joykisto v. Nityanund*, 3 C. 788.

(2) *Humoomanpersad v. Babooe*, 6 M. I. A. 398; distinguished in *Raghunathji v. Bank of Bombay*, 34 B. 72 (75, 76).

(3) *Bank of Bombay v. Raghunathji*, 10 Bom. L. R. 66³ affirmed O. A. *Ragunathji v. Bank of Bombay*, 34 B. 72 (81); *Ramlal v. Lakmichand*, 1 B. H. C. R. (App.) 51. (61, 62); *Johurra v. Sri Gopal* 1 C. 470; *Joykisto v. Nityanund*, 3 C. 788; *Bemola v. Mohun*, 5 C. 792; *Ramsebuk v. Ramlal*, 6 C. 816; *Sheo-*

prasad v. Saheblal 20 C. 458; *Lutchman v. Siva Prokasa* 26 B. 849; *Morrison v. Venchoy* 6 C. W. N. 429; *Pulukkavandey v. Periyakaruppa* 2 I.C. (M) 208; *Sankalrishnamurthi v. Bank of Burma*, 21 M. L. J. 620; 11 I. C. 79.

(4) *Mulchand v. Sadhusingh* (1898) P. R. 59.

(5) *Lutchman v. Sivaprokasa*, 26 C. 349; *Shamrathi v. Kishanpershad* 29 A. 811; contra *Damodhardass v. Vishendass*, 4 S. L. R. 2; 7 I.C. 584.

(6) *Jugal Kishore v. Tyndasi Ram*, 8 A. 264.

same rules for enforcing their contracts in courts of law as the members of any other partnership. (1)

1266. These general principles may now be examined and illustrated in detail.

1267. In an ordinary joint family, the office of the manager is determined by his age and hereditary rights and not necessary

Cl. (3) (1) Manager. by his competency. In a trading family, such a course if permitted, might lead to disastrous results. Consequently it is settled that the manager of a trading family may be such person as the family appoints or holds out as its accredited representative. (2) He need not be the conventional *karta* of the Hindu household. It may be that such *karta* may regulate the internal management of his household but in its trade relations with the outside world the manager might be quite a different person. This is a question of fact to be decided upon the facts of each case.

1268. Such manager has all the powers necessary for the purpose of carrying on a family trade. But he must professedly act in that

Cl. (3) (2) His powers capacity. When therefore, the manager of a family firm mortgaged certain family properties by a mortgage-deed which showed that the debt was to be recovered from him personally, from all kinds of goods and property belonging to him, but the manager signed the mortgage as owner of the firm, in a suit by the mortgagee against the manager and his minor co-parceners, it was held that the mortgage did not bind the undivided property of the family and nothing could pass beyond the property specifically mortgaged. (3) It was further held (it is submitted wrongly) that even as regards the mortgaged property, the interest of the minors therein was not liable for the debt unless the plaintiff proved that when he lent the money, he reasonably believed that it was required for the family business. That this is by no means necessary was decided by the same court in a later case in which it was held that a minor was liable to the extent of his share in the firm on bills or notes drawn by the manager in the name of the firm but in fraud of it and for purposes unconnected with it. (4) In so holding Chandavarkar, J., said: "In carrying on such a trade, infant members of the undivided family will be bound by all acts of the manager (or the adult member acting as the manager) which are necessarily incidental to or flowing out of the carrying on of that trade . . . The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purpose of the trade." (5) Sausse, C. J., observed in another case: "Third parties in the ordinary course of *bona fide* trade dealings, should not be held bound to investigate the status of the family, whilst dealing with him on the credit of the family property." (6)

1269. So it has been held that the rule of English law according to which none but those whose signatures appear on a bill of exchange or a negotiable promissory note can be sued thereupon, has no application in India so as to preclude the payee of a promissory note when suing the maker, from enforcing his rights against third parties who according

1) *Ramsebuk v. Ramlal*, 6 C. 815 (826, 827). But taken as a statement of law as to the necessity of impleading all partners this case is superseded by Order 80 C. P. C.

(2) *Ramsebuk v. Ramlal*, 6 C. 815.

(3) *Nathabai v. Ranchordas*, (1898) B.P.J. 297.

(4) *Raghunathji v. Bank of Bombay*, 34 B. 72.

(5) *Ib.*

(6) *Ramlal v. Lakmichand*, 1 B H. C. R. (App.) 51. To the same effect *Johurra v. Sri Gopal*, 1 C. 470 (475); *Sakrabai v. Moganlal*, 26 B. 206.

to Hindu Law, may in respect of family property in their hands, be responsible for such debts. Section 27 of the Negotiable Instruments Act has no application to a case where a person who is not a party to a promissory note or other similar instrument is sought to be made liable in respect of the money due thereunder in consequence of an obligation cast on him by his personal law in respect of such debts. (1) But of course the family firm is only liable for the debts incurred by the manager acting for the family. It will not be liable for the manager's debts incurred under circumstances which would not bind any other partnership. Consequently, while the firm is liable for all acts done by the manager in the ordinary course of his duties and within the scope of his authority it cannot be held liable for a fraud committed by the manager outside the scope of his authority and wholly unconnected with his business. (2) As Willes, J., observed: "With respect to the question whether a principal, is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of his servant or agent as is committed in the course of his service and for the master's benefit though no express command or privity of the master be proved." (3)

1270. As such, the manager may pledge the credit of joint family to its uttermost and it is immaterial that there are minors (4) and widows (5) to be maintained. Neither the one nor the other, has any precedence over his trade debts which may be realized out of the family assets without reference to the doctrine of necessity or benefit in the one case, and of the duty of maintenance and residence in the other.

1271. As Sausse, C J., put it,—“Were such a power not implied, property in a family trade which is recognized by the Hindu Law to be a valuable inheritance would become practically valueless to the other members of an undivided family wherever an infant was concerned. For no one would deal with a manager if the minor were to be at liberty, on coming of age, to challenge as against third parties, the trade transactions which took place during his minority.” (6)

1272. But of course the debts must be debts incurred by the manager acting for his firm and ostensibly for its benefit. The family is not liable for losses incurred by the manager in a speculative business of his own. His powers are to carry on the ancestral trade of the family and not to embark upon speculative transactions unconnected with the family and entailing great risk. (7) So where the manager borrowed money on a promissory note for the business of a toddy shop carried on by him as agent of a third party for which he was paid a fixed monthly salary, it was held, that the mere fact that the family may have benefited by the monthly salary allowed to the manager, or that the loan enabled the agency of the manager to continue, did not make it a loan for the benefit of the family so as to make the members of the

(1) *Krishna v. Krishnasami*, 28 M. 597 (806) F. B.

(2) *Morrison v. Verschoyle*, 6 C. W. N. 429.

(3) *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259.

(4) *Joykisto v. Nityanund*, 3 C. 788; *Sheo*

Pershad v. Sahablal, 20 C. 458.

(5) *Johurra v. Sree Gopal*, 1 C. 470.

(6) *Ram Lal v. Lakhmichand*, 1 Bom. H. C. R. (App.) 51; *Morrison v. Verschoyle*, 6 C. W. N. 429 (458).

(7) *Morrison v. Verschoyle*, 6 C. W. N. 429.

family liable. ⁽¹⁾ The debt here was not incurred even professedly for the family, nor was the toddy shop a family business. If however, in such a case the manager had professed to borrow for the family and misapplied the proceeds to his toddy business, then the result would have been different. ⁽²⁾ But of course, where a person acts as a manager of two firms it is upon persons dealing with him to ascertain for which firm he was at the moment acting. And while under the Hindu Law, it is open to the members of a family to claim under certain circumstances the benefits arising from a business carried on by one of the members, still until this is done, or until the business is in some way adopted as an asset of the family, no liability can be imposed on the other members for the debts of the business. ⁽³⁾

1273. The manager of a family firm is not accountable to the family for past profits and losses ⁽⁴⁾ though he would be so in a case of pure partnership. ⁽⁵⁾ The reason of this rule is that a joint family still remains a joint family and in its internal management the rights and liabilities of the members remain unaffected by reason of the fact that it carries on a family trade. As there is, ordinarily, no right to call for past accounts in a joint family *inter se*, so the right of the members is not enlarged by the nature of the business of the family.

1274. On the other hand from the very nature of the business, there can be no discrimination between the adult and minor members of the family. They share alike the profits and bear alike the losses incident to the joint trade. As Sausse, C. J., observed in a case already cited ⁽⁶⁾: "In carrying on such a trade, infant members of the undivided family will be bound by all acts of the manager, or the adult members acting as managers, which are necessarily incident to and flowing out of the carrying on of that trade, whether it be singly or with a co-parcener. The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade, and third parties in the ordinary course of *bona fide* trade dealings should not be held bound to investigate the status of the family represented by the manager whilst dealing with him on the credit of the family property. Were such a power not implied, property in a family trade, which is recognized by Hindu Law to be a valuable inheritance, would become practically useless to the other members of an undivided family, whenever an infant was concerned, for no one would deal with a manager if the minor were to be at liberty on coming of age to challenge as against third parties, the trade transactions which took place during his minority. The general benefit of the undivided family is considered by Hindu Law to be paramount to any individual interest and the recognition of a trade as inheritable property, renders it necessary for the general benefit of the family that the protection which the general Hindu Law generally extends to the interests of a minor should be so far trencched upon as to bind him by acts of the family manager necessary

(1) *Pullukavandy v. Periyakaruppa* 2 I. C. (M) 208.

(2) *Raghunathji v. Bank of Bombay*, 34 B. 72.

(3) *Maoleod v. Manikchand*, 3 Bom. L. R. 144.

(4) *Ganpat v. Annaji*, 28 B. 144

(5) S. 268, Contract Act.

(6) *Ramlal v. Lakhmichand*, 1 B. H. C. R. (App.) 51; *Samaibai v. Soneshur*, 6 B. 88; *Rampartab v. Foclibai*, 20 B. 767 (778, 779); *Sakrabai v. Manganlal*, 25 B. 206 (and cases there cited); *Topanmal v. Menghomal*, 4 S.L.R. 260; 10 I. C. 978; *Morrison v. Verschoyle*, 6 C. W. N. 429.

for the carrying on and consequent preservation of that family property, but that infringement is not to be carried beyond the actual necessity of the case." (1)

1275. The question then arises, what are the actual necessities of the case and by what tests are they to be decided. It was admitted that "it is not easy to draw a well-defined line between what is, and what is not incident to the carrying on of a trade." (2) In the case from which these excerpts are quoted, the surviving partners of a firm in the absence of a representative of a deceased partner, had adjusted the partnership accounts and had agreed to hand over a portion of the partnership property to one of the partners in compromise of his claim. The property so delivered was ancestral, and the Court held that the transfer of partnership property was not an act necessarily incident to the carrying on of a trade but should be left to be governed by the law applicable to the ordinary dealings with the manager of an undivided family when the interests of an infant member are concerned. (3)

1276. Apart however from such re-adjustment of rights and liabilities *inter se*, no member of a trading firm, whether adult or minor, can repudiate a debt incurred by the manager acting on behalf of the firm even though it be done with intent to defraud it. It was so held in a case in which the manager of a co-parcenary trading firm of a joint Hindu family had signed some promissory notes in the name of his ancestral firm to accommodate his friend with funds without consulting his *munim* and without any advantage to his own firm. In short, he saddled upon his firm a gratuitous liability from which the firm could gain nothing and still it was held that the firm was liable, though as regards the minor, his liability was restricted to the extent of his share. (4) A similar question arose in Madras when it was further pointed out that the liability must be restricted to the minor's share in the business but could not be extended to his other property. (5) As was observed in another case: "As regards the other property in the hands of a co-parcener, no other co-parcener, whether he be the manager or not, has any title whatever. The legal individuality of a co-parcener is not merged in the manager so far as the co-parcener's self-acquired or other separate property is concerned." (6) Of course the case would have been different, if in such a case, the manager had himself defrauded the firm, as where he had entered into a transaction with himself with intent to defraud the firm of which he was a member. (7)

1277. In the cases decided under the old Code of Civil Procedure of 1882 there was a conflict of views as to who were necessary or proper plaintiffs in a suit instituted on behalf of a trading partnership. In some cases the managing partner was held competent to sue, (8) while in others his competency was

(1) *Ramlal v. Lohmichand*, 1 B. H. C. R. (App.) 51 (61, 62)

(2) *Ramlal v. Lohmichand*, 1 B. H. C. R. (App.) 51 (62) followed in *Raghunathji v. Bank of Bombay*, 34 B. 72

(3) *Ib.*, p. 62.

(4) *Raghunathji v. Bank of Bombay*, 34 B. 72.

(5) *Sanka v. Bank of Burma*, 21 M. L. J. 620; 11 I. C. 79; *Johurra v. Sree Gopal*, 1 C. 470; *Joykisto v. Nittyanund*, 3 C. 788; *Chalamayya v. Varadayya*, 22 M. 167; *Bish-*

ambhar v. Fatehlal, 29 A. 176 (188); *Chalamayya v. Varadayya*, 22 M. 166.

(6) *Chalamayya v. Varadayya*, 22 M. 166 (168).

(7) *Sanka v. Bank of Burma*, 21 M. L. J. 620, 11 I. C. 79.

(8) *Lutchmanen v. Siva Prokasa*, 26 C. 349; *Gansavani v. Narayan*, 7 B. 467; *Jagabhai v. Vijbhukandas*, 11 B. 37 (41); *Hari v. Gokuldas*, 12 B. 158; *Guruvayya v. Dattarayya*, 28 B. 11 (19); *Kashinath v. Chinnaji*, 30 B. 477 (486).

questioned. (1) The subject has now been much simplified by the addition of O. 30 in the Code of Civil Procedure, 1908, which prescribes a special procedure for the institution of such suits. The right of suit would seem to be subject to the following (2) rules : (i)—a person who enters into a contract in his own personal name is entitled to sue alone; (3) (ii)—where it is entered into the name of a trading firm all members must ordinarily join, but (iii)—where such firm is a joint family, then the rule of Hindu Law permits the manager to sue in his representative capacity on behalf of the family as regards its property. (4)

1278. Exceptional cases:— It has already been postulated that the special

**Except where only
certain members
trade**

rules modifying the general law of joint family property only apply to a trading family. They have no application to cases where only some members of the family enter into a trading partnership to the exclusion of others (5) or in partnership with outsiders (6) which

must be subject to the ordinary law of partnership. Of course, one or more members of a joint family may start a trading business and afterwards admit his other co-parcener into the business impressing upon it the character of a joint family business. (7) Even then it would fail to be an ancestral trade to which the peculiar incidents, before set out, apply. Even where the family starts a new trade it is presumed to be with the consent of all adult co-parceners who are liable to the same extent as if the trade were ancestral; the only difference being as regards the minors whose shares cannot be held liable without reference to legal necessity or benefit. Where, however, the new business has developed out (8) of the old or is on the same lines, it is scarcely distinguishable from an ancient business for which all are equally bound.

1279. Rules applicable to Kutchi Memons.—The special rules and incidents applicable to Hindu family firms have been held to apply equally to Kutchi Memons who like the Hindus, possess therein the right of survivorship and the death of a member has not the effect of dissolving the firm. (9)

(1) *Kalidas v. Nathu*, 7 B 217; *Balkrishna v. Municipality of Mahad*, 10 B 32; *Imamuddin v. Tilmalhar*, 14 A 524; *Saamrathisingh v. Kishen Pershad* 29 A 311; *Damodhar Dass v. Vishen Das*, 4 S L. R. 2; 7 I. C. 584; *Kuttusheri v. Vallotil*, 3 M. 234; *Alagappa v. Vellian*, 18 M. 38; *Angamuthu v. Kolandavelu*, 28 M. 190; *Seshan v. Veera*, 32 M 284; *Ramabek v. Ramlal*, 6 C. 815.

(2) *Kisan Prasad v. Harnarain* 33 A. 272 (278) P. C. *Jahabhai v. Rustamji*, 9 B. 311; *Anantaram v. Channulal*, 25 A 378 (383) *Ganput v. Balmakund*, 18 I. C. (C). 206

(3) *Damodhar Das v. Vishen Das*, 4 S L.

R 2; 7 I C. 584 (587).

(4) *Savarnmal v. Purnamal*, 2 S. L. R. 13; *Rupchand v. Basanta*, (1889) P R. 102, *Macleod v. Manikchand*, 3 Bom. L R 144; *Vadilal v. Sheikkushal*, 27 B 157.

(5) *Ram Prasad v. Rattan Chand*, 10 P L. R. 321; *Sokhanadha v. Sokhanadha*, 28 M 344.

(6) *Macleod v. Manikchand*, 3 Bom. L. R 144.

(7) *Haji Noor Mahomed v. Macleod*, 9 Bom. L.R. 274. *Haroon Mahomed In re*, 14 B 189.

(8) *Krishnadhan v. Sanyasi*, 28 C.W.N. 500 (504).

(9) *Haroon Mahomed In re*, 14 B. 189.

CHAPTER IX.

DAYABHAG JOINT FAMILY.

112. In a family comprising the father and his sons and grandsons, the father is absolutely entitled to all property whether ancestral, or his self-acquired property.

Dayabhag family with father as head.

Synopsis.

- (1) *Constitution of Dayabhag family* father (1281).
(1280). (2) *Right to maintenance, limits of*
(3) *Rights of sons as against the* (1281).

1280. Analogous Law.—The following texts support the section :—

Dayabhag :—If sons have property in their father's wealth, partition would be demandable even against his consent, and there is no proof that property is vested by birth alone, nor is birth stated in the law as a means of acquisition ⁽¹⁾

Hence (that is, because property is not vested in sons, while the father lives, or because property is not by birth, but by survival or because the demise of the ancestor is a requisite condition) the passage cited beginning with the words "after the death of the father" ⁽²⁾ being intended to declare that property vested at that period (namely at the moment of the father's decease) recites partition which, of course, then awaits the pleasure (of the successor). For it cannot be a precept, as the same result respecting the right of partition at (pleasure) was already obtained (as the necessary consequence of a right of property). ⁽³⁾

1281. Dayabhag family.—A Dayabhag joint family may have the father as its head, or it may be a family comprising the brothers and nephews with a head other than the father. In the first case, so long as the father is the head of the family, he is the sole master of all its property, whether ancestral or self-acquired. His sons and grandsons possess no right over him. They cannot enforce a partition or exercise any of the rights of a Mitakshara co-parcener. The father is not even bound to maintain his adult sons or grandsons, though he is bound to maintain his minor sons, ⁽⁴⁾ his unmarried daughters, ⁽⁵⁾ his wife ⁽⁶⁾ and his parents. ⁽⁷⁾ Under the Mitakshara, the father is under a legal duty to maintain his son's widow, but under the Dayabhag the son having no vested interest in his father's property, his widow has equally no legal claim for her maintenance. Her claim upon her father-in-law for maintenance is merely moral and unenforceable in a court of law. ⁽⁸⁾ But she has a legal claim to be maintained by her husband's brother if he inherited property from his father, in which case the moral obligation of the father becomes a legal obligation of the son. ⁽⁹⁾ The mother is entitled to maintenance, and is allotted a share in lieu of maintenance. ⁽¹⁰⁾ With the exception of the "outcaste and his son" all disqualified members of the family are entitled to maintenance, ⁽¹¹⁾ the son of the outcaste being entitled to a share of the inheritance.

(1) Ch. 1 19.

(2) From Manu IX-104—"after the death of the father and the mother, the brethren being assembled, must divide equally the paternal estate: for they have not power over it, while their parents live".

(3) Ch. 1-26.

(4) *Premchand v. Hulaschand*, 19 W. R. 494; *Nilmony v. Beneshur*, 4 C. 91 (98).

(5) *Dayabhag* Ch. ii 84.

(6) *Khetramani v. Kashinath*, 10 W. R.

(F.B. 89.

(7) *Kamini v. Chandra*, 17 C. 378.

(8) *Janki v. Nand Ram*, 11 A. 191 F. B. *Kamini v. Chandra*, 17 C. 378; *Ammakannu v. Appu*, 11 M. 91; *Siddesury v. Janardhan*, 29 C. 557 (575).

(9) *Kedarnath v. Hemangini*, 18 C. 386 O. A.; *Hemangini v. Kedarnath*, 16 C. 758 P. C.

(10) *Dayabhag* Ch. V-11

(11) *Id.*, Ch. V-19.

1282. The absolute ownership of the Dayabhag father may be emphasized by the fact that the son does not acquire any right against him even by estoppel. So where the son constructed a house with money of his own on a plot of land belonging to the father, he could not claim even joint ownership thereon with the father, ⁽¹⁾ and the father had the right of turning him out of the house, even though he had allowed and encouraged the son to spend large sums of money for that purpose. ⁽²⁾ In such cases there can be no estoppel against the father, since the son is presumed to know the law, though the father would equitably be bound to pay for the improvements he had encouraged his son to make. ⁽³⁾

113. Except where the father is alive, the Dayabhag joint family is as regards its management and the rights of members, subject to the same rules as the Mitakshara family, except that :—

- (a) A co-parcener may alien his share by sale, mortgage, gift or devise :
 (b) Women are not disqualified from becoming co-parceners.

Synopsis.

- (1) *Rights of members of a Dayabhag family* (1283-1284). (3) *Rights of women in the co-parcenary* (1286).
 (2) *Right of member to alienate his share* (1285). (4) *Presumption of joint acquisition in Dayabhag family* (1287).

1283. Analogous Law.—Except that the father under the Dayabhag school possesses absolute power over the family estate, whether ancestral or self-acquired, a Dayabhag family without the father is indistinguishable from a Mitakshara family with only two exceptions set out in the two clauses.

1284. In all other respects the powers and duties of the manager of families subject to the two schools are identical. The manager may contract debts for the joint family for which its members would be liable, and a decree passed against the manager would bind them even though they were not parties to the suit. ⁽⁴⁾ It has been held that the manager is accountable to the other members, and in this respect the Dayabhag manager is subject to an added liability ⁽⁵⁾ but this view is not supported by any special rule of the Dayabhag school, but maintains his liability to account which is inconsistent with the fundamental idea of co-parcenership. ⁽⁶⁾

1285. It has already been seen that Jimut Vahan allows a co-parcener an unfettered right of disposal over his co-parcenary interest. In this respect the Bengal co-parcener has greater rights than his conferrer in the Bombay and the Madras Presidencies, in that while the latter can only transfer for value, the former can do

(1) *Bejoy Krishna v. Ashutosh*, 18 C.W.N. 397.

(2) *Dharma Das v. Amulyadhan*, 38 C. 1119 (127).

(3) *Ib.* p. 1129.

(4) *Dwarka Nath v. Bungshi*, 9 C. W. N. 379.

(5) *Abhay Chandra v. Pyari Mohan*, 5 B. L. R. 847 F. B ; 18 W. R. (F. B.) 75 : distinguished in *Balakrishna v. Muthusami*, 32 M. 271 (274) contra *Rungun v. Kassinaith*, 18 W. R. 76 note.

(6) *Balakrishna v. Muthusami*, 32 M. 271

so even by gift or devise. His transferee has not merely an equity to a partition but acquires a title to his co-parcener's share of which he may enforce a partition by metes and bounds.

Again, while a Mitakshara minor co-parcener can only claim partition upon special grounds, the Dayabhag minor may do so as of right. To borrow a term from the English law the Dayabhag co-parceners are as regards their rights, tenants-in-common.

1286. As such, it follows that they have no right of survivorship. Consequently, if of two brothers one should die, his widow becomes a co-parcener with the other and is entitled to enforce all the rights of her deceased husband. (1)

The Dayabhag makes no distinction between moveable and immoveable property inherited by a female as heiress of a male relative. She has the same powers and is subject to the same restrictions as regards management and alienation. (2)

1287. It is stated that the presumption of the Mitakshara law that acquisitions made in the names of the individual members, while the family remains joint, are joint property, is not applicable to a joint family under the Dayabhag school, under which it is incumbent upon a person alleging any property to be joint at least to prove the existence of an original nucleus with the aid of which the property sought to be partitioned, has been increased and amplified. (3) But in a subsequent case it was explained that the Mitakshara rule equally applies to a Dayabhag family. (4)

(1) *Dayabhag Ch. XI-1-8; Cossinaut v. Hurro Soondery* (1826) *Clarke's Rules and Orders* (App) 91; *Sudaminee v. Jogesh Chunder*, 2 C. 262; *Janaki v. Mothura*, 9 C. 580; *Bepin Behari v. Lal Mohun*, 12 C. 209; *Durga Nath v. Chintamani* 81 C. 214 (218).
(2) *Dayabhag Ch. XI-1; Durga Nath v. Chintamani*, 81 C. 214 (218).

(3) *Saroda Prasad v. Mahananda*, 81 C. 448; followed in *Govind v. Radha Kristo*, 81 A. 477 (480).

(4) *Rama Nath v. Kusum Kamini*, 4 C. L. J. 56 (62) distinguishing *Saroda Prasad v. Mahananda*, 81 C. 448 following *Taruck Chunder v. Jodhesser*, 19 W R. 178; *Kanhia Lal v. Debi Das*, 22 A. 141.

CHAPTER X.

DEBTS.

1288. Topical Introduction.—In a previous chapter the right of the manager and of the father to contract debts and make alienations of joint property has been already set out. And in discussing the right of co-parcener against the manager his right to challenge the former's invalid transfers has also been alluded to. But the rights of the family against strangers and *vice versa* still remain. They are of sufficient importance to deserve a separate chapter. As will be presently seen the equity in favour of the alienee is entirely a modern graft upon the archaic Hindu Law where it finds no place. The protection of the creditor or the alienee who advances a loan or receives a transfer for valuable consideration after due enquiry without notice, is an equitable rule of the civil law which has found a place in the jurisprudence of all nations. It has equally become embedded as an integral rule of Hindu Law. In some other respects also Hindu Law has been overshadowed by the statute law, the combined effect of which will be found set out in the ensuing sections, some of which deal with the burden of proof, a subject which occupies no inconspicuous place in Hindu Law, where in the conflict of evidence, onus is often the determining factor. It is not, however, a subject which is easy of generalization. And it has created a considerable conflict of views, as noticed by the Privy Council, who said: "The conflict of authorities cited to the Board is a conflict which occurs, not merely between the courts of one district in India and another, but also between decisions pronounced in Calcutta itself, in Allahabad itself, and in Madras itself." (1) This was clearly apparent to the Full Bench of the Allahabad High Court who had to consider the question of onus. (2) The ensuing sections enunciate a few leading principles on the subject, and they are practically all upon which the reports are more or less agreed. On other points they teem with conflicting cases, which have been relegated to the notes.

114. A debt is a pecuniary obligation arising out of a contract express or implied, or from a breach of civil duty.

Debt defined.

1289. Analogous Law.—The term debt (*Rin*) is used in Hindu Law in its primary sense as denoting a loan, that is, a liquidated money obligation arising out of contract and recoverable by suit. (3) But the texts show that the contract might be express or implied: "What has been spent for the household by a pupil, apprentice, slave, woman, menial, or agent, must be paid by the head of the household." (4) But modern law classes as debt other obligations *ex contractu* though they are not strictly within the comprehension of the archaic law. It is not proposed to discuss these in detail in this work which is confined to Hindu Law, especially as they have been already so discussed elsewhere by the present writer. (5) It may, however, be added that the term no

(1) *Sahu Ram v. Bhup Singh*, 39 A. 437 (448) P. C.

(2) *Chandra Deo v. Mata Prasad*, 31 A. 176 F. B.

(3) *Narad Tit. 1*; 38 S. B. E. 41 *et seq.*

(4) *Ib.*, pp. 1-12; 33 S. B. E. 45; *Vishnu VI-39*; *Mit. ii* 45, 47, 50, 54.

(5) 1 *Gour's Law of Transfer* (4th Ed.) 95-102.

longer retains its primitive import and has begun to be used in the sense in which it is understood in the secular law. So a decree for pre-emption obtained by the father has been held to be a debt. "A pre-emptive decree provides that the decree-holder shall acquire the property therein mentioned provided he pays the purchase money within a time fixed. If he does not do so, his suit is to be dismissed with costs. It is very hard to say that such a decree with the liability that is attached to it is not a debt." (1) Consequently, where a Hindu father mortgages joint property for complying with a pre-emption decree, his mortgage was held binding on the son as being for the payment of an antecedent debt.

1290. The Calcutta Court would go even much further. The father had illegally obstructed the watercourse of another who obtained a decree for damages. The father died, and the court held the decree executable against the son, on the ground that the decree constituted the judgment debt for which the son was liable. (2) It was contended that damages awarded for the father's tortious act could not be construed to be the "debt" for which alone the son was liable. But the court overruled the contention holding that a right to damages might be deemed to create a debt even before the suit is brought for its recovery, and that in any case, after decree it was a judgment debt.

But this is probably the extreme verge to which the term can be legitimately extended. As will be shown in the sequel, it does not apply to damages and fines paid or inflicted for the commission of criminal offences

115. The husband and wife are not liable for the debts contracted by each other except in the following cases:—

(a) Where they were contracted by one as the agent of the other.

(b) Where they were contracted for household necessities.

Synopsis.

(1) *Liability of husband and wife for debts of each other* (1291). (3) *Debt incurred for necessities* (1292).

(2) *Implied agency* (1292).

Texts.

1291. Analogous law.—The sacred texts on the subject of this section are in harmony with the present law:—

Narad:—16. The wife must not pay a debt contracted by her husband, nor one contracted by her son, except if it had been promised by her, or contracted in common with her husband.

18. A debt contracted by the wife shall never bind the husband, unless it had been contracted at a time when the husband was in distress. Household expenses are indispensably necessary. (3)

Vishnu:—A debt contracted by the wife, for the purpose of saving from distress her husband, son, daughter, or other family members, must be discharged by the family head. (4)

It has already been stated that as regards their property, both the husband and the wife are absolutely free. The husband cannot, except perhaps in a case of great distress, use his wife's *Stridhan*. Equally the wife has no right to use her husband's property. But since in the management of the

(1) *Nathu v Kundan Lal*, 7 A. L. J. 1182. (676)

(2) *Chhokauri v. Ganga Prasad*, 89 C. 862 (377) following *Pareman v. Bhattu*, 24 C. 672

(3) *Narad* 1-16, 18; 33 S. B. E. 46, 47.

(4) *Vishnu* VI-32.

household, one must at times act for the other, it follows that each may incur debts in circumstances when the other would become legally liable to discharge.

The liability depends upon agency. So where the wife alone executed a mortgage deed to secure a debt due from both husband and wife and the husband by his conduct ratified or acquiesced in the mortgage, the wife was deemed to have acted as her husband's agent.⁽¹⁾

The husband is not liable for sums misappropriated by the wife, though he approved of her taking service.⁽²⁾

1292. Such agency would be implied in purchases made by the wife for household necessities suitable to his situation in life and position. Where goods were purchased by the wife from the plaintiff's firm up to a limit fixed by the husband, he was entitled to repudiate his wife's purchases made in excess secretly and with the plaintiff's connivance.⁽³⁾

116. (1) A co-parcener is liable to pay his own debts personally and out of his separate property or co-parcenary interest so long as he is alive but on his death it cannot be recovered out of his co-parcenary interest unless it was attached during his life-time.

(2) Provided that where the debt was due from the father and is not illegal or immoral, both his son and grandson are, on his death, liable to pay it to the extent of the assets inherited by them from the father or the grandfather.

Synopsis.

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|--|--|
| (1) <i>Liability of co-parcener for personal debts</i> (1294). | (7) <i>Father's imprudent debts</i> (1302). |
| (2) <i>Mortgage by co-parcener of his share, if valid</i> (1295-1296). | (8) <i>Debt partially valid</i> (1303). |
| (3) <i>Liability for father's debt</i> (1297-1298). | (9) <i>Father's power over ancestral moveables</i> (1304). |
| (4) <i>Father's illegal and immoral debts</i> (1299). | (10) <i>Liability to pay interest on debts</i> (1306). |
| (5) <i>Evidence of illegality or immorality</i> (1300-1301). | (11) <i>Position of assignee of the debt</i> (1307). |
| (6) <i>Burden of proof</i> (1300-1305). | (12) <i>Limitation for enforcing liability against son</i> (1308). |

1293. Analogous Law.—This section refers only to the personal debts of the co-parcener or the father or grandfather. It does not refer to the debts of the joint family whether incurred by the manager, or the co-parceners jointly.

Clause (1) is the outcome of the decided cases already mentioned (§§ 1245-1252) while clause (2) is supported both by the texts and the cases set out under S. 107.

1294. Co-parcener's debts.—The co-parcener is personally liable for his own debts. The fact that he is a co-parcener does not, of course, clothe him with any special immunity. His separate property is equally liable. It is only when

(1) *Mgsin v. Mg Po*, 4 Bur. L. T. 214; 27 I. C. 622.
 (2) *Simpson v. Bachman*, 13 A. L. J. 55.
 (3) *Ram Charan v. Van Haltaru*, 10 I. C. (A) 9.

the creditor is unable to recover out of his person and separate property that his right of recovery comes in conflict with the law of co-parcenary. It is no hardship to him that his rights are then limited since he must be presumed to know the law to which co-parcenary interests are subject. These were at one time the subject of much uncertainty. But the courts are now agreed what they are in each case. In a Mitakshara family subject to the courts in Calcutta, Patna, Allahabad, Lucknow and Lahore, a co-parcenary interest is untransferable. In the Central Provinces, Bombay and Madras it is transferable for value, but cannot be transferred by gift or devise. In Bengal which is subject to the Dayabhag law a co-parcener possesses unlimited right of transfer and devise.

1295. Leaving Bengal out of consideration for the present, the co-parcener in the rest of India possesses only a qualified right of transfer. In Bombay, Madras and the Central Provinces he can transfer for value. Consequently, he is competent to mortgage his undivided interest, and the mortgagee is entitled to foreclose or sell it on foot of his mortgage. But since neither foreclosure nor sale can place him in possession of any specific property, all that he can so obtain is the right, title and interest of his mortgagor, that is a right to enforce a partition. ⁽¹⁾ But until partition he has no greater rights than his mortgagor. He cannot claim profits, ⁽²⁾ or disturb the undivided status. ⁽³⁾ So far all the courts outside Bengal agree. But there the agreement ends. In Bombay, Madras and the Central Provinces, where ⁽⁴⁾ the co-parcener has the right of transfer for value, the mortgage creates a right *in rem*, and as such, the mortgagee has a priority over a money creditor who subsequently attaches the same interest in execution of his decree. But though the mortgagee acquires an interest *in rem* in his mortgagor's interest, he does not acquire an interest in any specific property, though as to this, he has an equity to that property which he can press upon the court in a suit for partition. ⁽⁵⁾

1296. But in Behar, the United Provinces, Oudh and the Punjab where a co-parcener is incompetent to transfer his co-parcenary interest, a mortgage by a co-parcener conveys no right *in rem*, and as such, it is indistinguishable from a simple money bond. The creditor's remedy in such cases is to sue on the mortgage or on the bond, and attach the debtor's interest in the joint property. He then acquires an equity to recover his debt out of his debtor's interest by bringing it to sale in execution of his decree. ⁽⁶⁾

But if the debtor dies before the creditor or succeeds in attaching his interest, then except in the case of the son and the grandson, his interest passes to his other relations by survivorship, and the creditor has no interest of the debtor left, from which he may recover his debt. ⁽⁷⁾ In one case the Calcutta High Court was, however, of opinion that the purchaser's equity is not lost even if his debtor dies after the institution of his suit but before attachment. ⁽⁸⁾

(1) *Soman Koeri v. Goshain*, (1917) Pat. 128 ; 38 I. C. 222 ; *Mohan Lal v. Tekchand*, 9 N. L. R. 18.

(2) *Maharaja of Bobbili v. Venkataraman julu*, 39 M. 265

(3) *Venkata v. Tulja Ram*, (1917) M. W. N. 30 ; 38 I. C. 270 ; *Maharaja of Bobbili v. Venkataramanjulu*, 39 M. 265.

(4) *Joy Narain v. Girish Chander*, 4 C. 437 P. C. ; *Chidambaram v. Gouri Nachiar*, 2 M. 88 P. C.

(5) *Nanjaya v. Shanmuga*, 38 M. 684 ; *Ramkishore v. Jainarayan*, 40 C. 966 P. C.

(6) *Balgobind v. Narain Lal*, 15 A. 399 (351) P. C.

(7) *Madho Prasad v. Mehrban* 18 C. 157 P. C. ; *Jagarnath v. Shama Pandey*, 18 I. C. (O) 819.

(8) *Banwari v. Sheo Sankar*, 18 C. W. N. 815 ; 1 I. C. 670 ; *Suraj Bansi v. Sheo Prasad*, 5 C. 148 P. C. ; *Vithal Das v. Nand Kishore*, 28 A. 106 ; *Udaram v. Ramn*, 11 B. H. C. R. 76.

1297. Father's debt.—The second clause states the rule of Hindu Law which creates a special liability on the son and the grand son to pay his father's and grandfather's personal debts not shown to have been incurred for illegal and immoral purposes. This liability is of course, independent of whether the father and the grandfather was or was not the manager of the family. It is a liability created by the texts and may be enforced even against the manager if he is his son. The question of necessity or benefit to the family as well as their antecedent character are all immaterial, provided only they were not illegal or immoral. (1) As previously stated (§ 1203) the textual liability which was unlimited is now limited to the property inherited by them from that ancestor. Neither the son nor the grandson is liable to discharge the debt out of his separate property. If he was joint with the father, his liability is limited to the extent of his co-parcenary interest which might be seized on the father's death, though it cannot be seized during his life-time, for he is not liable for the debt during his father's lifetime (except where the father has abandoned worldly affairs or is absent for a period raising a presumption of his death). (2) Nor is he liable after his death unless, he has inherited to him, in which case his liability is limited to the extent of the property which he has so inherited. As the son and the grandson are liable, they cannot object to the attachment of their ancestor's interest after his death. The only case in which they may object to the attachment is when they repudiate their liability on the ground that the debts were tainted with illegality or immorality. In any other case the creditor is at liberty to proceed not only against the father's interest but also against that of his son and grandson in the co-parcenary property. (3)

1298. But as has been pointed out before, the liability of the son to pay his father's debt is not co-extensive with the father's right to alien the joint property. (4) In other words, the fact that the creditor may seize the co-parcenary estate for the payment of the father's debts does not justify the father in alienating it for the same purpose.

The subject of alienation will be more fully discussed in the next chapter.

1299. But since a co-parcener is entitled to transfer his interest for value and such transfer by a Mitakshara co-parcener in the north, raises an equity in favour of the transferee, it follows that even if the debt of the father was illegal or immoral, the creditor is entitled to obtain satisfaction from the co-parcenary interest of the father. It may then be that where the character of the debt is determined after the sale, it will determine the quantum of interest available to the purchaser. (5) And similarly where the father executes a mortgage of his right and share in certain villages, the quantum of interest available to the mortgagee must depend upon the character of the debt. If it was such as bound the joint family, all the interest which they possess in the property would pass, but the father's interest would pass in any case. (6)

(1) *Muttayan v. Sangili*, 8 M. 970 O. A. 9 L. A. 128 following *Girdharee Lall v. Kantoo Lall* 11 B. L. R. 187 P.O.; *Suraj Bansi v. Sheo Pershad*, 5 O. 148 P.O. affirming *Ponnappa v. Pappuvayyengar*, 4 M. 1.

(2) 1 Dig 266; Sa. 107 108 Ev. A.; *Karuppan v. Veriyal* 4 M. H.C.R. 1; *Ponnappa v. Pappuvayyengar*, 4 M. 1 (18, 26); *Gurusami v. Chinna*, 6 M. 37 (46); *Nowrat v. Trimbuk*, Bom. S. R. 218.

(3) *Girdharee Lall v. Kantoo Lall*, 14 B. L. R. 187 P.O.; *Suraj Bansi v. Sheo Prasad*, 5 C. 148 P. C.; *Muttayan v. Sangili*, 6 M. 1 P. C.

(4) *Jogi Das v. Ganga Ram*, 21 C. W. N. 957 P. C.; 42 I. C. 791.

(5) *Sripat Singh v. Prodyot Kumar*, 44 C. 524 (533) P.C.; *Deodhari v. Bhup Narain*, 3 Pat. L. W. 1; 42 I. C. 456.

(6) *Deodhari v. Bhup Narain*, 3 Pat. L. W. 1; 42 I. C. 456.

1300. Evidence of illegality or immorality.—It is now settled by the

Privy Council that the question of burden of proof must
 (1) **Burden of proof.** depend upon whether the property has or has not passed out of the family by an alienation made by the father. If it has, then the son suing to dispossess the alienee must shew why he is not bound by the father's alienation. If it has not and the creditor sues for the recovery of money or the enforcement of a mortgage executed by the father, then it is upon him to shew what right he has to sue the son for repayment of the debt of the father. (1)

1301. It is also a well settled rule, that where it is alleged by the sons that a particular debt was contracted by the father for an illegal or immoral purpose, the burden lies upon them to show that it was contracted for such purpose. Such burden is not discharged by proof that the father lived an extravagant or immoral life. It must be proved that the debt in question had been contracted for such purpose. (2) A mere general evidence adduced to show that the father used to attend nautches, and that he occasionally gave nautches at his own expense is no proof of immorality at all, much less of any specific act of immorality upon which the son might claim freedom from the debt. (3) Where however, the court found that the father was generally of dissolute habits and had squandered a large fortune thereon and commenced to borrow large sums, though his ordinary income was ample to meet his usual requirements the court held that the creditor advancing him loans was at least bound to enquire into their purpose, and his failure to make any enquiry coupled with the general dissolute habits of the borrower might be sufficient ground for the court to hold that the loans were made for an immoral purpose. (4) This was the line of ratiocination adopted in another case in which it was argued "that although the creditor would have been justified in advancing the money if he had made such inquiry as was open to him and had satisfied himself as well as he could as to the existence of the necessity, he did not in this case make such inquiry; or rather perhaps, his words may be taken to mean that the result of any enquiry must have shown him quite clearly that the only necessity of Adit Sahai was his own improper and immoral way of life, which caused the expenditure of funds not derivable from his regular income." (5) But these remarks were made with reference to one who had acted as the family banker for a long time previous and must necessarily have been acquainted with the debtor's circumstances and way of life.

(1) *Girdharee Lall v. Kantoo Lall*, 14 B.L.R. 187 P.C.; *Suraj Bunsil v. Sheo Pershad*, 5 C. 148 P.C.; *Nanum v. Madun Mohun*, 13 C. 21 P.C.; *Bhagbut v. Girja Koer*, 15 C. 717 (724) P.C.

(2) *Girdharee Lall v. Kantoo Lall*, 14 B.L.R. 187 (198) P.C.; *Suraj Bunsil v. Sheo Pershad*, 5 C. 148 P.C.; *Bhagbut Pershad v. Girja Koer*, 15 C. 717 P.C.; *Sri Narain v. Raghubans*, 17 C.W.N. 124 P.C.; 17 I.C. 729; *Hanuman Singh v. Nanukchand*, 6 A. 198; *Sita Ram v. Zalim Singh*, 8 A. 281; *Kishan Lal v. Garurudhuwai*, 21 A. 298; *Maharaj Singh v. Balwant Singh*, 28 A. 508; *Sadashiv v. Dinhar*, 6 B. 520; *Chintamani Rao v. Kashinath*, 14 B. 320; *Vasudev v. Krishnaji*, 20 B. 534; *Dattatray v. Vishnu*, 36 B. 68; *Hazari Mal v. Abani Nath*, 17 C.L.J. 88 (47); *Subrammia v. Sadasiva*, 8 M. 75; *Sheopal Singh v. Basant Singh*, 12 O.C. 248; 3

I.C. 911; *Jawahir Singh v. Mohanlal*, 6 C.P. 1, R. 140; *Babusingh v. Beharilal*, 30 A. 156; *Chait Behari v. Gulzarimal*, 6 A.L.J. 183; *Bhagat Mal v. Abdul Karim*, 1 Pat. L.J. 86; 20 C.W.N. 797

(3) *Budree Lall v. Kantoo Lall* 23 W.R. 260 (262); *Sri Narain v. Lala Raghubans* 17 C.W.N. 124 P.C.; *Maharaj Singh v. Balwant Singh*, 21 A. 508 (521, 525); *Ram Nath v. Bulaqi* (1913) P.R. 50; *Shib Nath v. Alliance Bank* (1915) P.R. 3; *Kishen v. Bhagwan* (1915) P.R. 89; *Indar Narain v. Nanakchand* (1916) P.R. 58; *Jaswanti v. Tej Narain* (1918) P.R. 10

(4) *Moharaj Singh v. Balwant Singh* 28 A. 508 (531); *Jaswanti v. Tej Narain*, (1918) P.R. 10.

(5) *Suraj Bunsil v. Sheo Pershad* 5 C. 148 (163, 162, 168) P.C.; *Narayan v. Jagannath*, 4 C.P.L.R. 29.

1302. Father's imprudent debts.—According to the text, the son is not liable to pay his father's "*avyavharic*" debt. What is then such a debt? The term has been explained to mean "unusual" or "those not sanctioned by usage or current custom."

Explanation.

Mr. Colebrooke translates the word to mean "as repugnant to good morals" and it is said that the word would include such debts which are not supportable as valid by legal arguments and on which no right could be established in the creditor's favour in a court of justice, (1) in short, such debts as the court considers unreasonable or improper. Now a debt may be so, without being illegal or immoral. Is the son then not bound to pay it? The question would seem to be one of degree. For instance, while the son is held to be exempt from making good the father's misappropriations, he is held liable to make good the money which the father, as a member of a temple committee had used in a litigation of his own. (2) In one case the court made the son pay for the father's debt incurred in betting over a wrestling match (3) but it is submitted, that this was clearly "gambling" within the express words of the text. An agreement may be so improvident as to become illegal by reason of its terms. Such was the father's agreement to pay to his father-in-law, who was his creditor to some extent not ascertained, a sum of Rs. 360 annually during the creditor's life-time and Rs. 1,008 to him perpetually for the use of a temple. The father-in-law assigned his claim to the plaintiff who sued for recovery of the annual dues but the court threw out the claim holding it void because it created a perpetual liability on the debtor. (4)

1303. Debt partially valid.—Where the father's debt is partially valid the son is only liable to that extent (5) And it may be that where the co-parceners are sued, the sons may be saddled with a greater liability than the other relations because of their filial obligation.

1304. Father's power over ancestral moveables.—Though the Mitakshara recognizes the father's powers to dispose of ancestral moveables "for indispensable acts of duty, and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth," (6) such power is necessarily limited and subject to what is now designated legal necessity, (7) apart from which he has no greater power over moveable property than he possesses over immoveable property; though as a matter of practice the court will not so narrowly canvass the purpose if the alienation is made only out of the income of joint property as when it is made out of the corpus. (8) But this is scarcely an exception to the rule, since the power to make appropriate gifts is an incident of ordinary management and is not exclusively possessed by the father. The rule then remains that the father has no greater power of disposal over ancestral moveables than he has over immoveables, (9) though the contrary was at one time maintained by the text writers cited with apparent approval by the Privy Council (10) It was so held by a Full Bench of the Madras

(1) *Venugopala v. Ramanadhan*, 87 M 458 (460).

(2) *Ib.*

(3) *Jai Ram v. Sheo Shanker*, 9 I. C. (O) 406 (409).

(4) *Bal Krishna v. Jmardhan*, 6 Bom. L. R. 642.

(5) *Sasi Bhushun v. Tara Lal*, 22 C. 494 (496); *Sheopal Singh v. Basant Singh*, 22 O. C. 248; 8 I. C. 911.

(6) *Mit* 1-1-27.

(7) *Bachoo v. Mankorebai*, 29 B. 51 (61, 62) affirmed O. A. 81 B. 373 P. C.

(8) *Ib.*

(9) *Raja Ram v. Tiwary*, 8 W. R. 15 (20). *Sudanand v. Soorjo* 11 W. R. 436; *Baba v. Timma*, 7 M. 357 F. B.; *Shib Dayee v. Dooraga Perishad* 4 N. W. P. H. C. R. 63 (70); *Nand Ram v. Mangal Sen* 31 A. 359.

(10) 2 Str. H. L. 436, 441; 1 W. Maon. 3 cited in *Gopee Krist v. Gungaparsaud* 6 M. I. A. 63 (76 77) In *Sudanand v. Bonomalee* 1 Marsh 820 the father was held to possess unrestricted power of alienation of ancestral moveables.

High Court who summed up the result of their examination of the textual passage as follows : "The effect of the several passages taken together is that, while the ownership of the son is recognized in all property, whether the self-acquired property of his father or ancestral, the father has power to dispose at his pleasure, of his self-acquired moveables ; and with a consent, which his son must give, of his self-acquired immovables, he has the power to dispose of ancestral moveables for purposes inculcated by sacred texts, and of all property for indispensable acts of duty ; but the son may interdict him if he applies ancestral wealth, whether moveable or immoveable, to purposes other than those sanctioned." (1)

1305. Burden of proof.—Where the creditor proves that the debt was incurred by the father the son is *prima facie* liable by reason of his pious obligation to discharge his father's debts and it is then upon him to prove that the debt was such for which he could not be made legally liable. (2) In this respect a distinction is to be made between a suit to recover the father's debts and one to enforce a mortgage or any other transfer effected by him. The two cases stand on quite a different footing, since in an ordinary money suit instituted by the creditor to recover his debt advanced to the father, the creditor may rest his case on the pious obligation of the son. But the case is different where the father has charged or alienated the joint estate for a debt of his own. In such a case, as already seen, the question of burden of proof depends upon whether the property has or has not passed out of the family. If it has, then he who sues to recover it must impeach the transfer, otherwise he cannot recover. If it is still in the family and the creditor sues to enforce the charge it is upon him to show that the debt was such as entitled the father to charge the interest of his son with his own. (3)

Liability to pay interest.

1306. The liability to pay a debt involves a liability to pay interest. (4) In the case of the son the liability is undoubted, but in the case of the grandson, the text provides

as follows :—

Bṛihaspati :—The father's debt on being proved must be paid by the sons as if it were their own ; the grandfather's debt must be paid by his son's son without interest ; but the son of grandson need not pay it at all. (5)

It has been held that this provision does not affect secured debts which are payable out of the property. (6) And the rule was no doubt literally enforced in a case decided in 1865 in which the grandson was held liable to pay his grandfather's debt without interest, independently of any inherited assets (7) but this unqualified liability was removed by a local act passed in the following year. (8)

In another case a decree for mesne profits obtained against the father and the grandfather was sought to be executed against the grandson who claimed exemption from payment of interest on the strength of Hindu Law, but the

(1) *Baba v. Timma*, 7 M. 357 (362) F. B.
(2) *Ramasami v. Ulaganatha*, 22 M. 49 F.
B. Nathani v. Baijnath, (1917) Pat. L. J.
212 ; 39 I. C. 352.

(3) *Jogi Das v. Ganga Ram*, 21 C. W. N.
957 P. C. ; 42 I. C. 791 P. C.

(4) *Lachman v. Khunnulal*, 19 A. 26 ;
Saundhanappa v. Shivbasava 31 B. 354.

(5) *Bṛihaspati* XI-49 ; 38 S. B. E. 328,

329.

(6) *Lachman v. Khunnulal*, 19 A. 26 F.
B. 2 Gour's Law of Transfer (4th Ed.) §§
2208, 1426.

(7) *Naraincharao v. Antai*, 2 B. H. C.
R. 61.

(8) Hindu Heirs' Relief Act Bom Act
VII of 1866 (printed in 2 B. H. C. R. (App)
418)

court appears to have conceded the rule, though it held the grandson liable on the ground that the decree he had to satisfy was passed for the wrongful act of both. (1)

It may perhaps be added that the Hindu Law prescribes a rule of liability independent of the assets, and now that it has been limited to assets, there is no reason why a further limitation detached from the context should be sanctioned to limit the liability of the grandson.

1307. Position of the assignee.—Assuming that the father's debt was irrecoverable out of the son by reason of its illegality or immorality, the next question that arises is what is the position of the assignee of the debt or of the decree passed against the father. Has he any equity superior to that of the son? The question was considered by the Privy Council who have held that the assignee of the debt or of the money decree is bound to enquire as to the character of the father's liability and that he must be deemed to have had notice of the illegality or immorality of the debt if he could have ascertained it by enquiry. (2) Where however the father mortgages the joint property for such debt whereupon a decree is passed, the purchaser stands upon surer ground, for he need not then enquire that the property sold to him was liable to satisfy the decree. But it is still open to the son to show that he had notice. (3) In other words, the question about the equity between the son and the father's assignee depends not so much upon the nature of the transaction, as upon his *bona fides* and notice. If the assignee is an assignee of the mere debt or decree and no property has passed out of the family to the purchaser, then the assignee takes subject to the same equity to which his assignor was subject. But if on the other hand, in pursuance of such a decree or otherwise by contract or sale, the joint property had gone out of the family to a purchaser, then the son cannot recover it from him by mere proof that the consideration for the transfer was tainted with illegality or immorality unless he further shews that the purchaser had taken it in good faith and with notice. (4)

1308. Limitation.—The limitation for a suit against the son for recovery of an unsecured debt of his father is six years from the date of the accrual of cause of action against the son, which was at one time held to be the father's death, (5) but it has been since pointed out that the cause of action against the son is not different from that against the father, and that the cause of action against one is consequently the cause of action against the other. (6) This may be the death of the father, but it is not invariably so where for instance, the father as agent of his employer, withdrew money from the chest of his principal from time to time and placed it in the chest of his own estate, doing so up to the day of his death and there was no adjustment of accounts. In a suit for the sums so withdrawn by the principal against the son and grandson, limitation was held to start from the death of the father and the period of limitation

(1) *Ram Deo v. Gopi*, 16 C. W. N. 383, 18 I. C. 349.

(2) *Muddun Thakur v. Kantoo Lall*, 30 C. 539 P. C.; *Girdharee Lall v. Kantoo Lall*, 14 B. L. R. 187 P. C.; *Suraj Bansi v. Sheo Pershad*, 5 C. 148 P. C. explained in *Mahabir v. Basdeo* 6 A. 284 (289); *Maharaj Singh v. Balwant Singh*, 23 A. 508 (519, 528, 529).

(3) *Jamrukh v. Raghunandan* (1861) B. S. D. A. 218; *Maharaj Singh v. Balwant Singh* 28 A. 508 (529).

(4) *Mchabir v. Basudeo*, 6 A. 284 (240,

241); *Maharaj Singh v. Balwant Singh*, 28 A. 508 (529).

(5) *Narsingh v. Lalji*, 23 A. 206; *Maharaj Singh v. Balwant Singh* 28 A. 508 (616) (affirmed on a different point *O. A. Balwant Singh v. Clancy* 34 A. 296 P. C.) following *Natasayyan v. Ponnusami* 16 M. 99; *Ramayya v. Venkataratnam* 17 M. 122.

(6) *Ramasami v. Ulaganatha* 22 M. 49 F. B.; *Mallesam v. Jugala*, 23 M. 292 (297) F. B.

was held to be 6 years as prescribed in Art. 120 of the Limitation Act. (1) The same view was taken by a Full Bench of the Calcutta High Court who had to decide the question whether a suit against the son on a mortgage effected by the father for a debt not binding on the family was governed by Art. 120 or Art. 132. It was held that as the mortgage was not binding on the son who was however only liable because of his pious obligation, the suit against him was subject to Art. 120 which allowed the creditor six years from the date when the cause of action accrues. (2) Now this may accrue either (i)—when the debt incurred by the father matures, (ii)—when the creditor after exhausting his remedies against the father, finds that the debt or a portion thereof is still unsatisfied, or (iii)—the date of the death of the father. The Full Bench refused to decide the *terminus a quo* but in an earlier case limitation was held to run from the first of these dates. (3)

117. (1) The son's liability to pay his father's debt is limited to the assets inherited by him from his father.

(2) His separate property is exempt from payment of such debt.

(3) The son in this section includes a grandson.

Synopsis.

- (1) *Limits of son's liability* (1309). *assets* (1310).
 (2) *Liability confined to inherited*

1309. Analogous Law.—It is now settled that the son's liability to pay his father's debt is limited to the estate inherited by him from his father or to his succeeding to the joint estate in which he and his father were co-parceners. It is however, immaterial whether the estate inherited from his father was the latter's ancestral or self-acquired property. As observed by the Privy Council, "the freedom of the son from the obligation to discharge the father's debt has, respect not to the nature of the estate, whether ancestral or acquired, by the creator of the debt." (4) Consequently, unless he can show that the debt for which he is made liable was incurred by the father for illegal or immoral purposes, he cannot escape liability from payment to the extent of the joint property he has received by survivorship, or of any other property which he may have inherited from his father.

The same liability and to the same extent extends to the grandson.

1310. Inherited assets.—The inherited assets in the hands of the son which is the measure of the latter's liability means all the joint property including the son's interest therein (5) and not merely the father's interest or his separate or self-acquired property.

(1) *Girraj Singh v. Raghubir*, 9 I. A. 429 following *Chand Mai v. Kalyan Mal*, (1886) P.R. 96; *Kalee Kishen v. Juggat Tara*, 2 B L R. 189; *Brindaban v. Jamna*, 25 A 55.

(2) *Brijnandan v. Bidya Prasad*, 42 C 1068 (1098) F B.

(3) *Sarja Prasad v. Golab Chand*, 27 C. 762.

(4) *Hunooman Persaud v. Mt. Boboee*,

6 M. I. A. 898 (421)

(5) *Ponnappa v. Pappuvayyanganar*, 4 M. I.; *Sheo Prashad v. Jung Bahadur*, 9 C. 189; the same rule applies to impartible estates the heir being liable to pay the previous holder's debts. *Muttayan v. Sangili* L. R. 9 I. A. 128 reversing 8 M. 670; *Sivagiri v. Tiruvengada*, 7 M. 399.

Not liable after separation.

118. The son is not liable to pay his father's debts incurred after his separation.

1311. Analogous Law.—On separation the son ceases to be a member of the joint family, and as his liability depends upon receipt of assets after the debt, it follows that the son who has already received his heritage can no longer be compelled to discharge his pious obligation in respect of debts incurred by the father after his separation. ⁽¹⁾ He is however liable for debts incurred before partition. ⁽²⁾

The son will, of course, be liable if the partition was unreal and made with intent to defeat the father's creditors. ⁽³⁾

When the son is personally liable

119. (1) The father's debt is not a charge upon the inheritance.

(2) But as heir, the son becomes personally liable to pay the father's debt if he has alienated the inherited property, otherwise than in due course of administration, with the intention of avoiding his liability.

Synopsis.

- (1) *Father's debt not a charge on the inheritance* (1312). *death* (1313).
 (2) *Pious obligation of son on father's* (3) *Cause of action against the son when arises* (1314-1315).

1312. Analogous Law.—The principle underlying this section is obvious and has been enacted as S. 2 of the Bombay Hindu Heirs Relief Act, 1866 ⁽⁴⁾ and S. 53 of the Code of Civil Procedure ⁽⁵⁾ and is enunciated in several cases. ⁽⁶⁾

The creditor's remedy against the son and heir is supplementary to that he may have against his transferee. ⁽⁷⁾

The son or heir is only personally liable if he is guilty of fraud. If the heir has in due course of administration disposed of the father's property, his liability is at an end. Such may be the case where the debts exceeded the assets which are utilized to discharge some of the father's liabilities.

1313. Sons liable on father's death.—The son's liability arising out of his pious obligation to pay his father's debts only arises on his father's death. This is now settled by the Privy Council who say: "While the father, however, remains in life, the attempt to affect the son's and grandson's shares of the property in respect merely of their pious obligation to pay off their father's debts and not in respect of the debt having been truly incurred for the interest of the estate itself, must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged". ⁽⁸⁾

(1) *Kulada Prasad v. Haripada*, 40 C. 407.

(2) *Ramachandra v. Kamdayya* 24 M. 555;
Kameswarama v. Venkata, 83 M. 1120.

(3) *Krishnasami v. Ramasami*, 22 M. 519;
 1 Gour's Law of Transfer (4th Ed) §§ 882-888.

(4) Bom. Act, VII of 1866, printed n 2 B. H. C. R. (App) 418.

(5) Act V of 1908.

(6) *Zuburdast v. Indurmun Agra* (F.B.) 55 (1908 Reprint) 71; *Unnopooram v. Gunga* 2 W. R. 296; *Greender v. Mackintosh* 4 C. 897;

Jamigatram v. Parbhudas, 6 B. H. C. R. 116;
Gnanabhai v. Srinivasa 4 M. H. C. R. 84

(7) S. 53 Transfer of Property Act.

(8) *Sahu Ram v. Bhup Singh*, 39 A. 487 (444) P. C.; *Desai v. Narayanaswami*, 9 V. L. T. 449; 9 I. C. 1028; *Jai Narain v. Bajrang*, 5 O. L. J. 691; 48 I. C. 914; contra *Ramasami v. Ulaganatha*, 22 M. 49 F. B. *Chidambara v. Koothaperumal*, 27 M. 926; *Khalilall v. Gobind*, 20 C. 828 (888); *Badri Prasad v. Madanlal*, 15 A. 75 F. B.; *Govind v. Sakharam* 28 B. 883 overruled.

1314. But though the liability of the son arises on the father's death the cause of action against the son is not independent of the father and a decree against the latter may be executed against the former out of the property which he has inherited from him or his grandfather, it being open to him to raise any objection or defence in such proceedings which he might have raised in a separate suit. ⁽¹⁾ This procedure is now sanctioned by the Code of 1908, prior to which the courts were divided on the competency of the creditor to execute against the son a money decree obtained against the father if he be dead before the issue of execution. In the view of the Allahabad ⁽²⁾ and Madras ⁽³⁾ High Courts, the ancestral property in the hands of the son or the grandson could not be seized in execution of a decree against the father even to the extent of the father's interest therein if the father died before the attachment ⁽⁴⁾ and the only remedy of the decree-holder was to institute a regular suit against the son or grandson. According to some cases of the Calcutta ⁽⁵⁾ and Bombay ⁽⁶⁾ courts however, there was no necessity for a regular suit even if the father died after the decree but before the attachment, and this view has now been confirmed even by the legislature. ⁽⁷⁾

1315. It is immaterial whether the decree against the father or the manager is a money or a mortgage decree, since a mortgage decree is executable against a successor of the judgment debtor even when he holds the property by survivorship under the Mitakshara law, without bringing a suit for declaration that the property in his hands is liable to be sold in execution of the mortgage decree. It is open to the successor to take the very defences in execution proceedings which he might take in a separate suit. ⁽⁸⁾

But the same rule cannot be extended to other co-parceners who succeed to the judgment debtor's estate by survivorship, ⁽⁹⁾ nor even to the sons where the decree is limited to the personal assets of the father. ⁽¹⁰⁾

Heir's liability to pay predecessor's debts.

120. (1) The debts of a person must be paid by the heir who inherits his estate to the extent of his inheritance.

(2) The heir to an impartible estate is liable to pay all the lawful debts of his predecessor out of the estate.

(3) The widow is liable to pay her husband's debts which she may pay even though barred by time.

(4) The rule stated in clause (1) applies equally to donees to the extent provided in Ss. 127 and 128 of the Transfer of Property Act.

(1) Ss. 47 (1) and 58 C. P. C.

(2) *Ravi Verma v. Narayana* 5 M. 223; *Venkatarama v. Senthil* 13 M. 265; *Thiruvengkata v. Mulhu Aiyar*, 14 M. L. T. 431.

(3) *Jayamath v. Sita Ram* 11 A. 302; *Lachmi Narain v. Kunji Lal*, 16 A. 449; *Dharamsingh v. Angan Singh*, 21 A. 30.

(4) *Lachmi Narain v. Kunji Lal*, 16 A. 449; *Sivagiri v. Tiruvengadu* 7 M. 389; *Peary Lal v. Chandi Charan*, 11 C. W. N. 163.

(5) *Chandra v. Selakchand* 30 C. 642 F. B. *Amarchandra v. Sebak Chand*, 34

C. 642 contra *Jugalal v. Audh Bahari*, 6 C. W. N. 223; *Parmeshri v. Deti*, 6 O. O. 101.

(6) B. 58. C. P. C.

(7) *Umed v. Goman*, 20 B. 385; *Sakarial v. Parvatibai*, 26 B. 288.

(8) *Chandra v. Sebagchand*, 30 C. 642 F. B. *Chandra Prasad v. Sham Koer*, 38 C. 676; *Karamsingh v. Bhupsingh*, 27 A. 16 F. B. *Kuriyoti v. Mayan* 7 M. 255; *Bhagavatulu v. Yelaswarpu*, 9 M. L. T. 481; 9 I. C. 648.

(9) *Javendra Nath v. Nebaloo*, 32 A. 404. (10) *Kalyan v. Bhawani*, 9 I. C. 631.

Synopsis.

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|---|---|
| (1) <i>Liability of heir to pay debts of predecessor</i> (1316) | (4) <i>Liability of other heirs</i> (1320). |
| (2) <i>Liability of holder of impartible estate</i> (1317). | (5) <i>Liability of donees for debts of donor</i> (1321). |
| (3) <i>Liability of widow for debts of husband</i> (1318). | |

1316. Analogous Law.—It is a well known principle of equity that he who receives the benefit must also bear the burden. And under Hindu Law the heir is expressly made liable for the debts of his predecessor (1) as declared in the following texts:—

Narad:—17. A sonless widow, and one who has been enjoined by her dying husband to pay his debts must pay it—or (it must be paid) by him who inherits the estate (For) the liability for the debts goes together with the right of succession (2)

Vishnu:—A widowed woman who has no son is bound to pay the debt of her husband, if he has commissioned her to do so on his deathbed, or if his property has escheated to her. If she is unfit to take the estate, her husband's debt must be repaid by those who have inherited the estate. The property and the liabilities go together (3)

Yajnavalkya.—He who has received the estate or the wife of the deceased should be made to pay his debts, or failing either, the son who has not received an inheritance. In the case of a sonless deceased those who take the heritage should be made to pay (4)

1317. Impartible estate.—It is now settled that an impartible estate cannot be the subject of co-parcenary rights of succession by survivorship. (5) The holder for the time being is its absolute owner, and in this respect he occupies the same position in regard to his estate as the Dayabhag father does in regard to his co-parcenary estate. On the death of both, the heir becomes liable to pay all his debts irrespective of their origin and purpose if they are within time. (6) The successor of an impartible holder is his heir, and as such, he takes the estate subject to his pecuniary obligations. Between him and his successor there is the privity of estate, and as such the heir is liable to pay the holder's debts which could have been recovered out of his estate if he were alive. (7) As between the sons of a Zemindar, his impartible estate and his other property not being *regalia*, which is partible, should contribute in proportion to their value to the discharge of his debt. (8)

1318. Husband's debts.—The widow is under the same pious obligation to pay her husband's debts as the son is to pay those of his father. But her liability is even greater since she is bound to pay his debts whether immoral or illegal, if the creditor was not an accessory, and she is entitled though not bound to pay them even if they be barred by time. (9) As in the case of the son so in her case the obligation arises only on the death of her husband. (10) Any payment made by her during his life-time would be a voluntary payment and will not support an alienation of her husband's estate which she inherits on his death. (11) The

(1) *Karimuddin v. Gobind*, 31 A. 497 (506) P. C.

(2) *Narad* 1-17 : 33 S.B.E. 46, 47

(3) *Vishnu* VI. 29

(4) *Yaj* II-51 (Mandlik) p. 206.

(5) *Rama Rao v. Rajah of Pittapur*, 41 M. 778 P. C. approving *Bachoo v. Monkore Bai*, 29 B. 51 (53).

(6) *Itam Das v. Vrita Behari*, 6 C. W. N. 879; *Shyamal v. Bijay Narain*, (1917) Pat.

121 : *Kalappa v. Akkappa* 8 M. L. T. 297 ; contra *Jugalal v. Audh Behari*, 6 C. W. N. 223; *Kali Krishna v. Raghunath*, 31 C. 224 proceed on the principle of survivorship which is no longer correct.

(7) *Kalappa v. Akkappa* 8 M. L. T. 297.

(8) *Dingarasami v. Babatgasami* 24 M. 613.

(9) *Bhagwat v. Miratti*, 39 B. 118.

(10) *Himmat v. Bhawan*, 30 A. 352.

(11) *Himmat v. Bhawan*, 30 A. 352.

widow inherits her husband's estate after payment of her husband's debts. All debts which would bind the husband personally are necessarily binding upon the widow in respect of all the assets which have come to her hands as his legal representative. A debt incurred by a person as surety is binding as a family-debt upon his undivided son, and *a fortiori* his wife cannot impugn such debt. Where therefore, in execution of a decree obtained by the creditor against his debtor in respect of an obligation incurred by the latter as surety, the decree-holder attached a house and brought it himself in court auction and applied to be placed in possession and the debtor's representative, the widow claimed, that she had a right of residence and that she should not be ejected, it was held that the widow had no right to residence in priority to the right of her husband's creditors to be paid out of assets and to realize their dues out of the estate if not paid, and that the surety debt was a family-debt which would bind the widow and defeat her right of maintenance including her right of residence. (1) The husband's debts recoverable from his widow may be set off against any debt due to her. (2)

1319. The trade debts properly incurred by a Hindu widow on the credit of the assets of the business to which she has succeeded as the heiress of her deceased husband are recoverable after her death out of the assets of the business as against the reversioners who succeed thereto, even in the absence of a specific charge. (3)

1320. Other heirs.—A Hindu inheriting property from his mother is liable for debts to the extent of the property inherited. (4)

1321. Liability of donees.—The principle that the heir is liable to pay his predecessor's debts is recognized in S. 126 of the Transfer of Property Act which enacts as follows :—

S. 128. Subject to the provisions of S. 127 where a gift consists of the donor's whole property the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein.

S. 127 enacts that where the gift is burdened by an obligation the donee can take nothing by the gift unless he accepts it fully. Where however, a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract and accepting property burdened by an obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given he becomes so bound.

But this does not mean that the gift is not complete the moment it is accepted. All it means is that the minor on attaining majority, is privileged to disaffirm his acceptance, if he finds it too onerous. Consequently where the minor dies before attaining his majority the gift remains, though his personal privilege is gone. (5) These provisions do not of their own force apply to Hindus, but they enact an equitable rule which is entirely consonant with Hindu Law. So where the testator devised the whole of his property to his

(1) *Jayanti v. Mangamma*, 27 M. 41.
Bhagwanti v. Macdonald & Co. (1909) P. W. R. 152.

(2) *Grish Chunder v. Daben*, 1 W. R. (Mis) 24.

(3) *Sakrabhai v. Mangonlal*, 26 B. 206.

(4) *Bishen Dass v. Sirdar Dial Singh* (1873) P. R. 9.

(5) *Subramania v. Sitha*, 20 M. 147.

daughters-in-law, whose husbands, his sons, had predeceased him, the testator's creditors sued them for recovery of his debt and the donees pleaded that they were not liable as they were not the testator's heirs, but the court held them liable as the testator's legal representatives to the extent of the value of the testator's estate. (1)

121. Where the manager or the heir contracts a debt or transfers property for consideration, alleging the existence of justifying necessity or benefit, it will as between the creditor or the transferee on the one part, and the manager or the heir and other persons (if any) affected by the debt or the transfer, on the other part, be deemed to have existed, if the creditor or transferee as the case may be, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

The same rule extends to the father contracting a debt or transferring property in consideration of an antecedent debt.

Illustrations

(a) *A*, the manager, represents to *B* that the joint family property was proclaimed for sale for non-payment of revenue. *B* enquires and learns that it is so. He advances money to *A*. *B* sues *A* and the other members for his debt when it appeared that *A* had deceived *B*. *B*, however, shows that he had made independent enquiries which corroborated *A*'s statement. *B* may recover on the basis of *A*'s statement which binds the family.

(b) *A*, a Hindu widow, whose husband has left collateral heirs alleging that the property held by her as such is insufficient for her maintenance, agrees for purposes neither religious nor charitable, to sell a field, part of such property, to *B*. *B* satisfies himself by reasonable enquiry that the income of the property is insufficient for *A*'s maintenance and that the sale of the field is necessary, and, acting in good faith, buys the field from *A*. As between *B* on the one part, *A* and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

Synopsis.

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| (1) <i>Bona fide transactions with manager protected</i> (1322). | (6) <i>Value of recitals</i> (1328). |
| (2) <i>Title of creditor or alienee</i> (1323). | (7) <i>Value of attestation</i> (1329). |
| (3) <i>Necessity for enquiry</i> (1324). | (8) <i>Quantum of evidence necessary to support justifying necessity</i> (1330). |
| (4) <i>Nature and extent of enquiry</i> (1325-1326). | (9) <i>Excessive alienations</i> (1331). |
| (5) <i>Notice of facts, what constitutes</i> | |

1322. Analogous Law.—This section is adapted from S. 38 of the Transfer of Property Act. Illustration (b) is the illustration appended to that section, which however, by reason of S. 2, last clause, does not of its own force apply to Hindus, though it enacts a rule which the Privy Council enunciated as a part of Hindu Law in the following words:—"The power of the manager of an infant heir to charge an estate not his own, is under the Hindu Law a limited and qualified power. It can only be exercised rightly in case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the

benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case unless he is shown to have acted *mala fide* will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge for a proper debt cannot be viewed as improvident management: the purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution but is himself deceived." (1)

1323. Creditor's or alienee's title.—The creditor or alienee dealing with the manager of a joint family knows that he is dealing with its representative whose authority to charge the joint property is limited. Consequently, if he advances money without enquiry into the purpose of the loan he takes the risk. If his loan was in fact advanced for a purpose binding on the joint family, then he of course, runs no risk. But if, on the other hand, the manager had falsely pledged the credit of the family, then the creditor can recover nothing beyond what represents the manager's interest in the joint property, for the manager being the immediate party to the contract, cannot repudiate his own liability. For the same reason, where he chooses to deal with all the members of the joint family, then they are all bound and the question of enquiry is immaterial.

1324. Inquiry is only necessary when the creditor deals with the manager as such, and he is anxious to safeguard his interests against the manager's misrepresentation as to the necessity for the loan. It may be that the object of the loan is legal but it does not thence follow that the loan itself was necessary. For it is not thereby necessary that the loan should be for a lawful purpose. It is perhaps even more necessary that it should be necessary. This was emphasized by the Privy Council in the passage already cited from the leading case, in which they observed: "The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded". (2) In other words, the manager is not entitled to borrow money for a lawful purpose, but only if it is necessary. In what circumstances it is so necessary must depend upon the circumstances of each case. The income received from the estate, its normal expenditure and

(1) *Hunooman Persaud v. Mt. Babooee*, 6 M. I. A. 398 (428, 424.)

(2) *Hunooman Persaud v. Mt. Babooee*, 6 M. I. A. 398 (428).

the savings made are all matters which a prudent lender is bound to enquire about. If he does so enquire and finds that the manager has been mismanaging the estate, and that with better management the loan might have been wholly unnecessary, he is on that account to refuse the loan, even if it is justified by the pressure of the moment. It will thus be seen that as a measure of caution it is always prudent to enquire, and the lender who omits this precaution, hazards his money which he may never see again.

1325. Nature and extent of inquiry.—Assuming however, that the lender does inquire, the next question that arises is what should be the nature and extent of the inquiry. It is obvious that, such inquiry must be made from one who is in a position to know. It is equally obvious that it must be made from an independent source, and not from one who is interested in upholding the manager. The question must of course, depend upon the facts of each case, the nature of the necessity, and the avenues of information available to the lender. He is not bound to sit in a star chamber but at the same time he owes a duty to himself and to his absent obligors whose estate he seeks to bind, that he should conduct his inquiry in a prudent and business-like way.

1326. Where the joint family comprises adult members, common prudence dictates that he should consult them all or at least such as are accessible to him. If some of them be minors, their guardians should be consulted. If the borrower is the widow, her reversioners are the persons to inquire from; if the father, the sons should be consulted. In short, the lender must take pains to consult those whose interest would be affected by his act. Where all co-parceners advise the loan the creditor need not do more. His difficulty only arises when any or some of them are minors. He has then to be more circumspect. He must inquire into the purpose of the loan. If, for instance, any amount is due from the joint family for purposes mentioned in S. 96 or 97, or from the father for his antecedent loan, it is his duty to inquire from those best qualified to supply him with correct information. (1)

1327. In this connection it is well to note that the lender is deemed to have notice of a fact not only when he actually knows that fact, but also "when but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to, or obtained by his agent under circumstances mentioned in the Indian Contract Act, 1878, S. 229." (2)

1328. Value of recitals.—The results of the inquiry are often recited in the lender's security. The question arises what evidentiary value have these recitals. In the leading Privy Council case it was said: "that the representations by the manager accompanying the loan as part of the *res gestæ* and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir." (3) But though admissible, they are not of themselves without other independent evidence, when available, sufficient to constitute proof of their truth, though when other evidence has, through lapse of time, become unobtainable, then they would be sufficient proof of the fact they state. The true value of recitals has been explained by the Privy Council with reference to a deed executed by a widow, to be as follows: "In general terms the facts recited would

(1) See the subject discussed in 1 Gour's Law of Transfer (4th Ed) §§ 692, 696.

(2) S. 8 Transfer of Property Act, and *ib.*

Trusts Act.

(3) *Hunooman Persaud v Mt. Babooee*, 6 M. I. A. 393 (419, 420).

establish the necessity alleged, but it is well established that such recitals cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. Indeed, it is obvious that if such proof were permitted, the rights of reversioners could always be defeated by the insertion of carefully prepared recitals. Under ordinary circumstances and apart from statute, recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them. But in such a case as the present their Lordships do not think that that these recitals can be disregarded, nor, on the other hand, can any fixed and inflexible rule be laid down as to the proper weight which they are entitled to receive. If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts. But as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case assumes greater importance, and cannot legally be set aside; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction, perfectly honest and legitimate when it took place, would ultimately be incapable of justification merely owing to the passage of time."⁽¹⁾

And the contrary might be proved by calling in the scribe or other attesting witnesses.

1329. Similarly, it is usual in this country to obtain the attestation of persons whom the obligee intends to bind by the deed.

Attestation But a different rule has come into vogue in accordance with the practice of the English courts, where an attesting witness is not presumed to know anything of the contents of the deed and is not consequently estopped by its recitals.⁽²⁾ This is a natural presumption due to the habits of the people where the attesting witnesses ordinarily, know nothing of the deed. But the very contrary should be presumed here when no one outside the Anglicized Indians, would ever dream of signing a deed without knowing all about it. In fact no document is ever penned in this country which is not discussed by the scribe, the attesting witnesses and the junto of quidnuncs who surround such transactions. The presumption of law here should certainly be that the attesting witnesses knew its contents. But as it is, the contrary has been laid down by English Judges who have presumed their own social habits as equally applicable to the people of India. However, it is only a presumption.

(1) *Banga Chandra v. Jagat Kishore*, 44 C. 186 (195, 196) P. C.

(2) *Huwoman Persaud v. Mt. Babooee*, 6

M. I. A. 898 (419, 420.) *Harikishen v. Kashi Pershad*, 42 C. 876 (886, 887) P. C.; *Banga Chandra v. Jagat Kishore*, 44 C. 186 (199) P. C.

1330. The quantum of evidence necessary to support the justifying necessity must of course vary according to the circumstances of each case. As the Privy Council observed: "It is obvious, however, that it might be unreasonable to require such proof from one not an original party, after a lapse of time and enjoyment and apparent acquiescence; consequently, if, as is the case here, as to part of the charge, it be created by substitution of a new security for an older one, where the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the appellant would be reasonable." (1)

1331. Excessive alienation.—It has already been stated, and is so held by the Privy Council that, granted the legal necessity for a loan, it is more advantageous to borrow money on a mortgage than on parol, since money on mortgage being better secured ordinarily carries a lower rate of interest. Again even the raising of money on a mortgage might be an imprudent act if there is no prospect of its repayment. In that case a sale might be justified, though since sale is the permanent alienation of the joint property, only so much of it should be sold as would suffice to meet the necessity. But this rule does not apply where the excess is small or where the money really required cannot otherwise be raised. (2)

122. Where a transfer by the manager is found to be void its effect upon the interest of the transferor is subject to the following rules:—

(1) Where the transfer was voluntarily made by the manager subject to the Mitakshara law as applied in Behar, the United Provinces, Oudh and the Punjab, it is wholly void, subject however to such restitution and compensation to the transferee as the requirements of equity may demand.

(2) Where however, in the provinces last mentioned, the transfer is involuntary, and in all other provinces whether it is voluntary or otherwise, on the transfer being found void against the joint family, the transferee is entitled to obtain his transferor's interest therein.

(3) Without prejudice to the generality of the rule stated in clause 1, due regard will be had to the following facts:—

(1) The representation made by the transferor as to the necessity of the sale.

(2) The enquiries, if any, made by the purchaser into the same.

(3) Improvements made by him.

(4) The fact that unconditional rescission of the sale will benefit the transferor.

(1) *Hanooman Persaud v Mt Babooee*, 6 M. I. A. 838 (190). (2) *Luchmeedhar v. Egbal Ali*, 8 W. R. 76.

- (5) Collusion between the transferor and his co-parceners.
- (6) Acquiescence and delay in challenging the sale.

Synopsis.

- (1) *Effect of invalid transfer* (1332).
- (2) *Differences between the courts* (1333).
- (3) *Different equities in voluntary and involuntary transfers* (1334-1336).

1332. Analogous Law.—It has already been seen that the right of transfer of co-parcenary interest is variously interpreted by the Indian courts and this variation is now recognized as settling the principle applicable to various localities. Thus in the Mitakshara territory subject to the jurisdiction of the courts of Calcutta, Patna, Allahabad, Lucknow and Lahore, a co-parcenary interest is not transferable except with the consent of all the co-parceners, or in case of necessity, while it may be transferred for consideration in the Central Provinces, Bombay and Madras, and in Bengal in the area subject to the Dayabhog law, it may be transferred even without consideration. But even in the former provinces though a co-parcenary interest is not voluntarily transferable the purchaser is entitled to an equity which is stronger if he is an auction purchaser.

1333. Consequently, where the manager transfers the joint property purporting to act on behalf of the co-parcenary, the right which the purchaser acquires must necessarily depend upon the local law. If the transfer is made in Bengal, Bombay, Madras and the Central Provinces, since there was nothing to prevent the transferor from conveying his co-parcenary interest, it will follow as a matter of course, whatever might be its effect upon the interest of the other co-parceners. But in the Upper Provinces where the transferor is incompetent to convey his undivided interest, the interest which the purchaser takes must depend upon his equity.

1334. The equity must differ according to whether the transfer is voluntary or involuntary. As the Privy Council observed: "But however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them. It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-parceners, but the purchaser at the execution-sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value. It seems to their Lordships that the same principle may, and ought to be applied to shares in a joint and undivided Hindu estate; and that it may be so applied without unduly interfering with the peculiar status and rights of the co-parceners in such an estate, if the right of the purchaser at the execution-sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place." (1) This is the least that the auction purchaser is entitled to in any case. He may be entitled to more but never less.

But the same equity may not be extended to the voluntary purchaser and it was so held by the Privy Council in an appeal from Lucknow, in a case where the undivided uncle had sold to the purchaser his undivided share and interest in three villages jointly held by him and his nephews as members of a

(1) *Deen Dyal v. Jugdeep*, 8 C. 198 (209) P. C. (a case from Gya).

joint family for his own personal benefit without the consent of the nephews and without legal necessity. The nephew sued for cancellation of the sale, which the trial judge refused, but the other courts in India decreed. On appeal to the Privy Council it was contended that the purchaser was entitled to an equitable charge in his favour for the consideration of Rs. 10,000 paid to the uncle. But the Privy Council held that since the death of the uncle, his share passed by survivorship to the nephew, and there was no pious obligation upon the latter to pay the debts of the former, and since the uncle was dead and could not profit by his nephew's action, the purchaser had no equity which he could enforce on the death of his vendor. "It might have been quite consistent with equitable principles to refuse to Zalim, (the uncle) restitution of the interest which he sold, except on condition of its being made at once available for repayment of the price which he received. But the respondent (the nephew) is not affected by any equity of that kind. He took in his own right by survivorship and is not liable for the personal debts and obligations of his uncle Zalim; and it appears to their Lordships, that an equity, which might have been enforced against Zalim's interest whilst it existed, cannot be made to affect that interest when it has passed to a surviving co-parcener, except by repealing the rule of the Mitakshara law." (1)

1335. But if in such a case the purchaser had taken time by the forelock and attached the uncle's interest while he was alive, then the purchaser would have acquired an equity which he lost by the death of his transferor. (2) The case, again, would have been different if the uncle had professed to transfer for legal necessity and the purchaser had purchased the property after due inquiry thereinto. So again, his case would have been better if his transferor had been the father in which case the pious obligation of the son to discharge his father's liability would have given the purchaser a stronger claim. (3) But this obligation cannot avail the purchaser during the father's life-time, or on his death, if the claim for its enforcement is barred by time. As Lord Shaw said: "While the father, however, remains in life, the attempt to affect the sons' and grandsons' share in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail; and the simplest of all reasons may be assigned for this, namely that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quite another thing. Accordingly, the case founded merely upon pious obligation, and so strenuously argued before the Board fails in the present instance by reason of the fact that Bhup Singh (the father) who contracted the debt, is still alive, and that there is a concurrent finding by both of the courts below to the effect that the plaintiffs have failed to prove that the debt of Rs. 200 for which the mortgage was granted, was incurred for any legal necessity or benefit to the estate." (4)

1336. Then, later on in the same case, they said: "The importance of the case being free from complications is this: that except, under the mortgage,

(1) *Madho Prashad v. Mehrban*, 18 C. 157 (163, 164) P. C.

(2) *Madho Pershad v. Mehrban*, 18 C. 157 (163) P. C. followed in *Lachman v. Sarma*, 39 A. 500 (505) P. C.

(3) *Sahu Ram v. Bhup Singh*, 39 A. 487 (444) P. C.

(4) *Sahu Ram v. Bhup Singh*, 39 A. 487 (444) P. C.

all other remedies have long ago disappeared and the appellants rear it up and claim under it now, there being no right in them to invoke the doctrine of the pious obligation to discharge the debt incurred by Bhup Singh because that debt, as such, cannot be successfully sued for. Accordingly, unless the mortgage validly affects the joint family estate, the appellants must fail." (1) So in another case the same Board set aside the father's mortgage as wholly bad without exempting the father's share on the ground that there were no special circumstances such as those mentioned in Mahabir's case where there had been a representation as to necessity. (2) Without such representation or other equity, the purchaser under the manager's voluntary conveyance cannot claim any right. Any other view would amount to this: "that for every mortgage by the head of a joint family the property of the joint family could be made available to the extent of the interest of the mortgagor," (3) and this would be subversive of the rule established in Upper India that a co-parcenary property cannot be aliened. Of course, where the father has mortgaged (4) or sold (5) the joint family property for his own antecedent debt, the son cannot complain, for the father then has the same right of transfer as any other manager has in the case of necessity or benefit.

These were, however, appeals from Allahabad where a co-parcener is not conceded even the right of alienation of his interest for value. The result would be different in the provinces where such alienation is permitted.

**Creditor's suit
against the son.**

123. (1) The unsecured creditor suing the son for the recovery of his father's debt must prove the debt.

(2) It is then upon the son to prove that the debt was non-existent, or that it was illegal or immoral of which fact the creditor had notice.

(3) The creditor may then show that he had made the loan after reasonable inquiry being satisfied that it was required for a purpose neither illegal or immoral. (6)

Synopsis.

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| (1) <i>Duty of creditor to prove the debt as against sons</i> (1337). | (3) <i>Onus on son impeaching decree on father's debt, to show illegality or immorality</i> (1341). |
| (2) <i>Liability of inherited property in the hands of son</i> (1338-1339). | |

1337. Analogous Law.—If regard be had to the fact that (i)—the son is bound to pay all his father's debts excepting only those that are shown to be illegal or immoral, though (ii)—the father has no power to transfer the joint property for such debts, his power being limited to transfers made as provided in S. 108 it will be seen that the burden of proof must necessarily vary according as the creditor is secured or unsecured. In the former case the father having

(1) *Ib.*, p. 448.

(2) *Mahabeer v. Ramyad*, 12 B.L.R. 90; 20 W.R. 192 explained in *Lachman v. Sarnam Singh*, 39 A. 500 (504) P.C.

(3) *Lachman v. Sarnam Singh*, 39 A. 500 (504) P.C.

(4) *Mahabir v. Moheswar*, 17 C. 584 P.C.

(5) *Sahu Ram v. Bhup Singh*, 39 A. 487 (446) P.C.

(6) Cl. (1)—*Debi Dat v. Jadu Rai*, 24 A. 459; *Karan Singh v. Bhup Singh*, 27 A. 16 F. B.; *Babu Singh v. Bihari Lal*, 30 A. 166; contra *Junna v. Nain Sukh* 9 A. 98 dissented from.

only a limited power of transfer it is for the creditor to show that he had acted within that power. In the latter case the father's debts being *prima facie* binding on the son, it is upon the latter to prove the exceptional cases of his immunity. If he does so prove, the creditor may then rebut the son's case by shewing that whatever might be the facts, he believed them to be true after due inquiry. In that case, law will give him the same benefit as if the facts had really existed. This view is supported by the principle that where of two persons one must suffer, it must be the one who is more liable.

1338. It is immaterial whether the property inherited by the son was the father's ancestral or self-acquired property, since "by the Hindu Law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the estate, whether ancestral or acquired by the contractor of the debt." (1) As however, the filial duty is general and the exemption an exception to the rule, his liability may be established on proof of the debt and it will be then on the son to establish his exemption by showing that the debt was either not antecedent or that it was illegal or immoral. The court presumes the debt to be binding because it presumes that the creditor would not have lent himself to an illegal or immoral transaction. (2) This question was referred to a Full Bench of the Calcutta High Court but its reply is not very illuminating, (3) and in other cases the distinction between the father's debt and his transfer appears to have been ignored. (4) For, while it is unquestionable that the son being under the duty to pay his father's debts the creditor suing for money need not prove anything beyond a debt of the father it by no means follows that the son is equally bound by an alienation of his interest made by the father, and that in a creditor's suit for enforcement of the alienation, he is as a matter of course entitled to a decree unless the son shews cause against it.

1339. It is apprehended that in a case of alienation the son is entitled to say, whatever may be his obligation for the payment of a debt, the father could not charge his interest except for limited purposes and that therefore, the transferee occupies no better position than the transferee from any other manager. They must both prove the act to be *ultra vires* of the transferor.

1340. The only exception that the rule admits of is that in favour of the purchaser who has already taken possession and of the execution purchaser whether he has or has not taken possession. The reasons why they are entitled to greater rights will be seen in the sequel.

1341. It lies on the son or grandson contesting a decree obtained for the father's debt to show that the debt was illegal or immoral. This of course, cannot be proved by general proof of immorality, that the father kept a mistress without establishing any connection between the act and the debt in question. (5) The son is liable to pay his father's debts whether the father was or was not the manager of the joint family. (6)

(1) *Hunooman Persaud v. Mt. Babooee*, 6 M. I. A 893

(2) *Rampersingh v. Saluj Rai* (1883) A. W. N. 107; *Karansingh v. Bhupsingh*, 27 A. 16 F. B. *Babusingh v. Bihari Lal* 30 A. 156 (159).

(3) *Luchmun v. Girdhar*, 5 C 855 F.B. The view of "antecedent debt" in this case has since been overruled by the Privy Council

(4) *Moheswar v. Kishun Singh* 34 C. 184 (189); *Kishun Pershad v. Tipan Pershad*, *id.*, p. 485.

(5) *Sadasahu v. Dinkar* 6 B. 520 (523).

(6) *Kunbali v. Keshavn* 11 M. 64 (71) explaining *Girdharce Lall v. Kantoo Lall*, 14 B. L. R 187 P. C.

124. In a suit on a mortgage executed by the father or manager against the other co-parceners it lies on the mortgagee to prove that the debt was contracted for a purpose binding upon them.

**Mortgagee's suit
against co-parceners**

Synopsis.

- (1) *Mortgagee's suit against co-parceners* (1343). (3) *Effect of absence of justifying circumstances* (1346-1349).
(2) *Proof of necessity* (1344-1345).

1342. Analogous Law.—The authority of both the father and the manager being limited as regards the alienation of joint property, the burden of proving that a mortgage executed by them was within their power as representative of the family is necessarily on the mortgagee. (1) The contrary has however, been laid down in cases in which the distinction between the father's right and the son's duty is overlooked. (2) Even in cases in which this distinction was kept in view the court gave currency to the view that the son was not bound by the mortgage without proof of the binding character of the debt which might be recovered, notwithstanding the form of the suit, out of the whole of the ancestral estate inclusive of the mortgaged property. (3)

1343. The question was considered by a Full Bench of the Allahabad High Court but the court was divided, though the majority laid the onus on the mortgagee. (4) In support of their view they quoted the following passage from a judgment of the Privy Council. (5) "Thus where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate and the motives influencing his immediate loan." The same high tribunal in another case reaffirmed the same rule in the following terms: "The mortgagor was the defendant Bhup Singh. The other defendants are his sons and grandsons. Under the Mitakshara law they are, as members of a joint family, co-parceners in the ownership of the property over which the mortgage was granted.

1344. It is well to keep the general principle applicable to such a situation in mind. There have been so many decisions by courts of law on the exception to the principle, that the principle itself has been apt to be forgotten. Under the law of the Mitakshara the joint family property owned, as stated by all members of the family as co-parceners, cannot be the subject of a gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners. Any deed or gift, sale or mortgage, granted by one co-parcener on his own account or over the joint family property, is invalid; the estate is wholly unaffected by it and its entirety stands free of it.

(1) *Sitaramasami v Midatana*, 6 M. 400, *Sami v Ponnammal*, 21 M. 28; *Venkataramanaya v Venkataramana*, 29 M. 200 F. B. overruling *contra* in *Chidambara v. Koothaperumal*, 27 M. 326; *Bheknarain v. Januk Singh* 2 C. 438; *Luchmun v. Giridhur*, 5 C. 855; *Jamra v Nain Sukh*, 9 A. 493.
(2) *Maheswar v Kishun Singh* 84 C. 184 :

Kishun v. Tipan *ib.* p. 785.

(3) *Luchmun v. Giridhur*, 5 C. 855 F. B.; *Khatibul Rahman v. Gubind*, 20 C. 828; *Suraj Prasad v. Golabchand*, 27 C. 762.

(4) *Chandra Deo v. Mata Prasad* 81 A. 176 (198) F. B.

(5) *Hunooman Pershad v. Mt. Baboo*, 6 M. I. A. 398 (419).

1346. The law of the Mitakshara has, however, given to the father in his capacity of manager and head of the family certain powers with reference to the joint family property. The general principle with regard to the matter is, that he is at liberty, to effect or to dispose of the joint property in respect of purposes denominated necessary purposes. The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or mutt, or of the guardian of an infant family. In all of the cases where it can be established that the estate itself that is under administration demanded, or the family interests justified, the expenditure, then those entitled to the estate are bound by the transaction. It is not accurate to describe this as either inconsistent with or an exception to the fundamental rule of the Mitakshara. For where estate or family necessity exists, that necessity rests upon the co-parceners as a whole, and it is proper to imply a consent of all of them to that act of the one which such necessity has demanded." (1)

1346. These remarks were of course, made in an appeal from the United Provinces. But the underlying principle is the same in any view of the rights of co-parceners. They are the joint owners of their estate which is managed by one of them who acts as their representative, and who as such possesses certain powers which he can exercise only in case of necessity. The alienee must therefore, prove that such necessity existed or that he was satisfied from inquiry that it did, before he could bind the other co-parceners by an act not their own.

1347. That it must be so in the case of co-parceners admits of no doubt. But is the case of the son any different? It was so argued before the Privy Council who adverting to it said: "It was argued that a mortgage was binding because of an obligation of religion and piety which is placed upon the sons, and grandsons, under the Mitakshara law, to discharge their father's debts. If accordingly he has incurred a debt, and the debt was not for immoral purposes, the pious obligation resting upon the sons and grandsons to discharge this debt is in practice worked out by giving effect to any mortgage or sale of the family property, in which they, with the father, its manager, were joint owners, so as to enable the debt to be discharged." But they added: "Responsibility to meet the father's debt is one thing, and the validity of a mortgage over the joint estate is quite another thing." (2)

1348. This case may be taken to have now settled an old controversy about the burden of proof. The case under reference was one of mortgage by the father but the same rule holds equally good where the mortgagor is any other manager.

1349. This case is in consonance with the previous decisions of the same Board (3) in which, however, their pronouncements did not so clearly define the rights and powers of the co-parcenary manager.

125. In a suit instituted to enforce a mortgage executed by the manager, the other members are proper parties, but their non-joinder does not exempt them from liability, if it appears that they were sufficiently represented by the manager.

(1) *Sahu Ram v. Bhup Singh*, 39 A 437 (442, 443).

(2) *Sahu Ram v. Bhup Singh*, 39 A. 437 (442, 443) P. C.

(3) *Hunooman Pershad v. Mt. Babooes*, 6

M. I. A. 398 (421); *Girdhari Lall v. Kantoo Lall*, 14 B. L. R. 187 P. C.; *Suraj Bansi v. Sheo Pershad*, 5 C. 148 P. C.; *Mahobir v. Moheswar*, 17 C. 684 P. C.; *Madho Pershad v. Mehrban*, 18 C. 157 P. C.

Synopsis.

- (1) *Parties to a suit on a mortgage executed by manager* (1350-1351). (2) *Right of co-parceners to join the suit* (1352).

1350. Analogous Law.—This section is explanatory of O. 34, R. 1 of the Code of Civil Procedure which requires the joinder in a mortgage suit of all persons interested either in the mortgage security or in the right of redemption. This rule was S. 85 of the Transfer of Property Act, which has been the subject of much conflict of views discussed in another place. ⁽¹⁾ But whatever conflict there may have been in the past, the view of the Privy Council supports this section, for they say: "There seems, to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions, including foreclosure actions when the manager of a joint Hindu family so effectively represents all other members of the family that the family as a whole is bound." ⁽²⁾ Their Lordships found that the case before them was one in which there was not the slightest ground for suggesting that the managers had failed to act in the interest of the family and this is the test. In this case the mortgagee had sued the mortgagor and his subsequent mortgagees who were members of a joint family. A decree was passed against them. But as they failed to redeem the prior mortgage, their interests were foreclosed, whereupon the minor members sued for redemption claiming that right on the ground that they should have been impleaded by the prior mortgagee and that his failure to implead them could not imperil their right. But the Privy Council rejected their claim holding that they were sufficiently represented through their manager.

1351. This case then settles the rule here stated. The manager has the authority to sue and be sued in respect of all transactions including mortgages on behalf of the family of which he is the accredited representative and all decrees obtained by or against him are decrees for or against the family.

1352. At the same time should any co-parcener desire that he should be impleaded in a suit, it is always open to the court to join him, as direct representation is in every way preferable.

1353. The law reports them with cases in which the courts have discussed the consequence of non-joinder of members of a joint family. They have now no practical value.

1354. But the question may sometimes be whether a person sued or was sued as a manager or as a member of the family. This is a question of fact which must be decided with reference to the nature of the claim and the pleadings in each case.

126. (1) It lies on the co-parcener suing for recovery of joint property sold by the manager to prove that the sale was one which by its nature and purpose, did not bind his interest, and that the purchaser had notice of it.

Burden where purchaser is in possession.

(2) In a sale made in execution of a decree obtained against the manager, the court will presume that the purchaser,

(1) See 2 Gour's Law of Transfer (4th Ed) §§ 2144-2149.

(2) *Shen Sankar v. Jaddo Kunwar*, 36 A. 888 (866, 887) P. C.

if a stranger to the suit, had no notice of anything that does not appear in the decree.

Synopsis.

- (1) *Suit to set aside alienation* (2) *Burden of proof, where purchaser is in possession* (1355).

1355. Analogous Law.—Joint property may pass out of the family by a voluntary or compulsory sale. Of these the court is especially concerned in protecting the title of the auction purchaser for without such protection no one will purchase at such sales. This was the view taken by the Sadar court who said: "The sales for the reversal of which the present suit is brought divide themselves into three classes: *first*, sales made by order of court in execution of decrees; *second*, sales made privately to satisfy decrees and bonds; and *third*, sales made simply in order to raise money for some purpose or another. Freedom on the part of the son, as far as regards ancestral property, from the obligation to discharge the father's debts under Hindu Law can be successfully pleaded only by a consideration of the invalid nature of the debts incurred. Now we are clearly of opinion that the plaintiff has been unable to show that the expenses for which those decrees were passed looking to the decrees themselves (and we cannot now look beyond these) were immoral, and such as under Hindu Law the son would not be liable for." (1) The Privy Council applied this principle to a case in which the sons had sued their fathers and the latter's alienees under compulsory sales for payment of the family and other necessary debts. They said: "A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the court was right in giving the decree or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that, if the decree was a proper one, the interest of the sons, as well as the interest of the fathers, in the property, although it was ancestral, were liable for the payment of the fathers' debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was property liable to satisfy the decree, if the decree had been given properly against them; and having inquired into that and having *bona fide* purchased the estate under the execution and *bona fide* paid a valuable consideration for the property, the plaintiffs are not entitled to come in, and to set aside all that has been done under the decree and execution, and recover back the estate from the defendant." (2) In a later case this case was held to establish the two following propositions:—

Firstly.—That where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or under a sale in execution of a decree for the father's debts, his sons by reason of their duty to pay their father's debts cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and

Secondly.—That the purchasers at an execution sale, being strangers to the suit, if they have not notice that the debts were so contracted, are not bound

(1) *Jinnuk Kishoree (Mt.) v. Raghunandan*, (1881) S. D. A. B. 218 followed in *Girdharee Lall v. Kantoo Lall* 14 B. L. R. 87 P. C.; *Suraj Bansi v. Sheo Persad*, 5 C.

149 (170) P. C.

(2) *Girdharee Lall v. Kantoo Lall*, 14 B. L. R. 187 (199-200) P. C.

to make inquiry beyond what appears on the face of the proceedings. (1) These were all cases of the son challenging his father's alienation. But the same principle would apply to the sale by any other manager. The only difference between the two would be that on the sale being found to be void if the sale was a voluntary one, then the transferee could not claim even his transferor's interest. (2) This is, however, quite a different question and is the subject of another section.

127. (1) A decree passed against the manager in respect of a liability incurred within the scope of his authority is enforceable against the other members of the joint family though they may not have been parties to the suit.

(2) But in such case the other members are not precluded from contesting the authority of the manager or the binding nature of the debt.

(3) Where a decree directs sale of the right, title and interest of the defendant in any property, the question whether the sale so made suffices to pass the entire estate of which the defendant was the manager or only his own interest, is one of construction and intention to be gathered from the proceedings and other circumstances of the case.

(4) In particular and without prejudice to the generality of the foregoing principle, in determining this question the following facts are material:—

- (a) The nature of the contract, if any.
- (b) The character of the debt.
- (c) The capacity in which the defendant is sued.
- (d) The intention of the court.
- (e) The price paid by the purchaser.
- (f) And any fact which shows what interest he intended to purchase.

Illustration.

A decree is passed against the father A, for sale of his interest in mouza B, which is his family property. C objects to the sale of anything beyond A's interest therein on the ground that the decree was obtained for A's immoral debt. He fails to prove it. The sale conveys the entirety of B.

Synopsis.

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| (1) <i>Effect of decree against manager</i> (1359). | <i>rest of manager</i> (1361-1362). |
| (2) <i>Right of other members to contest authority of manager or character of debt</i> (1360-1361). | (4) <i>Pleadings to be examined</i> (1363-1364). |
| (3) <i>What passes under an execution sale of the right, title and inte-</i> | (5) <i>Character of the debt</i> (1365-1366). |
| | (6) <i>Mortgage debts</i> (1367). |
| | (7) <i>Fraud of father</i> (1368). |

(1) *Suraj Bansi v. Sheo Pershad*, 5 C. 148 (191) P. C.

(2) *Deen Dyal v. Jugdeep Narain*, 3 C. 198 (209) P. C.

1356. Analogous Law.—This rule flows from the last which recognizes the manager as the accredited representative of all members of the joint family in a suit, who are necessarily bound by any adjudication made therein and any decree passed thereon. It has now been so settled by the Privy Council in a case cited under the last section (1) in which the manager was held to fully represent the other members and his failure to redeem the joint property was held to effectively destroy the right of redemption of the entire co-parcenary.

It is immaterial whether the manager was the father or any other relation. (2)

1332. Where a decree is passed against the manager in a suit to which the other members are not parties, they are entitled to show, either in execution or in a suit of their own, that the decree does not affect their interest, either because the manager did not represent them or that the nature of the liability was such as not to bind their interests. This is conceded by the Privy Council who, referring to a decree passed against the father, said: "If his debt was of a nature to support a sale of the entirety, he might have legally sold it without suit, or the creditor might legally procure a sale of it by suit. All that the sons can claim is that not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own." (3) Their Lordships have reiterated this view in several cases. (4)

1358. An auction purchaser purchases whatever right, title and interest his judgment debtor may possess in the property at the date of attachment. He cannot set up the title of a *bona fide* purchaser for value without notice. Consequently, where the judgment debtor's indeterminate interest is sold, the purchaser's title will depend upon determination of the question what interest his judgment debtor had which the court could and did sell. If, for instance, the decree is against the father for his separate debt not binding on the son, the sale would convey to the purchaser only the father's interest. (5) An auction purchaser who is a stranger to the suit is not affected with notice of the character of the debt, though the case is different when the purchaser is the execution-creditor himself. (6)

1359. Decree for or against manager.—If the manager may sue or be sued on behalf of the joint family, it follows that any decree passed in such suit for or against him, would bind the family which he represents. This was the *ratio decidendi* of the Privy Council decision already cited. (7) It is immaterial whether the manager was the father or any other relation, (8) provided he was the manager, and had or was sued in that capacity. This must be clear from the record. It cannot be assumed. (9) It is stated that it is the ordinary

(1) *Jaddo Kunwar v. Sheo Shankar*, 33 A. 71 affirmed O. A. *Sheo Shankar v. Jaddo Kunwar*, 86 A. 898 (386, 387) P. C.

(2) *Jogendra v. Fumindro*, 14 M. 1 A. 367(376); *Bissessur v. Luchmessur*, 5 C. L. R. 477 P. C. *Narayan v. Pandurang*, 5 B. 685; *Gan Savani v. Narayan*, 7 B 467; *Ram Krishna v. Vinayak*, 12 Bom L. R. 219.

(3) *Nanomi v. Modun Mohan* 18 C. 21 P. C.

(4) *Girdharse Lall v. Kanto Lal*, 14 B. L. R. 187 P. C.; *Suraj Bansi v. Sheo Pershad* 5 C. 148 P. C.; *Nanomi v. Modun Mohan*, 18 C. 21 P. C.; *Bhagbut Pershad v. Girja Koer*, 15 C. 717 (728, 724) P. C.; *Mahabir v. Mohenwar*, 17.

C. 584 P. C.

(5) *Bhikaji v. Yashwantrao*, 8 B 489.

(6) *Suraj Bansi v. Sheo Prasad*, 5 C 148 P. C explained in *Kumbali v. Keshava*, 11 M. 64 (72, 73).

(7) *Jaddo Kunwar v. Sheo Shankar*, 33 A. 71 affirmed O. A. *Sheo Shankar v. Jaddo Kunwar*, 86 A. 898 (886-8-7) P. C.

(8) *Jogendra v. Fumindro*, 14 M. 1 A. 367 (376); *Bissessur v. Luchmessur*, 5 C L. R. 477 P. C. *Mayaram v. Jayvantrao*, (1874) B.P. J. 41; *Narayan v. Pandurang*, 5 B. 685; *Gansa vanti v. Narayan*, 7 B 467; *Ram Krishna v. Vinayak*, 12 Bom. L.R. 219.

(9) *Padmakar v. Mahadev* 10 B. 21.

practice in suits filed on the original side of the Bombay High Court by managers to join all co-parceners, and it was said that where in such a case the manager sued alone even stating in the plaint that he was suing as manager on behalf of a co-parcenary the minor co-parcener would not be bound by the proceedings unless by judicial sale under the decree, rights had been created in innocent third parties and no prejudice were shown to the absent minors.⁽¹⁾ This case was decided in 1906, but the Code of Civil Procedure enacted in 1908 now permits even partners to maintain and defend suits in the name of the firm,⁽²⁾ and since a Hindu family has been spoken of and regarded as a corporation, there seems no reason why it should not be similarly represented by the manager. At any rate it is now so held by the Privy Council, though their Lordships' language is necessarily guarded, but it is clear that the only case in which they would permit the co-parceners to repudiate the authority of the manager is when he has acted in fraud of their rights, or when his interest was adverse, or that he has not otherwise fairly represented them.

1360 But there is no presumption that the manager has acted as such or that having so acted, he has not fairly represented the family.

1361. It is held that where the sons are not parties to the suit they are entitled to have an opportunity, either by a fresh suit or in execution of the decree to show that the decree does not bind their interests. This they may do by showing that the claim was not such as could bind their interests.⁽³⁾ It has, however, been held that he cannot be permitted to do so in execution in which he is impleaded as the legal representative of his father.⁽⁴⁾ This view proceeds upon the ground that a party in execution cannot go behind the decree. But a son may show that the decree passed against his father does not warrant seizure of his interest which would be a question relating to execution without affecting the decree. The question in such case is how far the terms of the decree precluded the trial of such questions. So where the father mortgaged "his right and interest" in a certain village which was decreed and sold and those words were used in the sale-certificate to define the interest sold to the purchaser the question arose what interest those words conveyed, whether only the father's interest or the interest of the entire family represented by himself and the four sons. The latter sued for a declaration that only the father's interest passed, but the Subordinate Judge dismissed their suit holding that since two of the sons had consented to the mortgage it referred to the entirety of the mortgaged property. The High Court reversed this decree holding that *prima facie* the father conveyed his own interest and this decree the Privy Council upheld on the ground that the sons were not made parties to the execution proceedings, adding, "If Bichuk relied on assent by the sons, he should have taken care to make them parties to the execution proceedings. In *Deen Dayal's* case⁽⁵⁾ where the expressions used by the mortgagor were much more favourable to the conveyance of the entirety than they are here, the creditor's omission of the sons from the proceedings was made a material circumstance against him. And in *Nanomi Babuasin's* case⁽⁶⁾ where the decision was in favour of the purchaser, the same circumstance was recognized as being material when the expressions by which the estate is conveyed to the purchaser are susceptible of application either to

⁽¹⁾ *Kashmath v Chinnaji* 30 B. 477 (486)

⁽²⁾ O. 30 C. P. C.

⁽³⁾ *Unred v Gomaa*, 20 B. 385; *Chander v. Sham Koor*, 38 C. 676; *Umabeswara v. Singaperumal* 8 M. 876.

⁽⁴⁾ *Hira Lal v Parmeshwar*, 21 A. 356

following *Sanyal Das v Bismallah*, 19 A. 480 overruling *contra* in *Lochan v. Sant Chandar*, (1899) A. W. N. 24.

⁽⁵⁾ *Deen Dayal v. Jugdip*, 8 C. 198 P.C.

⁽⁶⁾ *Nanomi Babuasin v Moduni Mohan*, 18 C. 21 P. C.

the entirety or the father's co-parcenary interest alone." (1) Then they added: "That when a man conveys his right and interest and nothing more, he does not *prima facie* intend to convey also rights and interests presently vested in others, even though the law may give him the power to do so. Nor do they think that a purchaser who is bargaining for the entire family estate would be satisfied with a document purporting to convey only the right and interest of the father." (2)

1362. Their Lordships also adverted to the fact that the creditor had taken no steps to bind the sons and that the price obtained appeared to be nearer the value of the father's share than of the entirety. This case is instructive. For it shows that the mere fact that the decree is obtained against the manager, would not necessarily cury with it the implication that it embraces all the interests of the joint family. The question is one of construction and intention. (3) So in another case where the right, title and interest of the judgment-debtor was sold and the sons claimed exemption of their shares, the court examined the proceedings and found that since the defendant had been sued for arrears of land revenue which was a common liability of the family of which he was the manager, the decree intended to direct the sale of the entirety of the family property which was *prima facie* liable for the claim. (4) The fact that the junior members of the family are no parties to the proceedings is material but not conclusive, since the question still remains whether they were or not represented by their manager. (5)

1363. In suits by or against the manager, the first question that the court has to examine is the capacity in which the manager sues or is sued. If it be found that he was not sued in his representative character no further question would arise, but if

**61. (3) Pleading
must be examined**

on the other hand it is not certain in what capacity he was sued, then the court would have to examine the pleadings to determine the nature of the obligation and to what extent it bound the family. If it appears that the manager was sued for a trade debt in respect of a business carried on for the benefit of the family, then the latter are unquestionably liable. (6) If the debt in respect of which the suit was filed was the father's debt the fact that the father was the holder of an impartible zamindari would not prevent the decree from being binding on the successor. So in such a case where the zamindar had contracted several debts, unsecured and secured, on parts of the zamindari, and on the suit of a creditor the whole estate was attached after which the zamindar having died, his son was brought on the record and he objected to the sale of his interest but the court ordered sale and sold "the right title and interest of the late zamindar" to a stranger. On the question arising as to what interest passed to the purchaser, the court held that in view of the debt of the father and the small price paid by the purchaser, what was intended to be sold was the life-interest of the father and not the whole interest in the zamindari. (7) The fact that an execution sale took place under an erroneous view of the law that no more than the life-interest of the zamindar could be sold, would not enlarge the interest of the purchaser if it is afterwards held that it was competent to the court to dispose

(1) *Simbhu Nath v. Gopal Singh*, 14 C. 572 (573, 573) P. C.

(2) *Ib.*, p. 580.

(3) *Mahabir v. Moheswar*, 17 C. 584.

(4) *Hitendra v. Rameshar*, 18 C.W. N. 42 (49).

(5) *Dowll Ram v. Meharchand*, 15 C. 70 P.C., *Bhagbut v. Girga*, 15 C. 717 P. C.

(6) *Umbra Prasad v. Ram Sahay*, 8 C. 898 (907, 908).

(7) *Pettachi v. Songili*, 10 M. 241 (250, 251) P. C.

of the entire interest.⁽¹⁾ As Lord Watson observed in another case of a sale in execution of a money decree, "the questions are what did the court intend to sell, and what did the purchaser understand that he bought."⁽²⁾ These are questions of mixed law and fact, and must be determined according to the evidence in the particular case.⁽³⁾ In cases of this kind the substance and not the mere technicalities of the transaction should be regarded.⁽⁴⁾

1364. So where in execution of a mortgage decree against the father of a joint Mitakshara family who alone was a party to the mortgage decree and the execution proceedings, the son objected to the sale of the entire estate on the ground that the father's debt was illegal and immoral and the order for sale was amended by adding the words "right, title and interest" of the judgment-debtor, which the court however added, was not intended to define what was actually sold. The son sued for a declaration that his interest was exempt but it was found that the father's debts were for legal and necessary purposes and the Privy Council held that as the sale was of an indeterminate interest, the definition of which depended upon the character of the debt and that as these were found to be legal, the interest which the purchaser took was the entire estate including the share of the son.⁽⁵⁾ The contrary was held in another case in which the son succeeded in proving that the father had contracted the debt by fraudulently mortgaging a certain mouza to which he was not entitled.⁽⁶⁾ There is no necessity to inquire into the nature of the debt if it is found that no more than the father's interest was sold. Such enquiry is only necessary when it is doubtful as to what was sold.⁽⁷⁾

1365. The fact that the decree was a mere money decree and the defendant the father against whom it was passed, is material but does not suffice to convey the son's interest in the joint property since it is not for every debt that the son is liable. If, however, the debt is shown to be the antecedent or necessary debt of the father, or there appears in anything from the record that the father was sued as head of the family, then the entire estate would pass on sale.⁽⁸⁾

1366. But the co-purchaser whose interest is put up for sale is entitled to show that it could not pass, either because the manager did not represent him or that the debt was not of such a nature as to convey his interest.⁽⁹⁾ In the case of a money decree against the father, the presumption is that only the father's interest is sold. It is all that passes to the auction purchaser.⁽¹⁰⁾ But this presumption may be rebutted by special circumstances showing an intention to sell the entire interest of the family in the property.⁽¹¹⁾ Where only the father's interest passes to the purchaser all that the purchaser can claim against a Mitakshara family is to enforce his vendors' right to partition.⁽¹²⁾

(1) *Abdul Aziz v. Appayyasami*, 27 M. 131 (142) P. C.

(2) *Pettich v. Sangili*, 10 M. 241 (248) P. C.

(3) *Abdul Aziz v. Appayyasami* 27 M. 131 (142), P. C.

(4) *Sripat Singh v. Tagore*, 44 C. 524 P. C. following *Mahabir v. Moheshwar*, 17 C. 584 P. C.

(5) *Sripat Singh v. Tagore*, 44 C. 524 P. C. (538) P. C. *Minakshi v. Immuddi* 12 M. 142 P. C.; *Cooraji v. Dewsey*, 17 B. 718.

(6) *Ram Sahai v. Kewal Singh* 9 A. 672.

(7) *Bika Singh v. Lachman Singh*, 2 A. 800 (805).

(8) *Kagal Ganpaya v. Manjappa*, 12 B. 691; *Kunhri v. Keshav*, 11 M. 64.

(9) *Bhagbut, Pershad v. Girja Koer*, 15 C.

717 P. C.; *Mahabir v. Moheshwar*, 17 C. 584 P. C.; *Nanomi v. Madun Mohan*, 18 C. 21 P. C. *Beni Parshad v. Puranchand*, 28 C. 262 (276, 277).

(10) *Maruti v. Babaji*, 15 B. 87 following *Hurdy Naram v. Rooder*, 10 C. 696 P. C.; *Sumbunath v. Golabsingh* 14 C. 672 P. C.

(11) *Nanomi v. Madun Mohan*, 18 C. 21 P. C.; *Menakshi v. Immuddi* 12 M. 142 P. C. *Mahabir v. Moheshwar*, 17 C. 589 P. C.; explained in *Maruti v. Babaji*, 15 B. 87 (89).

(12) *Hardi Narain v. Ruder*, 10 C. 626 P. C. following *Deen Dyal v. Jugdeep*, 8 C. 198 P. C. To the same effect *Collector v. Hurdai* 5 C. 426; *Ram Sahai v. Kewal Singh*, 9 A. 672.

1367. There is a distinction between a money claim against the father and one made to enforce the father's mortgage of the family property. A decree in the one case, presumably affects only the father's interest; in the other case it relates presumably to the entire property mortgaged. ⁽¹⁾ But the question is scarcely one for presumption, being rather one of fact as to what the father intended to mortgage. ⁽²⁾

1368. The sons are not bound by the father's illegal or immoral debt. And they may show it at any stage of the suit whenever their own interests are in jeopardy. So where the father professed to mortgage a certain zamindari in which he had no interest of any kind, whereupon the mortgagee sued him for recovery of the debt upon his personal covenant and in execution had his right, title and interest sold to an auction purchaser who claimed the son's share on the ground that the decree was against the father, the court had no difficulty in exempting the son's claim on the ground that the debt was tainted with fraud and that the son's interest therefore could not and did not pass. ⁽³⁾

128. (1) No debtor is liable to pay at the same time interest which exceeds the principal.

(2) This rule extends only to the areas within the original jurisdiction of the Calcutta High Court, ⁽⁴⁾ the Presidency of Bombay, ⁽⁵⁾ Sindh ⁽⁶⁾ and Berar ⁽⁷⁾:

(3) It does not apply to the following cases:—

(a) Where the debtor is not a Hindu. ⁽⁸⁾

(b) Where the creditor is liable to account. ⁽⁹⁾

(c) Where the debtor agrees to the capitalization of interest. ⁽¹⁰⁾

(d) Where the debt merges in a decree. ⁽¹¹⁾

Synopsis.

(1) *Texts on liability for interest* (1369).

(2) *Rule of damdupat* (1370-1372).

(3) *Rule when applicable* (1372).

(4) *Rule applicable only to Hindu debtor* (1373).

(1) *Hurdoy Narain v. Rooder Perlash*, 10 C. 626 P. C. explained in *Kumbali v. Keshava*, 11 M. 64 (75).

(2) *Kumbali v. Keshava*, 11 M. 64 (76).

(8) *Ram Sahai v. Kival Singh*, 9 A. 672.

(4) *Ramlal v. Harachandra*, 8 B. L. R. (O.C.) 190; *Nobinchunder v. Romesh Chunder*, 14 C. 781.

(5) *Narayan v. Satwaji*, 9 B. H. C. R. 83 (history traced).

(6) *Karamchand v. Bulchand*, 2 S.L.R. 10; *Deen Dayal v. Kylas Chunder*, 1 C. 92;

Surya Narain v. Sirdhari, 9 C. 82b.

(7) *Ramchandra v. P. Radha*, 10 N. L. R. 96.

(2) *Hansraj v. Bapusaheb*, 8 B. 131; *Ganpat v. Adamji*, 3 B. 812; *Abi Saheb v. Shabji*, 21 B. 85.

(9) *Balkrishna v. Hari Govind*, 15 B. 84; *Dhendshet v. Ravji*, 22 B. 86; *Nathubhai v. Mulchand*, 5 B. H. C. R. 196; *Raja Ram v. Gopal*, (1876) B. P. J. 229; *Bapuji v. Gungadhar*, (1877) B. P. J. 131; *Rango v. Balaji*, (1886) B. P. J. 76; *Krishnaji v. Balaji*, (1896) B. P. J. 415.

(10) *Sukhlal v. Bapu*, 24 B. 805; *Damodar v. Deoji*, (1890) B. P. J. 814; *Dhendu v. Narayan*, 1 B. H. C. R. 47.

(11) *Hari Lal Mallik (In re)*, 33 C. 1269 (proof of claim in insolvency amounts to a decree); *Lail Behary v. Thacomoney*, 23 C. 8-9; *Kanaye Lal v. Anand Lal*, *ib.*, p. 908 N; *Buggaban v. Pran Comaree*, *ib.*, p. 906 N; *v. Balakrishna v. Gopal*, 1 B. 73; *Ramachandra Bhimrao*, *ib.*, p. 577. contra *Asanaut v. Tulorbhai*, 6 S. L. R. 245.

1369. Analogous Law.—The rule of Damdupat is thus stated:—

Manu :—Interest on money recovered at once or month by month, or day by day, as it ought, must never be more than enough to double the debt, that is, more than the amount of the principal paid at the same time. On grain on fruit on wool or hair, on beasts

Texts.

of burden, but to be paid in the same kind of equal value, it must not be more than enough to make the debt quintuple.

Stipulated interest beyond the legal rate, and different from the preceding rule is invalid and the wise call it an usurious way of binding and the lender is entitled at most to five in hundred ⁽¹⁾.

Gautam : If the loan remains outstanding for a long time, the principal may be doubled (after which interest ceases). ⁽²⁾ The interest on produce, of animals, on wool, on the produce of a field, and on beasts of burden shall not increase more than the five fold value of the object lent ⁽³⁾

1370. Rule of Damdupat.—Damdupat is the Hindu Law against usury.

At one time it appears to have had wider vogue than it has now, being merely confined to the Mahratta Provinces of Bombay and Berar ⁽⁴⁾ and the area subject to the original jurisdiction of the Calcutta High Court. It has been locally extended by the Ajmere Laws Act ⁽⁵⁾ only to cases where the mortgagee sues to enforce his mortgage, being inapplicable when the mortgagor seeks to redeem. ⁽⁶⁾

It is said that the rule is inapplicable to mortgages, having been abrogated by the Transfer of Property Act ⁽⁷⁾ but there is no rule in that Act to repeal this rule of common law and the re-enactment of the Usurious Loans Act, 1917, leaves it intact.

1371. Law of Damdupat.—The Hindu rule of Damdupat was intended to correct the evils of usury. It has, however, outlived its day except in the areas stated in the section.

1372. The rule as stated in the texts prescribed that the amount of interest shall not exceed that of the principal paid at the same time. It does not mean that the amount of interest shall never exceed the principal. All it means is that *at the same time* interest in amount greater than the principal cannot be recovered. ⁽⁸⁾ Hence, if the principal remain outstanding and the interest be paid in smaller sums than the amount of the principal money, there is no limit to the amount which may be received for interest. ⁽⁹⁾ All that the rule prohibits is that the creditor may not recover more than double of the amount at any time remaining due, as on the last balance struck. He is not prevented from recovering more than the double of what he has actually lent. ⁽¹⁰⁾ The rule does not forbid the conversion of interest into capital by subsequent agreement. Nor does it preclude recovery of interest because the principal sum lent has been paid off. ⁽¹¹⁾ The rule is applicable equally to cases whether the interest was to be paid in cash or grain ⁽¹²⁾ or whether the debt was or was not secured by a mortgage. ⁽¹³⁾

Rule stated.

the same time interest in amount greater than the principal cannot be recovered. ⁽⁸⁾ Hence, if the principal remain outstanding and the interest be paid in smaller sums than the amount of the principal money, there is no limit to the amount which may be received for interest. ⁽⁹⁾ All that the rule prohibits is that the creditor may not recover more than double of the amount at any time remaining due, as on the last balance struck. He is not prevented from recovering more than the double of what he has actually lent. ⁽¹⁰⁾ The rule does not forbid the conversion of interest into capital by subsequent agreement. Nor does it preclude recovery of interest because the principal sum lent has been paid off. ⁽¹¹⁾ The rule is applicable equally to cases whether the interest was to be paid in cash or grain ⁽¹²⁾ or whether the debt was or was not secured by a mortgage. ⁽¹³⁾

(1) *Manu* VIII. 151, 152

(2) *Gautam* XII. 31; 2 S. B. E. 229.

(3) *Ib* XII. 36.

(4) *Ramchandra v. Radha* 10 N.L.R. 96

(5) Reg. III of 1877 S. 88

(6) *Nemichand v. Radha Ballobh* 26 A. 354.

(7) *Madhwa v. Venkataramanajulu* 26 M. 662; *Narayan v. Gunga Ram* 5 B.H.C.R. (Ac) 157 (rule inapplicable to mortgages) contra *Nathubhai v. Mulchand* 5 B.H.C.R. (Ac) 196.

(8) 1 *Ilg* 68; *Nobin Chunder v. Romesh Chunder* 14 C. 781 F. B.

(9) *Dhondu v. Narayan* 1 B.H. C.R. (Ac) 47 (49)

(10) *Sukalal v. Bapu*, 24 B. 805; *Karam-*

chand v. Bulchand, 2 S.L.R. 10.

(11) *Nusserwan i v. Laxman* 80 B. 582

(12) *Anand Rao v. Durgaba* 22 B. 761.

(13) *Rameconoy v. Johur Lall*, 5 C. 867; *Ram Kanya v. Collychurn*, 21 C. 840; *Nandlal v. Dhirendra* 40 C. 710; *Kunjilal v. Narsamba*, 42 C. 826; *Sundarabai v. Jayavant*, 24 B. 113; *Jeevanbhai v. Manordas*, 85 B. 199 (208); *Asanand v. Tulsambai* 5 S. L. R. 245; 15 I. C. 824; contra *Madhwa v. Venkataramanajulu*, 26 M. 662, in which S. 4 of the Transfer of Property Act coupled with S. 37 of the Contract Act was overlooked.

It is however inapplicable unless there is only one account to be taken of principal and interest due on the mortgage, and no account of rents and profits on the other side. (1) If therefore, the mortgagee in possession has to account for the rents and profits, the rule would be inapplicable unless there was an express stipulation that the rents and profits are to be taken in lieu of a fixed portion of the interest. (2)

The rule though equally applicable to secured or unsecured debts does not apply to judgment-debts, after which in the words of the Privy Council, the matter pass out of the domain of contract into one of law. (3) So the interest which the court may award under the Civil Procedure Code is not subject to the rule, (4) nor is it applicable to the amount recoverable in execution of a decree. (5) But since in a mortgage, interest at the contractual rate is to be calculated up to the date of the *dies datus* fixed as required by O. 34, Rr. 2 and 4 of the Civil Procedure Code, it follows that the decree is equally subject to the *Damduput* rule up to that date after which it ceases to be operative. (6)

Then again the rule is inapplicable to cases in which there is a liability to account, though no account is in fact maintained or taken. (7) If the mortgagee is put in possession he becomes liable to account, and the moment his accountability begins the rule of *Damduput* ceases to apply. In such a case then, the rule can only be let in by an express provision in the mortgage deed or otherwise against his liability to account. (8)

1373. Only applies to Hindu debtor.—The rule is a rule of Hindu Law and applies only to a Hindu debtor, though it does not matter whether he is the plaintiff or the defendant. So where the mortgagor, a Mahomedan sued his Hindu mortgagee for the redemption of his mortgage, and upon an account being taken, it was found that the amount of interest far exceeded the principal, whereupon the plaintiff claimed the benefit of *Damduput* but the court overruled his contention holding that as the defendant, was not a debtor the rule was inapplicable to him. (9) A non-Hindu mortgagor, cannot by assigning his equity of redemption to a Hindu let in the rule to the prejudice of the creditor, (10) nor can the Hindu debtor transfer his personal equity to a non-Hindu with his debt (11). The rule of *Damduput* remains unaffected by the Transfer of Property (12) or the Interest Act (13) or the provisions of the Usury Act, their repeal (14) and re-enactment (15)

(1) *Narayan v. Satyaji*, 9 B. H. C. R. 83. *Daji v. Daji* (1878) B. P. J. 74. *Vasudev v. Bhagwan* (1878) B. P. J. 82.

(2) *Shankar v. Babaji*, (1881) B. P. J. 291; *Rango v. Balaji* (1886) B. P. J. 76.

(3) *Lall Behary v. Thacomoney*, 23 C. 893; *Kanaye v. Anund Lall* 23 C. 903 N; *Buggoban v. Prancoomaree*, 28 C. 906 N.

(4) *Balakrishna v. Gopal* 1 B. 78; *Ramchandra v. Bhimrao* 1 B. 577; *Asanand v. Tulsanbi*, 5 S. L. R. 245.

(5) *Dhondshet v. Ravi*, 22 B. 86.

(6) *Dhondshet v. Ravi* 22 B. 86. *Harilal Mallick (In re)* 33 C. 1269; *Shanukrahawa v. Babaji* (1891) B. P. J. 191; *Rango v. Balaje* (1886) B. P. J. 76; *Shah Balidas v. Chudasama* (1891) B. P. J. 428; *Krishnaji v. Balaji* (1895) B. P. J. 415; *Lal Behary v. Thacomoney* 23 C. 892; *Kanaye v. Anund Lall* 23 C. 908 N; *Buggoban v. Prancoomaree*, 28 C. 906 N.

(7) *Raja Ram v. Gopal*, (1876) B. P. J. 229; *Bapuji v. Gangadhar*, (1877) B. P. J. 181.

(8) *Harilal Mallick (In re)* 33 C. 1269.

(9) *Dawood v. Vallubdas*, 18 B. 227.

(10) *Harilal v. Nagar*, 21 B. 88.

(11) *Jeevan Bai v. Manordas*, 35 B. 199.

(12) S. 4 Transfer of Property Act. IV of 1882 read with S. 37, Contract Act (IX of 1872); *Ambaldas v. Noraindas*, (1888) B. P. J. 817; *Ali Sahab v. Shabji*, 21 B. 85; *Sundarabai v. Jayavant*, 24 B. 114; *Jeevanbai v. Manordas*, 35 B. 199 (203); *Asanand v. Tulsan Bai*, 5 S. L. R. 245; 15 L. C. 824; *Janda Lal v. Dhirendra*, 40 C. 710; *Kunjilal v. Venkataramanjulu*, 26 M. 662, in which the effect of S. 74 of Act IV of 1882 read with S. 37 of the Contract Act was not considered.

(13) *Hakma v. Meman* 7 B. H. C. R. (O. C.) 19.

(14) *Ramlal v. Haran Chandra* 12 W. R. 9 (11, 18); *Kushal Chand v. Ibrahim*, 3 B. H. C. R. (A. C.) 28; *Kedari v. Atmarabhat*, 9 B. H. C. R. (A. C.) 11.

(15). Act X of 1918.

CHAPTER XI.

PARTITION.

1374. Topical Introduction.—The right of partition postulates a later development of archaic law. As stated before, the primal society was tribal and all that the tribe acquired was held in common without any right of alienation or division. The disruption of tribes into family groups marked a distinct advance in social evolution, but the incidents of tribal ownership continued and so Usanas declares that land was “indivisible among kinsmen even to the thousandth degree.”⁽¹⁾ As the families grew and became unwieldy and social conditions brought about greater security, the necessity of partition became inevitable. We have then the text: “land passes by six formalities; by consent of townsmen, of kinsmen or neighbours and of heirs, and by gift of gold and water.” “In regard to the immoveable estate, sale is not allowed; it may be mortgaged by consent of parties interested.”⁽²⁾ That is to say, townsmen, neighbours, kinsmen and heirs were all interested in its disposal, for they were all at one time, joint owners of the tribal domain. As time advanced their hold on the land relaxed, and the kinsmen alone formed a group who jointly held and enjoyed the common land. Yet another stage separated even the kinsmen but the separation in possession was not recognized as any separation of titles. So Brihaspati ordains: “Separated kinsmen as those who are unseparated are equal in respect of immoveables, for one has not power over the whole to make a gift, sale or mortgage.”⁽³⁾ But the same process which had put the townsmen and the neighbours out of account equally sufficed to place the separated kinsmen out of the family, contracted the individual rights of property, and the same texts which still recorded the history of the past had to be reconciled to the growing rights of property. As the communities became more scattered the law of convenience dictated the recognition of family rights. Individual effort began to be prized and a distinction became preceptible between individual acquisition and communal wealth. This is recognized in the following text of Brihaspati: “He among them who has made an acquisition, may take a double portion of it.”⁽⁴⁾ This was the first recognition of the incentive to individual enterprise but it was half-hearted and eaten up by the exception. “But if the common stock be improved, an equal division is ordained.”⁽⁵⁾ But the march of economic laws may be slowed, it cannot be thwarted. As the value of property grew and a keener competition for existence stimulated industry, the right of each member to separate his share could not longer be resisted. But this was not universally acknowledged. For instance, in Malabar a co-parcener has even now no right of partition, though the co-parcener is entitled to his self-acquired moveable property during his life-time, which on his death lapses to the tarwad.⁽⁶⁾

(1) Cited in Mit. 1-IV-26.

(2) Anon. cited in Mit. 1-1-81, 82.

(3) Cited in Mit. 1-1-80.

(4) Brihaspati XVII-42 cited in Mit. 1-

(5) Yaj. ii-121 cited in Mit. 1-IV-80.

(6) Govindan v. Sankaran, 82 M. 869

(360) F. B. following Kallati v. Folas, 1 M. H. C. R. 162.

1374. In places however, where the communal rights yielded to familial rights the community did not loose its hold upon such property. There then arose the right of pre-emption. Such is the right of pre-emption in the Punjab where the right was too well established to be shaken by the smaller families. But in more advanced sections of society both the communal and the familial rights have yielded to individual ownership. Such is the law of the *Dayabhag* in Bengal where a co-parcener enjoys rights in *quasi* severalty even when he is a member of a co-parcenary. But under the *Mitakshara* his rights are more medieval though here again, the presidencies of Bombay and Madras have adopted a view which recognizes the right of a co-parcener to alien his share for value. But the right of alienation though closely linked to the right of partition is yet distinct. The right of partition was the first to be forced for recognition. The right of alienation came in later. But they were both rights of property and have reacted upon one another. Take for instance, the case of Bengal where male and female co-parceners have alike the right to demand partition. And here the co-parceners enjoy the largest latitude of alienation.

1375. With the first concession of the right of partition the shares were unequally divided. "The portion deducted for the eldest is the twentieth part of the heritage, with the best of all the chattels; for the middlemost, half of that; for the youngest, a quarter of it." ⁽¹⁾ But this practice was not uniform, since *Manu* declares that in a partition after the death of the father and mother, "the eldest brother may take the patrimony entire and the rest may live under him as under his father," ⁽²⁾ thus foreshadowing the rule of primogeniture which still survives in custom and is ordinarily applied to Jagirs, Rajas, Zemindaris, chieftainships and principalities. When the right of unequal division could no longer be tolerated, the custom changed but the written law could not be altered. This is how equality of partition became established: "An unequal partition is admissible in every period. How then is a restriction introduced, requiring that sons should divide only equal shares? The question is thus answered: True this unequal portion is found in the sacred ordinances; but it must not be practised, because it is abhorred by the world; since that is forbidden by the maxim 'practise not which is legal, but is abhorred by the world (for) it secures not celestial bliss' ⁽³⁾ as the practice of offering bulls is shunned on account of popular prejudice, notwithstanding the injunction 'offer to venerable priest a full or a large goat'; and as the slaying of a cow is for the same reason disused, notwithstanding the precept ⁽⁴⁾ 'slay a barren cow as a victim consecrated to Mitra and Varun.' Therefore, unequal partition, though noticed in the codes of law, should not be practised, since it is disapproved by the world and is contrary to scripture. For this reason, a restriction is ordained, that brothers should divide only in equal shares." ⁽⁵⁾

1376. The history of the *Mitakshara* law of partition is thus an innovation on the ancient law. At first the right to divide rested with the father. It could not be enforced against his will. But later on it was recognized that what was right for the father to do was equally right for the son to demand. The only objection that could be taken to such enforced partition is prejudice to the father's afterborn issue. As to this the *Mitakshara* said: "While the mother is

(1) *Manu* IX 112.

(2) *Manu* IX-105.

(3) *Yaj.* according to *Mitra Misra* in the *Virmirodaya*, but ascribed to *Manu* in *Balam Bhatt's* commentary. It has not however, been found either in *Manu* or

Yajnavalkya's Institutes; *Cole. Note* to *Mit-1 iii 4*.

(4) *Veda*. -*Subodhini* and *Balambhatt*—*Cole. Note* to *Mit 1-iii-4*.

(5) *Mit.* 1—IV—7.

capable of bearing more sons and the father retains his worldly affections and does not desire partition, a distribution of the grandfather's estate does nevertheless take place by the will of the son."⁽¹⁾ But the son's right against the father is conditioned by the Mitakshara on the following facts: (i) It might be made by the father. (ii) Against the father if the father, is addicted to vice and the mother is past child bearing. But after the father's death partition could be had as a matter of course.⁽²⁾ This text is now explained away as referring to the father's self-acquisitions.

129. (1) Partition is the intentional severance of co-parcenary interests by members of a joint family.

(2) An unequivocal expression of an intention to separate such interest may amount to partition.

(3) Partition may be effected by the definition of rights or by the division of property by metes and bounds.

Synopsis.

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| (1) <i>Texts on the subject</i> (1377). | (6) <i>Declaration of intention</i> (1382). |
| (2) <i>Partition of revenue paying estate</i> (1378). | (7) <i>Division of rights</i> (1385). |
| (3) <i>What is partition</i> (1380). | (8) <i>Effect of institution of a suit</i> (1382 1386). |
| (4) <i>Intention essential</i> (1381, 1383, 1384). | (9) <i>Minor's suit</i> (1388). |
| (5) <i>Severance in interest</i> (1381). | (10) <i>Dayabhag law distinguished</i> (1389). |

Texts.

1377. Analogous Law.—The following texts bear on the subject of partition :—

(1) **Narad** :—Where a division of the paternal estate is instituted by sons, that becomes a topic of litigation called by the wise partition of heritage ⁽³⁾

(2) **Mitakshara** :—Partition ⁽⁴⁾ is the adjustment of divers rights regarding the whole by distributing them on particular portions of the aggregate ⁽⁵⁾

(3) **Virmitrodaya** :—Partition is the adjustment of the proprietary right into specific shares. ⁽⁶⁾

(4) **Dayabhag** :—Partition is the allotment of separate portions of the family property to the co-sharers corresponding to the shares already owned by each. By partition an allotment is made in respect of the share of a co-parcener. ⁽⁷⁾

(5) **Raghuandan** :—Partition is a distributive adjustment by lot or otherwise of the property of relatives vested in them, over the whole wealth, in right of the same relation, upon the extinction of the former owner's property ⁽⁸⁾

(6) **Mayukh** :—Even where there is a total absence of common property a partition is effected by the mere declaration, 'I am separate from thee'. for partition is a particular condition of the mind and the declaration is indicative of the same. ⁽⁹⁾

(7) **Saraswati Vilas** :—Without any formality partition can be effected by mere intention. ⁽¹⁰⁾

(1) Mit. L-V 8 : *Krishna v. Sami*, 9 M.

(2) Mit. 1-2-27.

(3) Narad XIII-1.

(4) Vibhag.

(5) Mit. I-i-4.

(6) Mitra Misra's *Virmitrodaya* 1 86.

(7) Cited in Mitra's *Joint family and Partition* (2nd Ed.) 303.

(8) *Dayatatwa* cited in Col. Dayabhag 1-1 8.

(9) Ch. IV: S. 3 (Mandik) 89.

(10) Setlur's Tr. 122.

1378. The Hindu Law of partition has been materially altered by the statute law which prescribes a special procedure for the partition of revenue paying estates by the Collector. (1) And the Partition Act of 1893 (2) generally empowers the court to sell the whole or any portion in order to prevent inconvenient divisions.

The effect of these statutes is to modify the procedure leaving the rights to be determined by Hindu Law.

1379. Gautam treats partition as one of the sources of property (3) and this view is echoed by the Mitakshara. This does not mean that before partition property does not vest in any one nor does it mean that before partition none of the co-parceners have any interest in the joint property. All that Gautam means is that before partition the right of a co-parcener was indeterminate and that partition defines and perfects it.

1380. What is partition.—The term “partition” involves the severance of undivided interests in common property. The very word “co-parcener” implies a right to the division of property. Cunningham defines partition as the process by which members of a joint family become separate, and cease to be co-parceners. (4) But this definition is too narrow since it is now settled that “a definite and unambiguous indication by one member of his intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed.” (5) This was pointed out by the same Board as far back as 1866 when referring to an argument that a partition deed was ineffectual to convert the undivided property until it has been completed by an actual partition by metes and bounds. Lord Westbury observed that the contention confounded the division of title with the division of the subject to which the title is applied. He then added : “When the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share which he may claim the right to receive and to enjoy in severalty although the property itself has not been actually severed and divided.” (6) This view has been since reiterated by the same Board in other cases, (7) in one of which they said : “Separation from the joint family involving the severance of joint status so far as the separating member is concerned, with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified shares

(1) Bengal Act V of 1897 supplemented by rules framed by the Board of Revenue. U. P. Act III of 1901. C.P. Act II of 1917 Ch. XI (Ss. 161-183) Punjab Act XVII of 1897 Ch. IX Bom. Act VI of 1888, and V of 1879 (Ss. 118, 117) subject to the provisions of Bom. Act V of 1862, Mad. Act II of 1864 (Ss. 45, 46) Mad. Act I of 1866 Assam Reg. 1 1856 Ch. VI.
(2) Act IV of 1893.
(3) Gautam X-39; 2 S. B. F. 228, cited

with approval in Mit 1-1 8.

(4) Hindu Law, p. 136

(5) *Suraj Narain v. Iqbal Narain*, 35 A 80 (87) P. C.

(6) *Appovier v. Rama*, 11 M 1 A 75 (89, 90).

(7) *Suraj Narain v. Iqbal Narain*, 35 A. 80 (87) P. C.; *Girja Bai v. Sadashiv*, 43 C. 1031 P. C.

separately from the others without being subject to the obligations which arise from the joint status, whilst the other is the natural resultant from his decision, the division and separation of his share which may be arrived at either by private agreement amongst the parties or on failure of that by the intervention of the court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the co-sharer can question it nor the court examine his conscience to find out whether his reasons for separation were well founded or sufficient; the court has simply to give effect to his right to have his share allocated separately from the others." (1)

The "intentional severance" mentioned in clause (1) may then be effected by a mere declaration or by some overt act, as in the case where one co-parcener "left the joint residence to withdraw himself from commensality as indicating a fixed determination henceforward to live separately from his cousin" and the court treated "the fact of his borrowing money for his maintenance as well as making a will as indicating, at all events, that he himself considered that a separation had taken place." The conclusion was based on the inference of intention derivable from the acts and declarations of the member who, it was alleged, had separated himself, and not from the conduct or attitude of any other party. (2)

The first essential condition of partition then is that it must be intended. The intention may be inferred from conduct, act, or declaration showing a determination to effect severance from the joint family.

1381 Such severance must be to determine the joint status, thus distinguishing partition from a mere family arrangement for convenience of management or possession. The severance may be of title, status, or possession but it must be with the intention to effect a severance.

The fact that a mere severance of interest does not constitute partition if such severance was not expressly or impliedly intended to have that effect, is the *ratio decidendi* of many cases. Such a case arose where the plaintiffs sued the defendants, for partition. The parties had long been separate in mess and residence, and as to estate the plaintiff's ancestors received some land, from the ancestors of the defendants by way of *sir* upon the income of which they maintained themselves. This *sir* did not correspond to the extent of the share which the plaintiff's branch would have received if there had been a partition. It was proved that there was a family custom according to which different members of the family on living separate, received similar allotments of *sir* for maintenance which were increased according to exigencies. There was such an increase at one time to the lands given to the plaintiff's branch, whereupon the Privy Council held that there had been no partition and as to the bar of limitation by the defendants the court held that the proceeds of the *sir* were payments by the defendants which kept alive the plaintiff's claim. (3)

(1) *Girja Bai v. Sadashiv*, 43 C. 1031 (1050) P. C.
(1047, 1048) P. C.

(2) *Joy Narain v. Giris Chunder*, 4 C. 134 P. C.; cited in *Girja Bai v. Sadashiv*, 43 C. 1031 (1050) P. C.

(3) *Ravjeet Singh v. Korr Gujraj Singh*, L. R. 1 I. A. 9; 3 S. P. C. C. 804.

1382. Declaration of intention.-- It was at one time held that two things

Ol. (2).

were at least necessary, to constitute partition namely the shares must be defined, and there must be distinct and independent enjoyment of those shares. (1) But as already stated, the Privy Council have in a series of cases laid down that the second condition is by no means a pre-requisite of a completed partition, (2) and that an unequivocal expression of intention clearly expressed may amount to partition. But the expression of such intention must be to presently appropriate and enjoy in a manner inconsistent with the ordinary state of enjoyment of an undivided family, that is, the expression must unequivocally create a present separation and not merely a contemplated separation. (3) So where two brothers, being members of a joint Mitakshara family executed an agreement whereby, after reciting that the declarants had remained joint and undivided and in commensality up to a certain date, and that portions of their properties, both moveable and immoveable, had been partitioned between them, they provided for the partition of the remaining joint properties by certain arbitrators appointed in that behalf, the court held the agreement of itself to amount to a separation of the brothers as a joint family and extinguished all rights of survivorship between them. (4) And so it has been held by the Privy Council that although a suit by a member of a joint Hindu family against his co-sharers for a separate share of the joint estate be not in terms a suit for partition, yet if it appears that the intention of the plaintiff was to obtain partition in the right of a co-parcener it does not require the consent of the other co-parceners to complete it. Severance of interest may be effected by an indirect act, such as sale of one's co-parcenary interest to another. (5) But in the North where a sale of undivided interest is not permitted, partition cannot be presumed from a mere sale though it is evidence from which partition might be inferred. So that where the members of a joint family agreed in writing that all the moveable and immoveable properties were to be divided as from the date of the agreement and that from that time forward separate accounts were to be kept by the co-parceners and the profit or loss subsequent thereto was on no account to be binding on the other co-parceners, the agreement was held to have effected a division in status, though there was no actual division of property by metes and bounds. (6) The giving of a notice or the institution of a suit would amount to such partition. So where a co-parcener sent a notice to the manager demanding

(1) *Sheo Dyal v. Judoonath*, 9 W. R. 61; *Sularsanam v. Namasimhulu*, 25 M. 149 (156) in which Bhasyam Ayyangar, J. held that a mere declaration was insufficient and that what was required was some further overt act namely the giving him "some trifle" out of the family property. (*ib.*, p. 156 citing Mit 1 ii-11, 12; Manu IX 207; Yaj.ii 117). So Yaj. navalkya says: "The separation of one who is able to support himself and is not desirous of participation may be completed by giving him some trifle" (11-117). But the contrary stated in the text is now too well established to admit of any controversy. These and the following cases must then be taken as overruled by the Privy Council; *Ambika Dat v. Sukhmani*, 1 A. 487; *Debee Pershad v. Phool Kuar*, 12 W. R. 510 (institution of suit insufficient); contra *Joy Narain v. Girish Chunder*, 1 C. 484 P. C.; *Girja Bai v. Sadashiv*, 43 C. 1081, 1045 P. C.

(2) *Appovier v. Rama*, 11 M. I. A. 75; *Doorga Pershad v. Kundun*, 21 W. R. 214 P. C.; *Ranjit Singh v. Koer Gujraj Singh*, L. R. 1 I. A. 9; *Chidambaram v. Gauri*, 2 M. 83 P. C.; *Joy Narain v. Girish Chunder*, 1 C. 484 P. C.; *Ram Pershad v. Lakhpati* 30 C. 231 (253) P. C.; *Bal Kushen v. Ram Narain*, 30 C. 738 P. C.; *Parbati v. Nannihal*, 31 A. 412 P. C.; *Suraj Narain v. Iqbal*, 35 A. 80 (87) P. C.; *Girja Bai v. Sadashiv*, 43 C. 1081 (1045) P. C. To the same effect *Tej Pratap v. Champa*, 12 C. 96; *Radhichurn v. Kripa Smidhu*, 5 C. 474 (477); *Phul Kuari (In re)*, 8 B. I. R. 388 note; *Sundra v. Arunachallam*, 39 M. 169.

(3) *Babaji v. Kashi Bai*, 4 B. 157.

(4) *Tej Pratap v. Champa*, 12 C. 96.

(5) *Soundra v. Arunachellam*, 29 M. L. J. 816.

(6) *Umayorupagam v. Palanarayanan*, 28 I. C. (M) 908; *Appovier v. Rama*, 11 M. I. A. 75 (91).

that his share be partitioned for which he instituted a suit pending which he died and the question arose whether he died joint or separated in estate the Privy Council said: "It would probably be enough for the determination of this appeal to say that nothing could be more unequivocal or more clearly expressed than the conduct of Harihar in indicating his intention to separate himself and enjoy his share in severalty by the notice of the 1st October 1908, completed with this suit, and that the acts amounted to a separation with all its legal consequences."⁽¹⁾ So partition is complete where the co-parceners enter into an agreement in which they declare each member entitled to a definite fractional part of the whole estate.⁽²⁾

1383. Partition by metes and bounds is then unnecessary to complete partition. ⁽³⁾ What is necessary is intention. So whether

Intention material. an agreement for the division of profits is merely an arrangement for convenience or a partition must depend upon the intention of parties to be gathered from the language of the instrument, though in construing instruments undue stress should not be laid on the words actually employed. As was said in a case: "Looking at the state of knowledge among even fairly educated Hindus, as to the exact principles of their own law (a point on which I do not mean to draw a comparison between them and the people of any European country at all to the disadvantage of the Hindus) looking to this fact, and to the inveterate habit of the natives to have accounts of the most important kinds drawn up by mere scribes, neither acquainted with law nor trained to precision of language, I have a strong repugnance to hold parties bound to a legal consequence arising from the use of particular terms, where surrounding circumstances appear to show that the parties had no such intention as that consequence would indicate, and that, in truth, the consequence was unforeseen."⁽⁴⁾ The decision in this case was upheld on appeal by the Privy Council who referring to the agreement observed that the statement that the four co-sharers were in possession of equal shares of which they appropriated and enjoyed the profits in proportion to their respective shares pointed to an appropriation and enjoyment of the profits inconsistent with that which is the normal state of enjoyment of a joint and undivided Hindu family, and that their resolve to have the shares mutated in accordance with their actual possession and enjoyment "appeared to their Lordships to be strong *prima facie* evidence of the intention to hold the undivided shares as the separate property of each co-parcener. It may not be conclusive but at all events it is strong *prima facie* evidence of such intention." They then added that though the deed did not declare that after the agreement the family was to be divided, at the same time there was a statement consistent with their continued indivision and that therefore it must be presumed that the agreement was only consistent with partition and inconsistent with continued jointness. ⁽⁵⁾

1384. It is thus clear that mere definition of interest with the intention to separate, constitutes partition. "Partition does not give him a title or create a title in him, it only enables him to obtain what is his own in a definite and

(1) *Girja Bai v. Sadashiv*, 48 C. 1031 (1945) P. C. following *Vato v. Rawshun*, 8 W. R. 82.

(2) *Phuljhari Koer (In re)*, 17 W. R. 102

(3) *Mahabeer v. Kundun*, 8 W. R. 116 affirmed O. A. *Doorga v. Pershad v. Kundun*, 21 W. R. 214 P. C.

(4) *Mahabeer v. Kundun*, 8 W. R. 116 (128)

affirmed O. A. *Doorga Pershad v. Kundun*, 21 W. R. 214 P. C.

(5) *Doorga Pershad v. Kundun*, 21 W. R. 214 (216) P. C. following *Appovier v. Rama*, 11 M. I. A. 75. To the same effect *Ranjit Singh v. Koer Gujraj Singh* L. R. 11 I. A. 9.

specific form for purposes of disposition independent of the wishes of his former co-sharers." (1)

1385. Division of rights.—It is seen that an intentional severance of joint interests amounts to partition. It has also been seen
 Cl. (3). that such severance may be effected by a mere verbal declaration unaccompanied by any overt act, from which it follows that partition may be effected by a mere division of rights without any physical division by metes and bounds. So Lord Westbury said: "It is necessary to bear in mind the twofold application of the word 'division'. There may be a division of right and there may be a division of property. And thus after the execution of this instrument, there was a division of right in the whole property, although in some portions that division of right was not intended to be followed up by actual partition by metes and bounds, that being postponed till some future time when it would be convenient to make that partition." (2) And later on he said: "Then if there be a conversion of the joint tenancy of an undivided family, into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right although not immediately followed by a *de facto* actual division of the subject-matter. This may, at any time, be claimed by virtue of the separate right." (3) So where after the death of one of the members of a joint family in 1861 the survivors mutually agreed that the joint property should be thenceforth held and enjoyed by the various members of the family in certain defined shares which they specified in a petition to the Collector dated 13th June 1861 to have their names entered to that effect in the official papers of the village which was done, and the petition was filed in the Collectorate and entries were made in the village papers in accordance with it up to 1899, it was held by the Privy Council—(reversing the Allahabad High Court) that on the evidence, in the circumstances of the case, a partition of the property had been effected in 1861 and that the transactions and conduct of the members of the family with respect to the management of the property had been on the basis that it was held in separate shares from that time. (4) The decree passed in the suit assigns him that share, to which he would be entitled on partition, and such decree does in fact effect a partition, at all events of such rights which is effectual to destroy the joint estate. So where a co-parcener by name Shiv Prasad Giri in consequence of his cousin Joy refusing to allow him any participation in their joint estate, left the house in which they had jointly resided, went to reside with the husband of his sister and had to maintain himself for sometime by moneys which he borrowed before he sued for his share in which he obtained a decree, but while it was pending before His Majesty in Council, he died devising his estate to his sister's son and thereupon the defendant Joy claimed the estate by survivorship.

(1) *Appovier v. Rama*, 11 M. I. A. 75; *Doorga Pershad v. Kundun*, 21 W. R. 214 P. C.; *Ram Pershad v. Lakhpati*, 30 C. 231 (253) P. C.; *Suraj Narain v. Iqbal*, 35 A. 80 (87) P. C.; *Girja Bai v. Sadashiv*, 43 C. 1031 (1045) P. C.; *Deo v. Dwarkanath* 10 W. R. 273; *Kailash v. Kachi*, 24 C. 389; *Kedar v. Ramoni* 7 J. C. (C) 884 (886); *Girja Bai v. Sadashiv*, 43 C. 1031 (1045) P. C.

(2) *Appovier v. Rama*, 11 M. I. A. 75 (91

92); *Parabati v. Naunihal Singh*, 31 A. 412 (422) P. C.

(3) *Appovier v. Rama*, 11 M. I. A. 75 92

(4) *Parabati v. Naunihal Singh*, 31 A. 412 P. C. *Suraj Narain v. Iqbal*, 35 A. 80 P. C. *Girja Bai v. Sadashiv*, 43 C. 1031 P. C. *Ramdhin v. Bisheshwar* 30 L. J. 508; 37 I. C. 111; *Sikhmani v. Annamayi*, 10 I. C. (M.) 86.

The Privy Council concurred with the courts in India in rejecting Joy's claim and said: "Their Lordships regard the conduct of Shiv Prasad Giri when he left the house in which both he and Joy Narain Giri lived and withdrew himself from commensality with his cousin, as indicating a fixed determination henceforth to live separate from his cousin, and they treat the fact of his borrowing money for his separate maintenance, as well as making a will as indicating at all events, that he himself considered that a separation had taken place." (1)

1386. The mere institution of a suit for partition may be regarded as an unequivocal expression of such intention. (2) But such intention cannot be inferred from a suit for a mere declaration of the plaintiff's right to a share in the estate of his father, since such a suit would not be inconsistent with an intention on his part to obtain a declaration of his being entitled to a joint interest (3) in a joint estate.

1387. Since intellectual partition is completed on a mere expression of an intention to separate, the fact that the parties thereafter continued to live together and enjoy their share in common might affect the mode of enjoyment but apart from reunion, it cannot restore the previous status of jointness. (4)

A had three sons—one by his first wife, and two by his second wife. He executed a will by which he authorized his executors to effect a partition among his sons when the eldest of them attained the age of majority. The executors did as they were directed. Properties were divided into three shares—one of which was allotted to the eldest son and two to the other two sons. The deed of separation provided that if any property was left undivided it should be divided into three shares by the three parties, and that in future the parties should have no connection in respect of property except relationship by blood. It was held that these provisions effected a severance in interest as between the sons of the second wife also, though their property was kept together without any division. (5) It is quite competent to the members of a joint family to have a completely divided status even though the division of the properties by metes and bounds is actually effected only in respect of certain items of property. (6)

1388. Effect of a minor's suit.—It being now settled that the mere filing of a suit for partition amounts to the unequivocal declaration of intention which law regards as a sufficient partition in law, the question arises whether the same rule would hold good where the plaintiff is a minor. On this subject two views are possible and both have received support. One is that the minor is no exception to the rule since he makes his declaration through his next friend (7) and the other is that since the partition of his share is discretionary with the court, there can be no partition till the court uses its discretion in his favour. (8) But this view ignores the fact that partition may be effected out of court and the minor suffers from no impediment of procedure if he exercises his election through his qualified mouthpiece.

(1) *Joy Narain v. Joy Narain* 4 C 484 (437) P. C. *Tandayulhasani v. Raghunath* 55 M. 389.

(2) *Girja Bai v. Sadashiv*, 48 C. 1031 (1045) P. C.

(3) *Debee Pershad v. Phool Koeree* 12 W R. 510 explained in *Joy Narain v. Joy Narain* 4 C. 434 (437, 438) P. C.

(4) *Ram Pershad v. Lakshpati*, 80 C. 231.

(5) *Komalambal v. Krishnasamy*, 2 M. W. N. 310, 10 I. C. 385.

(6) *Segu v. Segu* 2 M. W. N. 467; 12 I. C. 704.

(7) *Krishna Lal v. Nandeshwar*, 44 I. C. (Pat) 146 (151).

(8) *Chelimi v. Subhanna*, 41 M. 442 (445).

1389. Dayabhag law distinguished.—The rule of law stated in the clause is stated to be inapplicable to a Dayabhag family, "because although as regards the enjoyment of the family property there is no difference between a Dayabhag joint family and a Mitakshara joint family, there is this substantial difference between the two, that in the latter case the co-parceners hold as joint tenants while in the former they hold as tenants-in-common. The ascertainment of the shares in the one case affords no indication of an intention to destroy the unity of the family, because such shares are already determined by the law. In the other case, however, the definition of such shares would afford a very strong indication of partition, and would ordinarily amount to partition unless the strongest proof was afforded of an intention to remain united in estate or to become reunited. It may be further pointed out that in the case of a Dayabhag family, even the division of income for the convenience of the different members would not, in the absence of intention, amount to the division of the family." (1) There is, however, no distinction in principle between the two schools. The question is one of intention in both cases and it is for the court to decide whether conduct in a given case is a sufficiently unequivocal expression of an intention to separate.

130. (1) A family arrangement is a settlement by members of the joint family as to the mode of enjoyment of their property.

(2) It differs from partition in that it is an agreement for separate enjoyment by members without determination of their rights.

Synopsis.

- (1) *Distinction between partition and family arrangement* (1390) (2) *Effects of release* (1391, 1395).
 (3) *Effect of release* (1397).
 (2) *Law governing family arrangements*

1390. Analogous Law.—The rule here stated is not merely the rule of Hindu Law; but is founded upon a broad principle of equity which has a wider application. (2) So Cockburn, C. J., said: "The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Everyday a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and instead of being annoyed with an action, he escapes from the vexations incident to it." (3) The arrangement does not depend for its validity upon any right, for the plaintiff may have no right at all, and the defendant may know it, yet if the plaintiff believed that he had a right and the

(1) *Bata Krishna v. Gopal*, 5 C. L. J. 417 (1922).

(2) *Williams v. Williams*, L. R. 2 Ch. 294; *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449;

Mile v. New Zealand Alford Estate Co., 32 Ch. D. 266.

(3) *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449 (451, 452).

defendant preferred its settlement to trial by court it is a good settlement binding on the parties. (1) It is not a *nudum pactum* because the settlement of a dispute is in itself a good consideration provided that there was some dispute to settle and the party making a claim *bona fide* believed in it. (2) In the case of family arrangements the consideration is not the sacrifice of any right, but the settlement of a dispute and the court does not consider narrowly the *quantum* of consideration. Equity leans towards the maintenance of family arrangements and a fair settlement of the dispute is, as already stated, a sufficient consideration in such cases. (3)

These principles have been given effect to by the Privy Council in several cases (4) to be presently considered.

This fact distinguishes a settlement from what may be a colourable transaction which may bear the appearance of a settlement but be in reality a fictitious transaction.

1391. A family arrangement as distinguished from a partition is an amicable settlement made by members of a joint family to avert the costliness and bitterness of a formal partition. Where, for instance, the sons desire to separate from their father and there is a dispute as to whether certain parcels of property are self-acquired or ancestral and there is no other means of settling the dispute otherwise than by the arbitrament of law, parties may give and take and execute mutual releases agreeing to hold what they have got thenceforward in severalty. It is a family arrangement and not a partition, because parties have agreed to a course without advertance to their legal rights. The motive of the settlement is the purchase of peace, and where there is a motive, the courts do not enquire into the sufficiency of consideration (5) or disturb the arrangement on the ground of its inequality (6) unless there was fraud or some other ground to vitiate it in law. (7) The arrangement binds both the parties and their issue. (8) This arrangement may extend to treating self-acquired property as joint or *vice versa* (9) or it may be the culmination of a suit for partition in which the parties arrive at the settlement of a dispute which they desire to close. (10) Such settlement cannot be set aside upon the ground that it was accepted under a misconception of facts or an erroneous view of one's rights or that it has given to one party more than he was legally entitled to and would have recovered if he had taken the judgment of the court upon it. (11)

(1) *Cook v Wright*, 1 B. & S. 559 (570); 80 L. J. (Q. B.) 321 (324) cited per Blackburn, J. in *Callisher v Bischoffsheim*, L. R. 5 Q. B. 449 (451, 452) and per North, J. in *Mile v. New Zealand Alford Estate Co.*, 32 Ch. D. 266 (278).

(2) Per Cotton, L. J. in *Mile v. New Zealand Alford Estate Co.* 32 Ch. D. 266 (283); *Kamal Kumari v. Narendra*, 9 C. L. J. 19; 1 I. C. 573.

(3) *Kamal Kumari v. Narendra*, 9 C. L. J. 19; 1 I. C. 573.

(4) *Rajunder v. Bijai Govind*, 2 M. I. A. 181 (249); *Hetnarain v. Modnarain*, 7 M. I. A. 311 (323); *Mantappa v. Baswuntrao*, 14 M. I. A. 24 (36); *Greender v. Trogluck*, 20 C. 373 (377, 378) P. C.; *Bishenchand v. Asmaida*, 5 A. 560 (574, 575) P. C.; *Kedar Nath v. Ratan Singh*, 32 A. 415 (426)

P. C.; *Khunilal v. Govind*, 33 A. 356 P. C.

(5) *Lakshmi Bai v. Garpat*, 6 B. H. C. R. (O. C.) 128; *Upendramath v. Bindeshri*, 20 C. W. N. 210; 32 I. C. 468.

(6) *Rajunder v. Bijai*, 2 M. I. A. 191.

(7) *Ram Das v. Chabildas*, 12 Bom. L. R. 621 (624).

(8) *Anand Rao v. Administrator General*, 20 B. 450; *Ram Das v. Chabildas*, 12 Bom. L. R. 621 (627).

(9) *Kedar Nath v. Ratan Singh*, 32 A. 415 (426) P. C.

(10) *Kedar Nath v. Ratan Singh*, 32 A. 415 (426) P. C.; *Khunilal v. Govind*, 33 A. 356 P. C.

(11) *Birbadra v. Kalpataru*, 1 C. L. J. 348 (405); *Helen v. Durga Das*, 4 C. L. J. 323 (331).

1392. It is not essential for its validity that a settlement should have been acted upon, though the fact that it has been acted upon adds to its binding force.

1393. It is a mistake to suppose that the doctrine of family arrangements extends no further than arrangements for the settlement of doubtful or disputed rights. The principle is applicable not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but also to cases in which arrangements are made between them for the preservation of its property. ⁽¹⁾

1394. Family arrangements are governed by a special equity peculiar to themselves and will be enforced if honestly made, although they have not been meant as a compromise but have proceeded from an error of all parties originating in mistake or ignorance of fact as to what their rights actually are or of the points on which their rights actually depend. ⁽²⁾

1395. Partition distinguished.—Though a partition is confined to only specified relations a family arrangement is not similarly limited. So the Privy Council said: "There can be no partition directly between grandfather and grandson while the father is alive. But it is a family arrangement, partaking so far of the nature of a partition that Udai Narayan receives a portion and is thenceforth totally excluded, and *quod ultra*, Matadyal surrenders his interest to his grandson who on a complete partition among the whole family would be entitled to one-fourth. Now in such an arrangement it would be quite consistent with Hindu ideas of ancestral property to express a desire that the whole generation to which the property was transferred should benefit by it. . . . The notions present to the mind of the head of a joint Hindu family who is making a family arrangement are something very different from notions present to the mind of an English testator when he makes a gift to a class". ⁽³⁾

1396. It has already been seen that a family arrangement may be made without reference to or determination of the legal rights of the parties. The fact that a person has obtained by a family arrangement what he could never have obtained by partition is no blot upon its validity. Such for instance would be the grant of land by the holder of an impartible estate to the members of his family in the shape of maintenance or other grants. It may be that the grantee has no legal claim to maintenance but the grant once made cannot be resumed on that account.

1397. Release.—A party may relinquish his right, or execute a release which may be supported as a family arrangement. ⁽⁴⁾ But where a co-parcener released his share in favour of the rest who were to pay the debts it was held that the release was void though registered and that even S. 25 of the Contract Act could not save it. But the judgment appears to be unsound and proceeds upon the view that because the creditors could still hold him liable for the debt, the relinquishment failed for want of consideration. ⁽⁵⁾ But if

(1) *Stapilton v. Stapilton*, 1 Atk. 2 cited in *Helan Dasi v. Durga Das*, 4 C. L. J. 323 (381, 332).

(2) *Williams v. Williams*, L. R. 2 Ch. 294 cited in *Helan Dasi v. Durga Das* 4 C. L. J. 323 (381) followed in *Sukhrum v. Uderam*, 8 I. C. (A) 85 (compromise by a widow binds the reversioner)

(3) *Bishenohand v. Asmaida*, 6 A. 560

(574, 575) P. C.

(4) *Sadashiv v. Trimbak*, 28 B. 146 (173) the portion laying down that a minor's contract is merely voidable and not void is unsound; contra *Appa v. Ranga*, 6 M. 71 (73) (release held void as made without consideration)

(5) *Appa v. Ranga*, 6 M. 71 (73).

the creditors could hold the co-parcener liable he had his remedy against those who had taken his estate and undertaken to pay his debts

131. (1) A family arrangement cannot be set aside except for coercion, fraud, misrepresentation or undue influence.

When a family arrangement may be set aside

(2) In particular and without prejudice to the generality of the foregoing rule it may not be set aside upon any of the following grounds :—

(a) That there was no consideration to support it. (1)

(b) That it has transferred property to a person without any right. (2)

(c) That it was unfair and such as no court would support upon its merits. (3)

(d) That it was made by mistake of either party. (4)

(3) It may however be set aside on the ground that it was not *bona fide* or that there was no dispute.

(4) But before giving weight to these considerations due regard must be had to the time during which the arrangement has been acted upon or has remained unchallenged. (5)

Illustrations

(a) A disputes B's legitimacy. He afterwards compromises his claim with B on the basis of legitimacy. A cannot afterwards repudiate the compromise on proof of B's illegitimacy. (6)

(b) A, B, and C are three brothers. On a distribution of the family estate C receives an allotment of land in lieu of maintenance. He did not claim nor was allowed any share. C is bound by the arrangement. (7)

(c) A transfers to B property by mistake. B accepts it innocently. The transfer is valid. (8)

(d) A and B partitioned their property in mutual ignorance of their respective legal rights. The partition is binding. (9)

Synopsis.

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| (1) Family arrangement when liable to be set aside (1398). | (5) Unfair arrangement (1403). |
| (2) Mistake of parties not a sufficient ground (1405). | (6) Unilateral mistake (1405). |
| (3) Extraneous consideration not requisite (1400-1401). | (7) Arrangement when set aside (1407). |
| (4) Antecedent rights immaterial (1402). | (8) Effect of conduct and actings of the parties (1408). |
| | (9) Release when operative as family arrangement (1409). |

(1) *Kamalkumari v. Narendra* 9 C. L. J. 19; *Satya Kumar v. Satya Kripal*, 10 C. L. J. 503.

(2) *Cook v. Wright* 1 B. & S. 559 (570).

(3) *Rajunder v. Bijai Govind*, 2 M. I. A. 181 (24th).

(4) *Gordon v. Gordon* 3 Swan. 400; 19 R. R. 230; 36 E. R. 910 explained in *Satya Kumar v. Satya Kripal* 10 C. L. J. 503 (511).

(5) *Mantappa v. Baswantrao* 14 M. I. A. 24 (37); *Helan Dasi v. Durga Das*, 4 C. L. J.

323; *Satya Kumar v. Satya Kripal*, 10 C. L. J. 503 (511).

(6) *Gajapathi v. Gajapathi*, 18 M. I. A. 497 (512, 513).

(7) *Mantappa v. Baswantrao*, 13 M. I. A. 24 (36).

(8) *Gordon v. Gordon*, 3 Swan. 400; 19 R. R. 230 explained in *Satya Kumar v. Satya Kripal*, 10 C. L. J. 503 (511).

(9) *Rajunder v. Bijai Govind*, 2 M. I. A. 181.

1398. Family arrangement: valid and void.—The compromise or settlement of a family dispute and an acceptance of a given distribution instead of a general partition, are upheld by the courts as necessary to check litigation ⁽¹⁾ and to preserve the peace of families. The only condition required to support it is that it must be the *bona fide* settlement of a family dispute; or in other words, there must be a dispute and its settlement. If this is conceded the court will not scan too closely the rights of the contending parties affected thereby. The fact that one party had yielded to a claim in honest error is no ground for repudiating it when the error is discovered unless the other party was an accessory. This was settled by Lord Eldon who ruled that family arrangements without fraud must be established, though founded in mistake; but they would not be supported if founded on mistake of either party to which the opposite party was an accessory. A family arrangement concluded in honest error, is binding unless either party has been misled by the concealment of material things, for the family agreement requires communication of all material circumstances. So Lord Eldon, L. C. said: "Where family agreements have been fairly entered into without concealment of or imposition upon either side, with no suppression of what is true, or suggestion of what is false, then although the parties may have greatly misunderstood their situation and mistaken their rights, a court of equity will not disturb the quiet, which is the consequence of that agreement; but when the transaction has been unfair and founded upon falsehood and misrepresentation, a court of equity would have a very great difficulty in permitting such a contract to bind the parties." ⁽²⁾ In a settlement of a doubtful right truth may be on either side, but it is of the essence of a settlement that investigation is stopped and a settlement concluded to restore harmony. So where three sons one of whom being a minor was represented by his father effected a partition on the basis of which a suit was filed. It was however opposed on the ground that there was no partition but merely a working arrangement in which no account was taken of the joint property, that it was partial and incomplete and that there was a mistake in the scheme of division adopted at the private partition. The court however, overruled all these objections holding that a family arrangement could not be set aside on any of the grounds urged ⁽³⁾ So where the co-parceners had agreed to admit the adopted son of a widow, who under the Mithila law was only entitled to the lady's stridhan, in the mistaken belief of law that he was a co-parcener, the Privy Council refused to dissolve the settlement holding that it was a mistake which could not prejudice the adopted son who was not an accessory. ⁽⁴⁾ So in another case in which the plaintiff sued to set aside a partition on the ground of coercion, fraud, undue haste and gross inequality, the Privy Council found the first two facts not proved and the other two insufficient to annul it. ⁽⁵⁾ So where the question was whether certain persons were entitled to the properties in dispute, their predecessors-in-title being themselves illegitimate sons of their father to whom they could not inherit, the Privy Council held the question immaterial on the finding that they had obtained their estate under compromise or family arrangement which proceeded on the basis of their legitimacy. ⁽⁶⁾

(1) *Hetnarain v. Modnarain*, 7 M. I. A. 311 (822).

(2) *Gordon v. Gordon*, 3 Swan 400 (488). 36 E. R. 910 (917); followed in *Satya Kumar v. Satya Kripal*, 10 C. L. J. 508 (511).

(3) *Satya Kumar v. Satya Kripal*, 10 C. L. J. 508.

(4) *Rajunder v. Bijai Govind*, 2 M. I. A. 181.

(5) *Hetnarain v. Modnarain*, 7 M. I. A. 288 (321, 322).

(6) *Gajapathi v. Gajapathi*, 13 M. J. A. 497 (512).

1399. In another case three brothers had entered into an agreement on the assumption that their family estate was impartible and subject to the rule of primogeniture. As such, the two junior widows merely received land in lieu of maintenance. Later on the estate being partible, one of them sued for partition but the Privy Council threw out his suit on the ground that he was bound by the family arrangement. (1) The same view was taken in another case in which one brother gave another a share out of his self-acquisition believing it to be joint. (2)

1400. Consideration.—A family arrangement cannot be supported on the ground that it is a valid contract. As such it requires consideration to support it. (3) But as every promise and every set of promises form the consideration for each other (4) and reciprocal promises are consideration for each other (5) it follows that a family arrangement would be supported by consideration if it is the result of mutual promises or relinquishments. (6)

No extraneous consideration is then required to support a family arrangement. As observed in a case approved by the Privy Council, "The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light rather than as conferring a new and distinct title on each other, that the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the courts to uphold and give effect to such an arrangement." (7)

1401. The settlement of a mutual dispute and the purchase of peace is in itself a sufficient consideration required to validate such an agreement. (8) The relinquishment by one is consideration for the relinquishment by the other (9) or as Parke, B. said: "the agreement by each individual to give up part of his claim is a sufficient consideration". (10) The court will not consider the *quantum* of consideration too nicely in a family settlement even when there were no rights in dispute, if sufficient motive for the arrangement is proved. (11)

1402. Right immaterial.—So it is immaterial that the arrangement has transferred property to one who had no legal right to it. As previously remarked the difficulty of ascertaining the rights is a justification for the settlement. Even where the rights are plain its proof or acknowledgment might be difficult. If a family settlement could be set aside on proof of legal title, no settlement would be made since the proof of legal title would entitle the parties to their legal remedies and there would be

(1) *Mamlappa v. Baswantrao*, 14 M. I. A. 24 (85, 87). In *Greender v. Troyluckh*, 20 C. 373 P. C. the decision was given on the construction of the agreement.

(2) *Kedar Nath v. Ratan Singh*, 82 A. 415 (426) P. C.

(3) S. 10, Contract Act.

(4) *Ib.*, S. 2 (e) (f).

(5) *Mahammadinissa v. Bachelor*, 29 B. 428; *Ashidbai v. Abdulla*, 31 B. 271 (277).

(6) *Krishendra v. Debendra*, 12 C.W.N. 798; *Bejoy v. Girindra*, 18 C.W.N. 201; 8 C.L.J. 458; *Mahammadinissa v. Bachelor* 29 B. 428; *Ashidbai v. Abdulla* 31 B. 271

(7) *Beharee Lal v. Mewa Koomoor*, 8 Agra 82 (84) cited and approved in *Khusni Lal v. Gobind*, 33 A. 856 (867) P. C.

(8) *Bejoy v. Girindra*, 8 C.L.J. 458; *Kamal Kumari v. Devi Narendra*, 9 C.L.J. 19; 1 I. C. 573.

(9) *Ashidbai v. Abdulla*, 31 B. 271 following *Mahammadinissa v. Bachelor*, 29 B. 428, *Norman v. Thompson*, 4 Ex. 755 (760).

(10) *Norman v. Thompson* 4 Ex. 755 (760).
(11) *Krishendra v. Debendra*, 12 C.W.N. 798; *Satya Kumar v. Satya Kripal*, 10 C.L.J. 508.

no occasion for a private settlement which law encourages as being in the interest of peace and concord.

1403. Unfair arrangement.—Family arrangements are governed by a special equity peculiar to themselves and will be enforced

Cl. (c). if honestly made although they have not been meant as a compromise, but have proceeded from an error of all parties originating in mistake or ignorance of fact as to what their rights^a actually are, or of the points on which their rights actually depend. When the responsible members of a family agree to the arrangement, which is *per se* not unfair and has been arrived at without undue advantage being taken, the courts will be slow to interfere when subsequently one of the parties wishes to have that arrangement set aside.⁽¹⁾

1404. Though unfairness *per se* is no blot upon an agreement, it is evidence of fraud, and where an arrangement is shown to be so unfair that one could not have acceded to it without the exercise of undue advantage or coercion, the court may cancel the arrangement, not because it was unfair but because it was fraudulent. So where there is inequality of position, mutual mistake or of any of those elements which dissolve the most solemn acts of parties, the court will not be slow to give effect to its conclusions. But the inclination of the court is always against it, even though a minor be concerned ⁽²⁾

1405. Unilateral mistake.—So again the fact that the arrangement was due to a mistake of either side is no ground for

Cl. (d). rescinding a settlement any more than it is a ground for rescinding a contract. ⁽³⁾ So where *A* believes *B* to be entitled to co-parcenary right, which he as the adopted son of a widow subject to the Mithila law was not, his mistake being in no way induced by *B* cannot prejudice the latter and a settlement made with him cannot be set aside on that ground. ⁽⁴⁾

1406. Mistake in law is not a ground for setting aside a compromise, if the parties to the transaction were in difficulty and doubt,

Mistake of law. and wished to put an end to disputes and to terminate or avoid litigation. If one or more parties having, or supposing they have, claims upon a given subject matter or claims against each other, agree to compromise these claims, and the knowledge, or means of knowledge, of each of them with respect to the mode in which, and the circumstances under which, his claim arises, stand upon an equal footing and there is an absence of fraud or misrepresentation, the transaction is binding although the conclusion at which the parties may have arrived is not that which a court of justice would have arrived at had its decision been sought. The real consideration which each party receives under a compromise being, not the sacrifice of the right, but the settlement of the dispute and the abandonment of the claim, it is no objection to the validity of the transaction that the right was really in one of the parties only, and that the others had no right whatever. If, for instance, two parties claim adversely to each other the inheritance of a deceased person, and, in order to avoid litigation, agree to divide the inheritance, it is no ground for setting aside the agreement that only one was heir, and that the other gave up the right which he really possessed. The fact

(1) *Kermatulla v. Kermatulla*, 28 C. W. N. N. 118.

118; *Hassan Bibi v. Fazal Kadi* (1909) P. L. (3) S. 20 Contract Act.

R. 189. (4) *Rajunder v. Bijai Govind*, 2 M. I. A.

(3) *Kermatulla v. Kermatulla*, 29 C. W. 181.

that the one may have had no claim is immaterial, if he was honestly mistaken as to his claim. It is enough if, at the time of the compromise, he may have believed he had a claim, and that the parties have, by the transaction, avoided the necessity of going to law. To render valid the compromise of a litigation, it is not even necessary that the question in dispute should really be doubtful, if the parties *bona fide* consider it to be so. It is enough to render a compromise valid, that there is a question to be decided between them. A compromise of doubtful rights will not be set aside on any other ground than fraud. (1) This is the rule of law regarding compromises generally. But the Courts go still further in favour of upholding compromises by which family disputes are settled as appears from the following passage in the same treatise: "The principles which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, but have proceeded from an error of all parties originating in mistake or ignorance of facts as to what their rights actually are, or of the points on which their rights actually depend." (2)

1407. Arrangement when set aside.—A family arrangement may however be set aside on the ground of mutual mistake, inequality of position, undue influence, coercion, fraud or any similar ground, provided it is clearly established by evidence. (3) Where for instance, two persons collude to the prejudice of a third, the latter may set aside the transaction as compassed to his prejudice. So where one party has taken advantage of the other, the court will not permit him to retain it even though it had received the sanctity of a family arrangement. Such was the case of the defendant who had made a settlement with his brother, plaintiff in the case, who believed that he was the illegitimate son of his parents but which the defendant knew he was not, as he was aware of the private marriage of their parents before the plaintiff's birth which fact he did not communicate to the plaintiff, whereupon the court set aside the settlement holding that it was the duty of the defendant to undeceive the plaintiff as to the fact of the marriage and that if thereafter the plaintiff had decided for himself that the ceremony was not valid, and treating it as not a marriage *de jure*, had chosen to enter into the contract, there would have been no ground for the suggestion of the imposition. (4) In another case a compromise was set aside at the instance of a minor because the court had sanctioned it under a misapprehension or mistake as to material facts. (5) There is nothing illegal in an agreement between expectant heirs to divide their expectancies and such agreements are not obnoxious to the rule against the transfer of a mere *spes successionis*. (6) Of course, parties cannot alter the incidents of a property by any agreement between them. They cannot for instance, render partible property impartible by any family arrangement conferring the estate on the eldest son. An arrangement so made would be void as opposed to public policy. (7)

(1) Ker's Fraud, 385 cited in *Ram Niranjan v. Prayag* 8 C. 188 (141, 142).

(2) *Ib.* p. 364.

(3) *Satyaj. Kumar v. Satya Kripal*, 10 C. L. J. 508; *Lachmi v. Durga*, 40 A. 619; *Krishna v. Hemaja*, 22 C. W. N. 468.

(4) *Gordon v. Gordon* 3 Swans. 400; 86 E.

R. 910 (917).

(5) *Solomon v. Abdool*, 6 C. 687.

(6) *Ram Niranjan v. Prayag*, 8 C. 188 (145). As to Khojas see *Jan Mahomed v. Dattu*, 88 B. 449.

(7) *Muthusami v. Muthusami*, 27 I.C. (M) 3.

1408. When acted upon.—An arrangement materially gains in strength if it is acted upon by the party interested in challenging it. Such was the case of a brother who had received a maintenance allowance under a settlement made under the mistaken belief that he was not entitled to partition the family estate, which he erroneously believed to be impartible for about ten years, on which the Privy Council observed: "If this be a valid document and not open to challenge on the ground of fraud or upon any other ground, their Lordships would be slow to fail to give effect to a family arrangement of the kind thus expressed, followed as it has been by enjoyment and possession for a period of ten years". (1)

In this connection it would not be amiss to mention that relief on the ground of fraud or mistake can only be given if it is claimed within three years when the fraud or mistake is known to the plaintiff. (2)

1409. Practice—Where the arrangement was reduced to writing it was thrown out of the case for want of registration. The pleadings on the nature of the document were inconsistent throughout, sometimes the parties relied on it as a settlement, while at other times it was alleged to be a will. The Privy Council held that it was bound to give effect to the real character of the instrument which they held to be a family settlement. As such it was inoperative as regards immoveable property, but was otherwise valid and could be given effect to. But inasmuch as both parties had made inconsistent pleas *anent* there-to the court deprived the successful appellant of his costs. (3)

1410. A deed of release whereby the releasor simply undertakes to vacate house may be operative as a *bona fide* settlement of a family dispute, even though it contains no words of conveyance. (4)

Whom it binds

132. A family arrangement binds both the parties and their legal representatives.

1411. Analogous Law.—It has already been stated that in making a compromise it is competent to the father to represent his minor sons, (5) the manager the joint family, the guardian his ward, (6) and it is equally competent to the widow in possession of her husband's estate to make a settlement binding on the reversioners. (7)

133. No writing is required to effect partition, but if it is reduced to writing, which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immoveable property, it must be stamped and registered.

(1) *Montappa v. Baswant Rao*, 14 M. I. A. 24 (37); *Hasan Bibi v. Fazal Kadir*, (1909) P. L. R. 189; 4 I. C. 954.

(2) Art. 95, 16 Limitation Act.

(3) *Umrao Singh v. Lachman Singh*, 38 A. 844 P. C.

(4) *Muthusami v. Govindasami*, 9 M. L. T. 342; 9 I. C. 267.

(5) *Ram Das v. Chabildas*, 12 Bom L. R. 621; *Bishen Singh v. Jawala Singh*, (1911) P. W. R. 3: 81 C. 776.

(6) *Natesa v. Rama*, (1911) 2 M. W. N. 154; 10 I. C. 221.

(7) *Khumtilal v. Govind* 38 A. 356 P. C. *Ram Narsh v. Sadhu Saran*, 28 I. C. (A) 585.

Illustrations.

(a) *A* and *B* divide their property in 1918. Next year *A* desiring to mortgage his share to *C*, *C* demands evidence of his separation. *A* and *B* reduce it to writing. The writing though it relate to immoveable property over Rs. 100 in value, is not compulsorily registrable because it is a written memorandum of a past partition.

(b) *A* and *B* having a valuable estate agree to divide it by exchanging lists of the property which falls to the share of each party. The lists require registration if they were intended to evidence partition.⁽¹⁾

(c) *A* and *B* appoint an arbitrator who delivers an award detailing the division of property. *A* and *B* both sign it in token of their acceptance. The award is converted into a partition deed and must be registered if it affects land over Rs. 100 in value.

Synopsis.

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| (1) <i>Registration necessary if arrangement is in writing</i> (1412). | (3) <i>What documents require registration</i> (1414-1418). |
| (2) <i>Oral partition, valid</i> (1413). | (4) <i>Effect of non-registration</i> (1419). |

1412. Analogous Law.—The Transfer of Property Act provides that certain transfers therein mentioned should be in writing, but partition is not a transfer of any rights but is merely a change in the enjoyment of property. It is not an exchange⁽²⁾ and as such the Transfer of Property Act does not affect a partition and there is no other statute which prescribes the necessity of writing. The Registration Act however provides for the compulsory registration of all documents which purport or operate to create, declare, assign, limit any right, title or interest, whether vested or contingent of the value of Rs. 100 and upwards to or in immoveable property.⁽³⁾ As a deed of partition is one such document it follows that if it purports or operates as such it must be registered.⁽⁴⁾

1413. No writing is required to effect partition⁽⁵⁾ but if it is reduced to writing which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property, it must be registered.

1414. The question then arises what documents purport or operate to 'Purport' to be a deed of partition. A document 'purporting' to be a partition deed must be executed as such. Its formality and language must conform to such deed, though it may fail of its effect. Such a document may recite an accomplished fact and be a mere written memorial of the past. It would not then require registration.⁽⁶⁾ Then again a deed may operate as a partition though in form it may be in the form of a will, agreement or award or a mere receipt, in all of which cases, if it creates a definite change of legal relation to the property of the person executing

(1) *Ganpat v. Supdu* 82 B. 509; *Sundaramma v. Kamakathiah* 26 I. C. (M) 514; *In Nihalchand v. Sasson* (1912) P.L.R. 229; 15 I. C. 28 *Mahomed v. Mahomed* (1917) P. R. 38; 38 I. C. 387, the lists were memoranda of a previously completed partition and so their registration was considered unnecessary.

(2) *Satya v. Satya*, 10 C. L. J. 508; 8 I. C.

(3) S. 17 Act XVI of 1908

(4) The contrary held in *Nem Roy v. Laimun*, 25 W. R. 876 is not good law.

(5) *Latchumamma! v. Gangammal* 84 M. 72, 247.

(6) *Sankharum v. Madan*, 5 B. 282; *Vishnu v. Govind* (1:95) B.P.J. 257; *Gangad v. Sham Gir* (1905) P.L.R. 38; *Badhawa v. Hira* (1884) P. R. 30.

it, then it would be compulsorily registrable.”⁽¹⁾ So where two co-parceners by agreement appointed a sole arbitrator to effect partition of their joint ancestral property and consented that the partition effected by the arbitrator, by taking the bids of the parties for the property will be accepted, and the award was thereon made and written upon the back of the said agreement which was not registered, it was held that the document was intended to be and was regarded by the parties as an instrument declaring rights over immoveable property and consequently compulsorily registrable. ⁽²⁾

1416. A document may declare a right though it may not be final and parties may contemplate the reduction of its terms into another document. ⁽³⁾ So again it is immaterial that the document is an award if it is countersigned by the parties in token of their acceptance of its terms which makes it their own contract. ⁽⁴⁾ So a document which after reciting the allotment of lands contained an agreement to act accordingly, was held to be compulsorily registrable because it related to a partition transaction completed by the agreement contained therein. ⁽⁵⁾

1416. Where a document recites a past partition and completes it by partitioning the remaining property, it would be compulsorily registrable if the property presently partitioned under it is of Rs. 100 or more in value. ⁽⁶⁾

A mere draft deed of partition is not compulsorily registrable. ⁽⁷⁾

1417. Where a partition deed deals with property both moveable and immoveable, the fact that it is not registered cannot affect any immoveable property comprised therein or be received as evidence “of any transaction affecting such property.” ⁽⁸⁾ This phrase is ambiguous and might either mean that it shall not be evidence of the partition so as to affect the immoveable property therein mentioned which seems to be the meaning ⁽⁹⁾ or it may mean that it is not evidence of the partition at all because the deed affects immoveable property even as regards the moveable property, ⁽¹⁰⁾ or because the deed cannot be held partially admissible. The transaction being one and indivisible, it must stand or fall together, it being presumed that the division of the moveables was not made without division of the immoveables. ⁽¹¹⁾ But it is submitted that a document may be admissible without being operative.

1418. The documents executed in consequence of partition such as mutual releases would of course require to be registered. ⁽¹²⁾

1419. Effect of non-registration.—It is provided in S. 49 of the Registration Act that “no document required by S. 17 to be registered shall affect any immoveable property comprised therein or be received as evidence of any transaction affecting such property.”

(1) *Sahakram v. Madan*, 5 B 232; *Anand Rao v. Joti*, 24 B. 615.

(2) *Asmat Singh v. Kalwant Singh*, (1906) P. R. 71

(3) *Lakshamma v. Kameswara*, 18 M 281.

(4) *Amarsi v. Dayal*, 9 B. 50; *Rattan-chand v. Ghasita*, (1900) P. L. R. 459.

(5) *Ramchandra v. Dinkar*, 2 Bom. L. R. 800.

(6) *Kachubai v. Krishnabai*, 2 B. 685

(7) *Nem Roy v. Lalman*, 25 W. R. 376

(378).

(8) S. 49 Registration Act.

(9) *Thandavan v. Valliamma*, 15 M. 285

(10) *Bua v. Gungsa*, (1906) P. L. R. 119, *Sarbachand v. Chandsingh*, (1877) P. R. 84.

(11) *Dhondo v. Gopala*, (1876) B.P.J. 123;

Pool v. Secretary of State, (1886) P. R. 68; *Deoki v. Kala* (1887) P. R. 76; *Lakshamma v. Kameswara*, 18 M 281

(12) *Latchumammal v. Genqammal*, 34 M. 72.

Now since the fact of separation is something different from the allotment of shares it follows that the existence of an unregistered partition-deed is no impediment to the proof of the existence of a particular *status*. So where the question was whether a particular property claimed by the plaintiff to be joint family property was at the date of suit joint or separate and there was evidence that there was a partition in the family which was recorded in an unregistered partition-deed, it was held that though the terms of the partition could not be proved by parol, there was nothing to prevent the parties from proving *aliunde* the fact of separation. (1)

Persons entitled to partition.

134. The following persons are entitled to claim partition of joint property:—

- (1) Adult co-parceners not disqualified for inheritance.
- (2) Minor co-parcener, if the partition of his share would advance or protect his interest.
- (3) Co-parcener's transferee acquiring a partible interest in the joint property.

Synopsis.

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|---|---|
| (1) <i>Persons entitled to claim partition</i> (1420-1422). | (6) <i>Minor co-parcener</i> (1431-1432, 1438). |
| (2) <i>Rule of equal division</i> (1423). | (7) <i>Illegitimate sons, when entitled to partition</i> (1433-1435). |
| (3) <i>Father's power to effect a partition</i> (1427). | (8) <i>Adopted son</i> (1436). |
| (4) <i>Co-parcener's right to partition</i> (1428). | (9) <i>Disqualified heir</i> (1437). |
| (5) <i>Partition as against grandfather</i> (1429-1430). | (10) <i>Absent co-parcener</i> (1439). |
| | (11) <i>Rights of after-born son</i> (1440-1442). |

1420. Analogous Law.—Theoretically every co-parcener is entitled to demand a separation of his share which is commended by the ancient writers.

Manu:—111 Either let them thus live together, or if they desire separately to perform religious rites, let them live apart; since religious duties are multiplied in separate houses, their separation is therefore, legal and even laudable (2)

1421. The right of partition originally belonged to the father. He could make a partition if he chose but the sons had no right to demand partition. Such is the present law of Bengal. So in one case Innes, J. said: "An action will not indeed lie unless there is something clearly indicating that the interests of the infant will be advanced by partition, because ordinarily speaking, the family estate is better managed and yields a greater ratio of profit in union than when split up and distributed amongst the several parceners, and as a general rule, therefore, it is more profitable for an infant parcener that his estate should continue an integral portion of the whole estate in the hands of kinsmen." (3)

1422. His right to partition then depends upon the questions of necessity and benefit to him and his estate. Necessity for partition may arise if the

(1) *Chhotalal v. Mahakore*. 41 B. 466
(2) IX-111,

(3) *Kamakshi v. Chidambara*, 8 M. H. C.
R. 94 (96).

manager is guilty of malversation (1) or waste, or declares himself as holding adversely to him. Such was the case of the illegitimate son of a Shudra father who sued his father's sons for a partition of his share which the court decreed because the defendants had denied his title to any property. (2) It may be that though jointness may not prejudice the minor, yet partition may benefit him. In that case partition cannot be refused. (3) On the other hand it cannot be decreed upon grounds apprehended but not proved. (4)

Yajnavalkya says:— When the father makes a partition, let him separate his sons from himself at his pleasure and either dismiss the eldest with the best share, or if he choose all may be equal sharers. (5)

1423. Originally the shares allotted to each co-sharer on partition were unequal. But there was a revolt against this inequality. And so the Mitakshara had to concede equal partition (§ 1375).

1424. It however does not permit a partition between the grandfather and the grandson while the father is alive. (6) This is supported by the following text :—

Mitakshara:—If the father be alive, and separate from the grandfather, or if he have no brothers, a partition of the grandfather's estate with the grandson would not take place; since it has been directed that the shares shall be allotted in right of the father, if he be deceased; or admitting partition to take place, it would be made according to the pleasure of the father, like a distribution of his own acquisitions; to obviate this doubt the author (7) says, "For the ownership of father and son is the same in land which was acquired by the grandfather or in a corrody or in chattels (which belonged) to him". (8)

1425. The minor co-parcener's right to demand partition is conditional upon its being to his advantage, the view of law being that his interests are safe in a joint family and it is only when that presumption is rebutted by any special reason assigned to the contrary that he is allowed to sue for partition as of right. The rule is the outcome of decided cases in which it is laid down that a minor cannot leave his family unless it will be to his own advantage (9) either by protecting or advancing his interest.

1426. The right of the co-parcener's transferee to call for a general partition has already been the subject of extended discussion (§§ 1234-1251).

1427. The father is vested under the Hindu Law with power to effect a partition of ancestral property without the consent of the sons (10) though he cannot do so by a will, (11) unless the disposition so made is accepted by the sons in which case it operates as a partition destroying their right of survivorship. (12)

(1) *Swamiyar v. Chokkalingam*, 1 M. H. C. R. 105; *Mahadev v. Lakshman*, 19 B. 99 (104); *Bholanath v. Ghassi Ram*, 29 A. 878.

(2) *Thangam v. Suppa*, 12 M. 401 (404).

(3) *Bhola Nath v. Ghassi Ram* 23 A. 878.

(4) *Bachoo Mankorebai*, 29 B. 51 (50) O.A. 31 B. 378 (379) P. C.

(5) Yaj. II 115 cited in Mit 1-II-1.

(6) *Rai Bishenchand v. Asnaida*, 6 A. 560 (574) P. C.

(7) Yaj. II-122.

(8) Mit. I-V-8.

(9) *Damodar v. Senabutty*, 8 C. 537 (540, 541); *Swamiyar v. Chokkalingam*, 1 M.H.C. R. 105; *Kamakshi v. Chidambaram*, 8 M.H. C. R. 94; *Thangam v. Suppa*, 12 M. 401 (404); *Govind v. Moro*, (1875) B. P. J. 261;

Mahadev v. Lakshman, 19 B. 99 (104).

(10) 1 Str. H. L. 179; *Kandasami v. Doraisami*, 2 M. 817; *Koruppannan v. Buloham*, 29 M. 16; *Visalakshi v. Sivaramien*, 27 M. 577 F. B.; *Rooplaul v. Lakshmi*, 29 M. 1; *Murugaya v. Palaniyandi*, 31 M. L. J. 147; 36 I. C. 507; *Rangasawmy v. Sundararajulu*, 31 M. L. J. 472; 35 I. C. 52; *Singh v. Venkataramana*, (1918) M. W. N. 1016; 23 I. C. 6; *Ganpat v. Gopal Rao*, 23 B. 686; *Balkishendas v. Ram Narain*, 30 C. 788 P. C.; *Kedarnath v. Jai Narayan*, 40 C. 266 P. C.

(11) *Brijraj Singh v. Sheodan Singh*. 35 A. 397 P. C. Mit 1-2 7 applies both to ancestral and self-acquired property of the father; *Nagalinga v. Subramania*, 1 M. H. C. R. 77; *Laljeet v. Rajcoomar*, 20 W. R. 386

(12) *Jadunath v. Bhadruti*, 33 I. C. (O) 785

1428. Who may claim partition.—Generally speaking all co-parceners are entitled to claim partition. But this rule is subject

Cl. (1) Co-parceners. to three exceptions, two of which are textual and the third is due to cases. The texts declare a person disqualified to inherit as incompetent to take a share. Such persons are those born deaf, dumb, or blind ⁽¹⁾ or without a limb or organ, such as those born idiots ⁽²⁾ and eunuchs or without a leg, nose or tongue. ⁽³⁾ Persons suffering from lunacy ⁽⁴⁾ and leprosy ⁽⁵⁾ or from any incurable disease though not congenitally, are equally disqualified for their share.

1429. Another textual exemption is said to disqualify the son to demand a partition of his share from his grandfather so long as the father is alive. ⁽⁶⁾ This is explained by Yajnavalkya as due to the identity of the father and son but the identity extends even up to the grandfather. But it is said that though the two cannot divide there may be a family arrangement, and a transfer made by the grandfather to his grandson with the consent of the father would be upheld as a valid gift. ⁽⁷⁾

1430. But the view that the son cannot enforce a partition against his grandfather during his father's life-time goes against the vested theory of his right and has been combated by Telang, J. in a Bombay case, ⁽⁸⁾ by a Full Bench of the Allahabad Court, ⁽⁹⁾ and cases of both of the Calcutta ⁽¹⁰⁾ and Madras High Court. ⁽¹¹⁾ The force of this almost unanimous attack upon the narrow doctrine published in a single Full Bench case of the Bombay High Court from which Telang, J. dissented in a considered judgment was felt by Tyabji, J. who however felt bound to follow the majority of the Full Bench of his High Court. ⁽¹²⁾

It is submitted that the view taken in the Bombay case is unsound and opposed to the inherent rights of the grandson.

1431. Minor co-parcener.—The right of the minor co-parcener to call for his share has been modified by considerations for his own welfare. It is presumed that a minor's welfare can best be looked after by his dear and near relations who are bound to him by ties of affection and relationship. It was consequently laid down by Sir Thomas Strange in his manual of Hindu Law that where there was no evidence of malversation, no court would sever a minor's share as a matter of course on a suit being filed on his behalf by his next friend. This view has since been adopted and followed in several cases. ⁽¹³⁾

(1) *Mohesh Chunder v. Chunder Mohun*, 14 B. L. R. 273; *Charn Chunder v. Ndo Sundari*, 18 C. 327; *Murari v. Parbatibai*, 1 B. 177; *Umabai v. Bhavu* p. 537; *Hira Singh v. Ganga*, 6 A. 322 P. C.

(2) *Surti v. Naraindas*, 12 A. 580; *Rambijai v. Jagat Pal*, 18 C. 111.

(3) *Venkata v. Purushottam*, 26 M. 133.

(4) *Bodhunarain v. Omrao*, 13 M. I. A. 419; *Goolbsingh v. Kurun Singh*, 14 M. I. A. 176; *Deo Kishen v. Budh Prakash* 5 A. 509; *Wooma Pershad v. Grish Chunder*, 10 C. 63.

(5) *Ananta v. Rama*, 1 B. 554; *Rangayya v. Thani*, 19 M. 74.

(6) Obiter in *Rai Bishenchand v. Asmaida*, 6 A. 550 P. C.; *Apaji v. Ramchandra*, 16 B. F. B. followed per Tyabji, J. in *Jivabhai v.*

Vadilal, 7 Bom. L. R. 282.

(7) *Rai Bishenchand v. Asmaida*, 6 A. 560 P. C.

(8) Per Telang, J. dissentiente in *Apaji v. Ramchandra*, 16 B. 29 (36, 57) F. B.

(9) *Jogul Kishore v. Shib Sahai*, 5 A. 480 F. B. (Stuart, C. J. dissenting).

(10) *Rameshwar v. Luchmi Prasad*, 31 C. 120.

(11) *Subba Ayyar v. Ganasa*, 18 M. 179.

(12) *Jivabhai v. Vadilal*, 7 Bom. L. R. 282.

(13) *Swamiyar v. Chokkalingam*, 1 M. H. C. R. 105; *Kamakshi v. Chidambara*, 8 M. H. C. R. 94 (96); *Thangam v. Suppa*, 12 M. 401 (404); *Govind v. Miro*, (1876) B. P. J. 261; *Mahadev v. Lakshman*, 19 B. 99 (104); *Damoodur v. Senabuthy*, 8 C. 587 (540, 541).

1432. It will be seen in the sequel that in the absence of prejudice, a minor will be bound by a partition decree though he was not represented in the suit. (1)

1433. Illegitimate son.—Since only co-parceners are entitled to enforce partition the question whether an illegitimate son possesses that right depends upon his right in the family. It is settled that the illegitimate sons of the three regenerate castes are entitled to nothing beyond maintenance "if they be docile", (2)

1434. But in the case of a Shudra the question has not been quite settled. The rights of a Shudra's son are thus defined in the texts:—

Yajñavalkya :—Even a son begotten by a Shudra on a female slave may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share and one who has no brother may inherit the whole property in default of a daughter or daughter's son. (3)

Mitākshara:—2. The son begotten by a Shudra on a female slave, obtaining a share by the father's choice, or at his pleasure. But after the demise of the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share; that is let them give him half a share; that is let them give half as much as is the amount of one brother's allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate provided there be no daughters of a wife, nor sons of daughters. But if there be such, the son of the female slave participates for half a share only. (4)

1435. Following this text it has been held that a Dasiputra of a Shudra has no right of partition against his father, since as against his father he has no vested right though on his death he could enforce a partition as against his legitimate brothers, (5) unless they received the estate by a transfer from their father during his life-time in which case the illegitimate son cannot enforce his right against his father's transferee, though he be his legitimate brother. (6)

1436. Adopted son.—It has already been stated that an adopted son is as regards his rights indistinguishable from an *Auras* son though the *quantum* of interest is reduced in competition, with him (§§ 809-811). The adopted son of a son when an exclusive heir, succeeds to his grandfather's estate like a natural grandson. But in competition between the son and the adopted son of a predeceased natural son, the grandson by adoption does not take the share of his father but only the share which his father would have taken if he had himself been an adopted son. (7) Where a co-parcener dies and his widow makes an adoption after partition, the adopted son would be entitled to call upon the other co-parceners to make over to him a portion of the wealth equal to that which would have been taken by his father. (8) It was so held by the Privy Council in a case decided upon the following facts. An impartible Zamindari, the property of two undivided brothers, was in the possession of the elder. On his death, leaving a widow and no male issue, the brother became entitled by survivorship to the entire estate. The widow made a valid adoption to her

(1) *Ajoodhya v. Manohar*, 8 Pat. L. W. 366; 40 I. C. 131

(2) Mit. 1-XII 8; Dayabhag IX 28; *Mayukh* IV-29-81; *Chouturya v. Sabub Purhalad* 7 M. I. A. 18; *Gajapathi v. Gajapathi*, 2 M. H. C.R. 369 reversed on a different point 18 M. I. A. 497; *Roshan v. Balwant Singh*, 22 A. 191 P. C.

(3) Yaj. ii-134, 135 cited in Mit. 1-XI-1

(4) Mit. 1-XI-2.

(5) *Sadu v. Baiza*, 4 B. 37 (44, 45) followed

in *Jogendro v. Nityanund* 110. 702 (714); *Jogendro v. Nityanund*, 18 C. 151 (155) P.C.; *Ramasaran v. Tekchand*, 28 C. 194 (204); *Parash Ram v. Sobba Ram*, (1878) C. P. S. C. Pt. No. 32; *Sheoraj v. Rambax*, (1883) C. P. S. C. No. 8.

(6) *Ram Saran v. Tekchand*, 28 C. 194 (204).

(7) Datt Ch. V-25.

(8) *Sri Raghunadha v. Sri Brozo*, 1 M. 69 P. C; explained in *Krishna v. Sami*, 9 M. 64 (78) F. B.

husband and it was held that the adopted son was entitled to possession of the Zamindari. (1)

1437. Disqualified heir.—An heir disqualified from inheritance is equally disqualified to enforce or take a share in a partition but the disqualification is personal while it lasts. If then a co-parcener was excluded from participation by reason of his disqualification, its subsequent removal would entitle him to his share which he may claim from his quondam co-parceners. (2) On the other hand if his disability was not congenital, then his interest which became vested in him on his birth could not be divested by his subsequent disability. So a co-parcener who became a lunatic subsequent to his birth can during his lunacy maintain a suit for partition of his share in the joint property. He has vested rights in such property by birth, which are not divested by his subsequent lunacy. (2) It will be seen when discussing the laws of inheritance, as has been remarked before (§ 1105), that a disqualification from inheritance is a personal disqualification which only affects the person disqualified and not his heirs; from which it follows that the son or grandson of such person, if not himself disqualified, is competent to claim partition. It is immaterial if he was born after the death of his disqualified ancestor. (3) Even if he was born after partition he will divest those in whom it has vested before his birth.

1438. Minor co-parcener.—The right of a minor co-parcener to claim partition has already been considered (§ 1388). The fact that the co-parcenary comprises some minors is no obstacle to a partition. As the Privy Council observed: "There is no doubt that a valid agreement for partition may be made during the minority of one or more of the co-parceners. That seems to follow from the admitted right of one co-parcener to claim a partition; and (as has been said) if an agreement for partition could not be made binding on minors, a partition could hardly ever take place. No doubt if the partition was unfair or prejudicial to the minor's interests, he might, on attaining his majority, by proper proceedings set it aside so far as regards himself." (4) The interest of the minor would of course, be protected by his natural guardian and in his absence by his *de facto* guardian. (5) On coming of age the partition of his nonage binds him unless he can shew that it was a fraud upon his rights, or that it was made to his conscious prejudice. The mere fact that it was unequal would not by itself vitiate the partition arrangement.

1439 Absent co-parcener.—The position of an absent co-parcener is like that of minors, idiots and other disqualified persons. As Sir Thomas Strange said: "Upon the same footing, in this respect, with minors are absentees, residing in a foreign country, whose consent at the time not being obtainable, partition may proceed without it, the law enjoining the preservation of their respective shares, till the one arrives at majority, and the other returns; and this in the case of the latter, to the extent of the seventh in descent, the right of

(1) *Sri Raghunadha v. Sri Brozo*, 1 M. 69 P. C.

(2) *Deo Kishen v. Budh Prakash* 5 A. 509 F. B. C. *Twbeni v. Mhd. Umar* 28 A. 247; *Hotchand v. Manghammal*, 8 S. L. R. 279; 29 I.C. 42, *contra Ram Sahye v. Laljee* 8 C. 149; *Ram Soonder v. Ram Sahye*, 8 C. 919 dis-sented from.

(3) *Gautam XXVIII-42* 48, 2 S.B. E. 801

"The male offspring of an idiot receives his father's share". To the same effect *Narad XIII-22*; *Vishnu XV 32-35*; 7 S.B.E. 64; *Yaj. ii 140-142 (Mandlik)* 223; *Smriti Oh. V-8 Sarasvati Vilas V-148 (Foulkes Tr.)* 81

(4) *Balkishen v. Ram Narain*, 80 C. 788 (752) P. C.

(5) *Nallappa v. Balammal*, 2 M. H. C. R. 182.

parceners remaining at home, being lost by dispossession beyond the fourth." (1) This view was reiterated by a Full Bench of the Madras court who said: "Again, let the eldest son B have gone to a foreign country and let his brothers in his absence make a partition of the family wealth; a share is not necessarily set apart for him; the time may have elapsed when it may reasonably be believed he was dead. According to Hindu Law which does not in other cases ignore limitation, he may after seven generations, return and claim to have a share or a half share made up to him out of his brother's allotments." (2)

1440. After born son.—Under Hindu Law a child is presumed to come into existence from the moment of its conception. Consequently where partition is effected while a co-parcener was in the womb, on his birth he becomes entitled to a share which he may claim by reopening the partition. (3)

1441. But if the partition was completed before his conception he has no right against his separated brothers. So where the father of three sons, two of whom were minors made a partition giving his eldest son a third of the estate, retaining the other two thirds himself on behalf of his two younger sons by his younger wife and five years after, another son was born to him by her, who sued the father and his three sons by the senior wife for a general partition claiming a fourth share of the entire estate, the court rejected his claim against the separated son adding: "The general rule of Hindu Law, as expounded by the Mitakshara, Mayukh and the Smritichandrika is that a son born after partition has no claim on the wealth of his separated brothers. He has a preferential claim on the wealth of his parents. He can have a share of it with those brothers who lived in union with the father or were reunited with him. The separated brothers have no claim over this distributed parental share. A partition is limited to the interests of the person demanding it, and has no enforced general operation against those who desire to live in union."

"The somewhat vague texts of Vishnu and Yajnavalkya which direct separated brothers to give a share to an after-born son, apply to sons who have no provision made for them and have further been explained by commentators as applicable only to the case of posthumous sons. In the present case there has been no partition between the brothers. The father only cut off one of his sons with a separate provision, and retained the rest of the property in his own charge and management for the sons of his younger wife. All branches of the family gave effect to this understanding for twelve years. His claim can only be made against respondents Nos. 2 and 3 who lived with their father in union and with whom he himself has been all along living as a member of a joint family". (4)

1442. This case then establishes the rule that where the father separates only some of his sons, remaining joint with the rest of his family an after-born son must look to this family for his share. He cannot make any claim against his separated kinsman unless his separation was a fraud on his right.

1443. The case is again not different even where there has been a general partition between the father and his sons, provided the father takes his

(1) 1 Str. H. L. 206, 207.

(2) *Krishna v. Sumi*, 9 M. 64 (78) F.B. 23 B. 686 (643).

(3) *Shivaji v. Vasant Rao*, 83 B. 267.

(4) Per *Ranade, J* in *Ganpat v. Gopab Rao*,

legitimate share. The after-born son cannot then enforce a re-partition of the whole estate but must take his share from his father's allotment.

Co-widow's right to partition.

135. (1) A co-widow is entitled to the partition of her life-interest in her husband's estate.

(2) But such partition is not absolute and does not in the absence of an express agreement to the contrary, determine her co-parcenary right of survivorship.

Synopsis.

- | | |
|---|---|
| (1) <i>Interest of widows in husband's property</i> (1444). | (4) <i>Right of donee from co-widow to claim partition</i> (1449). |
| (2) <i>Right of co-widows to partition</i> (1445-1446). | (5) <i>Effect of partition on right of survivorship among co-widows</i> (1450). |
| (3) <i>Effect of partition among co-widows</i> (1447). | |

1444. Analogous Law.—This section deals with the interest which the co-widows acquire in their husband's estate by inheritance. As such they are in the strictest sense co-parceners (1) possessing the right of survivorship to each other. As such, partition being an incident of the co-parcenary right of co-widows they should *prima facie* be entitled to claim the right of partition which they do. But since their interest in their husband's property is limited it follows that partition in their case must be necessarily modified by the nature of their interest in their husband's inheritance and the reversionary rights of others who are entitled to see that their interest is not prejudiced by the destruction or waste committed by the life holders or their transferees. Again since the partition of the interest of co-widows is not allowable, it follows that partition can only affect their mode of possession and enjoyment and cannot alter their title. In other words the partition to which the co-widows are entitled is the partition merely of their life-estate which is their right to possession and enjoyment (2) and this right belongs to all female heirs such as daughters (3) inheriting to their father. (4) Neither co-widows nor daughters can by their alienation alter the character of their qualified estate so far as concerns the right of survivorship or the rights of reversioners, but they may alienate their interests in the property or have that interest taken and sold in execution of a decree against them. They may also, subject to the same condition, demand a partition of the property. When their interests are transferred, it is obviously desirable that the transferees should be able to partition their transferor's interest.

(1) *Bhagwan Deen v. Myna Bai*, 11 M. I. A. 487; *Gajapathi v. Gajapathi*, 1 M. 290 (299) P. C.; *Kola v. Muthayammal*, 21 M. L. J. 977; 12 I.C. 766; contra in *Sellam v. Chinnammal* 24 M. 441 (443) erroneous.

(2) *Bhagwan Deen v. Myna Bai*, 11 M. I. A. 487; *Gajapathi v. Gajapathi*, 1 M. 291 P.C.;

Sundar v. Parbati, 12 A. 51 P.C.; *Durga Das v. Gita*, 33 A. 443; *Chittar Kunwar v. Gaura*, 34 A. 189.

(3) *Kanni Ammal v. Ammakannu*, 28 M. 504.

(4) *Kanni Ammal v. Ammakannu*, 28 M. 504.

1445. Widows have the right to demand partition of their husband's inheritance. The wife has no right of partition against her husband. ⁽¹⁾ But as his heir she is entitled to the separation of her share in her inheritance against her co-widow. ⁽²⁾ Even as against her husband's co-parceners she is entitled to demand partition if his share was ascertained during his life-time though he died before it could be severed *in specie*. ⁽³⁾

1446. Under the Mitakshara as well as both under Mayukh, and the Daya-bhag ⁽⁴⁾ it is the right of each of the co-widows to enjoy her deceased husband's property by partition *inter se*. She can assign her right to any one she chooses. If he has already obtained the share by partition she can alienate her interest in that share. But the assignment or alienation cannot take effect or have validity beyond her life-time. It is good so long as she lives. On her death her interest in property ceases and the share goes to the surviving co-widow or co-widows as the case may be. ⁽⁵⁾ A co-widow is entitled to partition even if she has no more than a possessory title. So where on the death of their husband, his two co-widows took possession of the estate left by him. The deceased had before his death, adopted a boy, to whom also he bequeathed his property by will. The boy however, died soon after the testator. The High Court dismissed the suit holding that the widows could not enforce partition of their possessory title, but on appeal the Privy Council held that a possessory title was sufficient to support a claim for partition. ⁽⁶⁾ The fact that after the death of her husband the widow was leading an immoral life is no ground for refusing her partition. As a matter of fact the court has no discretion in the matter. ⁽⁷⁾

1447. But the partition to which co-widows are entitled is not an absolute partition destroying their right of survivorship to each other. As the Privy Council observed : "Two or more lawfully married wives take a joint estate for life in the husband's property, with rights of *survivorship* and equal beneficial enjoyment. ⁽⁸⁾ As to the mode of enjoyment, it has no doubt been decided ⁽⁹⁾ that widows taking a joint interest in the inheritance of their husbands have no right to enforce an absolute partition of the joint estate between them." ⁽¹⁰⁾ Their Lordships then went to cite cases to shew that though they could not enforce an absolute partition, they could nevertheless obtain separate possession and enjoyment of their shares leaving the title to each share unaffected and that such qualified partition did not destroy their co-parcenary right of survivorship.

(1) *Sunder Bahu v. Monkur* 10 C. L. R. 79.

(2) *Mahadeo v. Doakoe* 9 C 53

(3) *Ram Joshi v. Lakshmi Bai* 1 B. H. C. R. 189.

(4) *Padmamani v. Jagadamba*, 6 B. L. R. 134; *Janki Nath v. Mothura* 9 C. 580.

(5) *Hari v. Vital* 31 B. 360.

(6) *Sundar v. Parbati* 8 A. 1 reversed O. A. 12 A. 51 (56) following *Armory v. Delamirie* 1 S. L. C. (6th Ed.) 318 in which the finder of a jewel was held to possess such property as will enable him to keep it against all but the rightful owner and therefore to maintain an action of trover and *Aslier v. Whitlock* L. R. 1 Q. B. 1 in which possessory interest was held to be devisable.

(7) *Sellam v. Chinnammal*, 24 M. 441 (443). In this case it has been erroneously held that co-widows inherit as tenants in common. That they do not do so is clear from *Gajapathi v. Gajapathi*, 1 M. 290 (299) P. C. *Jijoyamba v. Kamakshi*, 3 M. H. C. R. 424; *Padmamani v. Jagadamba*, 6 B. L. R. 134; *Dal Koer v. Panbas* 8 C. W. N. 658.

(8) *Jijoyamba v. Kamakshi* (The Tanjore case) 3 M. H. C. R. 424 (452); *Gajapathi v. Gajapathi*, 1 M. 290 (299, 300) P. C.

(9) *Jijoyamba v. Kamakshi*, 3 M. H. C. R. 424 (452); *Bhugwandeon v. Myna Bai*, 11 M. I. A. 457

(10) *Gajapathi v. Gajapathi*, 1 M. 290 (300) P. C.

1448. The principle applicable to co-widows would apply equally to two or more sisters inheriting to their father. (1)

1449. The donee of a co-widow may equally enforce the same right of partition which belonged to his donor.⁽²⁾ But since this partition is only of the life estate it should not be made so as to prejudice the rights of the reversioners who are entitled to inheritance, if the partition is prejudicial to their rights, as where it would lead to waste or otherwise be injurious to the corpus.

1450. While the quasi partition to which co-widows are entitled does not destroy the co-parcenary, there is nothing to prevent them by express agreement between themselves to put an end to their right of survivorship.⁽³⁾ But this again cannot prejudice the reversioners.

Female shares on partition. **136.** Subject to any local law or usage to the contrary, the following female relations are each entitled to a share on partition:—

(1) On a partition between the father and his sons, or between the sons, their mother and their grandmother are entitled to a share which with the stridhan received from their husband or the father-in-law must equal a son's share.

(2) And unmarried daughters are entitled to quarter of a son's share.

(3) On a partition between her sons or grandsons a widow is entitled to a share equal to that of a son's son.

Exception.—The wife or the widow in Southern India is allotted no share.

Synopsis.

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|---|---|
| (1) <i>Rights of females on a family partition</i> (1451). | (4) <i>Wife's share on partition</i> (1456). |
| (2) <i>Texts on the subject</i> (1452). | (5) <i>Rights of mother</i> (1456-1459). |
| (3) <i>Rights of unmarried daughters and sisters</i> (1453-1461). | (6) <i>Rights of grandmother</i> (1460). |
| | (7) <i>Usage in Southern India</i> (1462-1463). |

1451. Analogous Law.—The last section deals with persons who are entitled to claim and if necessary, enforce a partition of their share by suit. This section deals with the female members who are allotted a share on a partition being made, though they have no right to demand or enforce a partition.

Their right is subject to local law and usage.

Texts.

1452. The following texts bear on the subject of women's share on partition:—

(1) *Balabai v. Tanu Bai*, 10 N. L. R. 51; 24 I. C. 808; *Kanni Ammal v. Ammakannu*, 28 M. 504.

(2) *Durga Dal v. Gita*, 33 A. 448; *Kailash*

v. Bitto, 15 O. C. 228; 16 I. C. 471.

(3) *Ramakal v. Ramasami*, 22 M. 522; contra *Durga Dal v. Gita*, 33 A. 448 (446).

Yajnavalkya :—If he (the father) makes the allotments equal, his wives to whom no separate property has been given by the husband, or the father-in-law, must be rendered partakers of like portions ⁽¹⁾

Of heirs dividing after the death of the father let the mother also take an equal share. ⁽²⁾

But sisters should be disposed of in marriage, giving them as an allotment, the fourth part of a brother's own share. ⁽³⁾

Mitakshara :—10. When the father by his own choice makes all his sons partakers of equal portions, his wives to whom peculiar property had not been given by their husband or by their father-in law, must be made participants of shares equal to those of sons. But if separate property has been given to a woman the author subsequently directs half a share to be allotted to her; or if any had been given, let him assign the half.

11. But if he give the superior allotment to the eldest son and distribute similar unequal shares to the rest, his wives do not take such portions, but receive equal shares of the aggregate from which the son's deductions have been subtracted besides their own appropriate deductions specified by Apastamb. The furniture in the house and her ornaments are the wife's property. ⁽⁴⁾

1. When a distribution is made during the life of the father, the participation of his wives, equally with his sons, has been directed "If he make the allotments equal, his wives must be rendered partakers of like portions." The author now proceeds to declare their equal participation, when the separation takes place after the demise of the father: "Of heirs dividing after the death of the father let the mother also take an equal share". ⁽⁵⁾

2. Of heirs separating after the decease of the father the mother shall take a share equal to that of a son's, provided no separate property had been given to her. But, if any property had been given to her, she is entitled to half a share as will be explained.

5. In regard to unmarried sisters, the author states a different rule, "But sisters should be disposed of in marriage giving them as an allotment, the fourth part of a brother's own share." ⁽⁶⁾

6. The purport of the passage is this: "Sisters also who are not already married must be disposed of in marriage by brethren contributing a fourth part of their own allotments. Hence it appears that daughters also participate after the death of their father. Here in saying "of a brother's own share" the meaning is not that a fourth part shall be deducted out of the portions allotted to each brother, and shall be so contributed but that the girl shall be allowed to participate for a quarter of such a share as would be assignable to a brother of the same rank with herself. The sense expressed is this. If the maiden be daughter of a Brahmani she has a quarter of so much as is the amount of an allotment for a son by a Brahmani wife.

14. Therefore, after the decease of the father, an unmarried sister participates in the inheritance. But before his demise she obtains that only, whatever it be, which her father gives since there is no special precept respecting this case. This all is unexceptionable. ⁽⁷⁾

Dayabhag :—When participation is made by brethren of the whole blood after the demise of the father an equal share must be given to the mother. For the text expresses. ⁽⁸⁾ "The mother should be made an equal sharer." ⁽⁹⁾

Since the term mother intends the natural parent, it cannot also mean a step mother. For a word employed once cannot bear the literal and metaphorical senses at the same time.

(1) Yaj. ii-116, cited in Mit 1-ii-8.

(2) Yaj. ii-124

(3) Yaj. ii 125

(4) Mit. 1-ii 9 10

(5) Yaj. ii 124; Mit. 1.VII-1; explained per curiam in *Pursid v. Hanooman*, 5 C 845 (854). This text is held by Mitter. J. in *Sunrum v. Chunder*, 8 C 17 (19) to only refer to the self-acquired property of the father

(6) Yaj. ii-125

(7) Mit 1-VII 1, 2, 5, 6, 14. To the same effect Manu IX-118; 25 S. B. E. 348; Vishnu XV-11-34, 35; 7 S. B. E 73; Yaj ii 124 (Mandlik) 217; Prihaspati XXV-64; 33 S. B. E. 37; Katyayan cited in *Vyastha Darpan* (2nd Ed.) 498 followed in *Lochan v. Babai* 5 N. I. R. 161

(8) Brihaspati.

(9) Dayabhag III-II, 29.

The equal participation of the mother with the brethren takes effect, if no separate property had been given to the woman. But, if any have been given, she has half (a share). And if the father make an equal partition among his sons all the wives (who have no issue) equally share with the sons. So Yajñavalkya declares: 'If he make the allotments equal, his wives to whom no separate property has been given by their husband, or their father-in-law, must be rendered partakers of like portions.' To a woman, whose husband marries a second wife, let him give an equal sum, as a compensation for the supersession, provided no separate property have been bestowed on her but if any have been assigned let him allot half (1)

Unmarried daughters, likewise following the allotments of sons, take a quarter thereof. Thus Brihaspati says "Mothers are equal sharers with them: and daughters are entitled to a fourth part" (2)

Mayukh.—In case of equal partition between a father and his sons, a share to the wife is also spoken of by Yajñavalkya. (3) "If he make the allotment equal his wives to whom no *stridhan* has been given by the husband or the father-in-law, must be made partakers of equal portions." But if any has been given, one-half is to be given, for (the text is) "if any has been given one half should be assigned"; *ardham* (one half) meaning so much as should make, with what has been given before as *stridhan*, a share equal to a son's share. (4) But if her wealth be already in excess of such a share, no share should be given her. (5)

1453. As regards the rights of unmarried daughters and sisters the texts
01. (2). uniformly allow them a share on partition equivalent to one-fourth of the son's share. (6) The leading text on the subject is that of Manu's, commenting on which Jagannath says: "The text of Manu is thus interpreted: the fourth part of the shares which are allotted to brothers of the same class with the sister shall be computed; and deducting that sum, in due proportion, out of their own several shares, the brothers shall give it as a portion to the unmarried daughters. It is directed that a fourth part of a share shall be given, and that allotment according to Chandeshwar is merely intended to defray the expenses of the nuptial ceremony. Others hold, that so much only shall be given as is sufficient, to accomplish the sacrament or marriage. On this subject Jinut Vahan remarks, that if the estate be considerable, a sufficient sum for the nuptial ceremony shall be given; and a fourth part of a share is not positively directed. This must be understood where the number of daughters and sons is equal. If the number be unequal, a large sum is thus given to the daughters, and the sons are altogether deprived of their shares. Nor can this be proper for the son is pre-eminent. A fourth part of the share must be given to sisters; but if they be twice or thrice as numerous, they would receive a greater sum than their brothers, if they be four times as numerous, the brothers would be deprived of their shares; if they be five times as numerous, the case would be very puzzling. Yet such a case may occur. The rule for giving a quarter of a share cannot therefore be received without exception. In fact the rule only bears that a brother shall give a fourth part if he have a considerable allotment. But if sisters be few in number compared with the number of brothers, or if there be no brothers, another rule of Vishnu must be adduced. "The marriage and other ceremonies of

(1) Yaj. II 149; Dayabhadg III-II 31.

(2) Dayabhadg III II 82.

(3) II 116

(4) Maheshwar:—"The allotment of a moiety implies that the other moiety is completed by the woman's separate property. Else so much only should be given as will make her allotment equal to the son's" cited per Macpherson, J. in *Jodonnath v. Brojonnath*, 12 B. L. R. 385 (389, 390); Jagannath:—"Moiety" (*ardham*) in the masculine

gender signifies part in general not equal parts or exact half which is signified by the same word in the neuter gender.

(5) Mayukh IV-10. (Mandlik) 41-42.

(6) Manu IX-118; 25 S. B. E. 348; Vishnu XVIII 34, 35; 7 S. B. E. 78; Yaj. II. 124 (Mandlik) 217; Brihaspati XXV-64; 88 S. B. E. 379; Katyayan cited in Vyavastha Darpan (2nd Ed) 498; Virmitrodaya 1.11-21; (Golap Shastri's Tr) 81-85; Dig. p. 109.

unmarried daughters must be defrayed in proportion to the wealth inherited." (1)

1454. Similarly the quarter share is held in the Mithila country to mean the expenses of marriage. (2)

The right of the wives to a share has been recognized in a long series of cases. (8)

1455. The right of unmarried daughters to participate in a partition is considered in the texts only when there is a division between the sons. (4) But her share is generally taken to be one fourth of that of a son.

The cases have now settled most of these rights which will therefore be now examined.

1456. Wife's share on partition.—The right of the wife, the mother,

Cl. (1) Share of the wife or mother.

or the grandmother to a share on partition is recognized by all the schools as will be manifest from the texts already cited. She is not the owner of any share and cannot therefore claim a portion. (5) A share is given to her for no other purpose than as a provision for her maintenance. She has no right to ask for maintenance after she has got such a share, and if a partition is effected after her death her heirs can make no claim to her share. As was observed by Mitter, J. in a case, "The mother or grandmother as the case might be, is entitled to a share, *when* sons or grandsons divide the family estate between themselves. But the mother or the grandmother can never be recognized as the owner of such a share, until the division has been *actually* made. She has no pre-existing vested right in the estate except a right of maintenance. She may acquire property by partition, for partition is one of the recognized modes of acquiring property under the Hindu Law. But partition in her case is the sole cause of her right to the property. It follows therefore, that the effect cannot precede the cause". (6) The right of the mother is a latent and inchoate right which becomes effective when separation takes place. (7)

1457. So in another case Phear, J. after passing in review all the relevant texts summed up his conclusion as follows:—"The father during his life, may at his pleasure partition the whole of his property in his hands or any of it, and if he does so, he must allot a share to his wife for her maintenance in addition to the share which he takes himself; also the sons can, at any time during the father's life at their pleasure, (even when any of the contingencies which entitle them to divide the whole estate have not happened) call upon him to partition the ancestral property, and in the event also the mother must have her share as before. After the father's death again, the sons may divide the property among themselves, but then, too, they must give a share to their father's widow, and to an unmarried sister if there is one. In all the cases alike, the mother's share in the ancestral property must be equal to that of a

(1) 3 Dig. pp 98, 94.

(2) *Vivad Chintamani* p. 248 "Here the mention of a quarter is not essential. Property sufficient to defray the expenses of the nuptials should be given" followed per Mitter, J. in *Damoodur v. Senabuttu*, 8 C. 587 (541).

(8) *Sheo Dyal v. Judoonath* 9 W. R. 16; *Mahabhar v. Ramyal*, 12 B. L. R. 50; *Laljeet v. Rajcoomar ib.*, p. 878; *Bilaso v. Dina Nath* 8 A. 88; *Pursid v. Honooman* 5 C. 845; *Sumrun*

v. Chunder 8 C. 17; *Damoodur v. Senabuttu ib.*, p. 537; *Thakur Prashad v. Bhagbati* 1 C. L. J. 142; *Ganesh v. Jewach*, 31 C. 262 (271) P. C.

(4) *Manu* IX-118; *Yaj* ii-124; *Vishnu* XV 31; *Narad* XIII-18.

(5) *Venkatammal v. Andayappa*, 6 M. 180.

(6) *Sheo Dyal v. Judoonath*, 9 W. R. 61 (62, 63).

(7) *Bilaso v. Dina Nath*, 8 A. 88 (90) F. B.

son". (1) That is to say if there be three sons, the property, would in an ordinary case, be divided into four shares of which one would go to the mother. (2) But where the mother has already received some property from her husband or her father-in-law then she entitled to only so much as will give her a share equal to the share of a son. And if the property received by her is more than such a share she will receive nothing on partition. (3) The mother can claim such share not only *quod* the sons, but even as against an auction purchaser of one of her son's interest. (4) The property which the mother might have inherited or acquired otherwise than from her husband and father-in-law does not affect her share. (5)

1458. The mother under the Bengal law is entitled to the same share. (6)

1459. And it has been held that the same right belongs to the step mother since the term "wives" in the Mitakshara text (7) must necessarily include step mothers. (8)

1460. Grandmother.—The grandmother's right to the same share as the mother in a partition between her sons and grandsons has been admitted in several cases (9) but the contrary has been held in Allahabad in a case of partition between the father and his sons, (10) the court refraining from expressing any opinion as to what would be her right on a partition between her grandsons on the death of the son, though it was inclined to the view that she would be entitled to a share. It was however, said that during her son's own life-time the mother of the father should look to her own son for support and maintenance. (11) The view proceeds upon the literal reading of the Mitakshara text before cited (12) in which on a partition between the father and his sons only his "wives" are allotted a share.

1461. The unmarried daughter or sister.—The texts all favour the rights of the daughter and the sister to share at partition and this has been recognized in several cases, (13) and in the view of text writers. (14) A Hindu Judge referring to the subject said: "The

(1) *Laljeet v. Rajcoomar*, 12 B. L. R. 373 (382, 383).

(2) *Jodoonath v. Brojonath*, 12 B. L. R. 385 (388).

(3) Per Macpherson, J. in *Jodoonath v. Brojonath* 12 B. L. R. 386 (389, 390); *Jugomohan v. Saradamoyee*, 3 C. 149; *Kishori Mohun v. Moni Mohan*, 12 C. 165; *Poorendra v. Hemangini*, 36 C. 75; *Jairam v. Nathu*, 31 B. 54.

(4) *Bilaso v. Dina Nath*, 3 A. 83 (90) F. B.
(5) *Jugomohan v. Saradamoyee* 3 C. 149, *Poorendra v. Hemangini*, 36 C. 75 (84). In *Kishor Mohun v. Moni Mohun* 12 C. 165 (167) the court deducted the value of the property which she had received by gift or legacy from her father.

(6) *Ganesh v. Jewach*, 31 C. 262 (271) P. C.

(7) 1-VII-1, 2.

(8) *Damodar v. Senabuttu*, 8 C. 587; *Thakur Prasad v. Bhagbat*, 1 C. L. J. 142, 144; *Mari v. Chinammal*, 8 M. 107 (123) F. B.

(9) *Sibboscondery v. Bussoomutty* 7 C. 191 followed per Mitter, J in *Badri v. Bhagwat* 8 C. 649 (652); *Mari v. Chinammal*, 8 M. 107 (128)

F. B.

(10) *Sheo Narain v. Janaki Prasad*, 34 A. 505 F B following *Radha v. Bachchaman* 3 A. 118.

(11) *Sheo Narain v. Janki Prasad* 34. A. 505 (509, 510) F B following *Radha v. Bachchaman* 3 A. 118 dissenting from *Shibhoscondery v. Bussoomutty* 7 C. 191 on the ground that it was a Dayabhag case; followed in *Badri v. Bhagwat*, 8 C. 649; *Sheo Dayal v. Juddo Nath*, 9 W. R. 61.

(12) 1-ii-8.

(13) *Lalljeet v. Raj Coomar* 20 W. R. 886 (310); *Damodar v. Senabuttu*, 8 C. 587 (541) in which Mitter, J allowed 1/24 of the estate valued at Rs. 3,000. As the members of the family were 2 widows, three sons and a maiden daughter, the latter got 1/4th of what she would have received had she been a son. *Lechan v. Babai*, 5 N. L. R. 161 (168, 169) in which the court allowed the fourth following the text.

(14) 2 Strange H. L. 367 citing Sutherland and Colebrook *ib.*, p. 813; Jolly's Tagore Lectures, 103, 104.

texts I have referred to all prescribe the rule in the case of a partition among brothers. They do not deal specially with a case where there is only one brother and one or more sisters. But looking to the spirit pervading them and the object they are meant to conserve, it is clear that what holds good in the former case must hold good in the latter as well. To hold the contrary would be to make the undoubted and well recognized right of sisters depend on an accidental circumstance entirely lacking in relevancy to the question of her right as a member of a joint family". (1)

1462. Local usage.—It is said that the widow or mother in Southern India is in practice never allotted her share in a partition. (2) This view is maintained in the *Smritichandrika* (3) the correctness of which is however disputed in the *Madhaviya*. (4) It has been held that the view of Nanda Pandit that the right of a mother to a share is not a right of heritage but a right to a provision has become established law in the Madras Presidency. (5)

1463. In this view account is to be taken of property which she has already received and if it is insufficient for her maintenance, an allotment is to be made to her so as to provide her with a sufficiency for her wants, which allotment could never be in excess of a son's share but which would be less than a son's share if the property was so large that a son's share would more than suffice for her needs. (6)

When partition refused **137.** A person otherwise entitled to partition may be disqualified from enforcing it for any of the following reasons :—

- (a) If he has entered into a valid agreement against it.
- (b) If the property is subject to a family arrangement.
- (c) If the parties have already become otherwise separate.
- (d) If he has relinquished his share in the joint property.

Synopsis.

- (1) *Agreement against partition, how far binding* (1464-1465)
- (2) *Bar to partition* (1464).
- (3) *Family arrangement* (1467).
- (4) *Prior partition* (1468).
- (5) *Relinquishment* (1469).

1464 Analogous Law.—It has already been stated that Manu and other law givers commend partition as multiplying religious duties. (7) They do not encourage jointness. Nor does the modern law.

A partition may, however, be postponed though it cannot be prevented by an agreement *inter partes*. Such agreement does not bind any but those entering into it. It may also be more effectively prevented by a family arrangement or an implied partition. The subject of family arrangement has already,

(1) *Lochan v. Babai* 5 N. L. R. 161 (169); *Pugalia v. Vellor* 22 M. L. J. 821; 13 I. C. 476. In *Ramasami v. Vengidusami* 22 M. 118 (114) the court noticed the conflict of views but was inclined to support Vigyaneshwar's text.

(2) *Mayne H. L.*, 478.

(3) *Ch. IV Ss. 9-17.*

(4) *Daya Vibhag S. 22*, cited in *Mari v. Chinammal*, 8 M. 107 (123) F.B.

(5) *Mari v. Chinammal* 8 M. 107 (123) F. B.

(6) *Smriti Ch. IV 9, 17*: cited with approval in *Mari v. Chinammal*, 8 M. 107 (123) F. B.

(7) *Manu IX-111.*

been considered (1) while the subject of a previous separation will be dealt with in the next section.

1465. Agreement against partition.—There is some conflict between

the decided cases, more apparent than real, as to the validity of an agreement against partition. There can be no doubt that the parties cannot by agreement make a partible estate impartible, since impartibility must arise out of a special tenure or a general family or local custom. (2) Moreover, an agreement never to divide certain property would be invalid on the ground that it tends to create a perpetuity. (3) As Phear, J. said: "It is not competent for the owners of a property in this country by any arrangement made in their own discretion to alter the ordinary incidents of the property which they possess, for instance, in this particular case, to say that the joint property shall remain the joint property of the joint family in perpetuity, but shall not possess the incident which the law of the country attaches to property in such condition, namely, that every independent parcener is entitled at any time to have his share divided off from the rest. No doubt any member of the family, and therefore, all might, for sufficient consideration bind themselves to forego their rights for a specified time and definite purpose, by a contract which could be enforced against them personally." (4) As was observed in another case: "The right of a co-owner to have partition of his share is incident to the right of ownership, and an agreement not to partition for an indefinite period would be contrary to that right, and therefore not enforceable." (5)

In other words, an agreement against partition is unenforceable even as between the immediate parties to it, unless it is supported by consideration and is otherwise reasonable and proper and intended for the beneficial enjoyment of the joint property. Even then the agreement does not bind the heirs and assignees of the parties. (6) This appears to be the dominant note of several cases. (7)

1467. Family arrangement.—This has already been the subject of

previous discussion (S. 130).

1468 Separation.—There remains the question of a previous separa-

tion, which may be express or implied. As this raises a question of some importance and is of frequent occurrence it forms the subject of the next section.

1469. Relinquishment.—It is open to a co-parcener to relinquish his

interest in the joint property. This he may do if he finds it overburdened with debts or otherwise subject to obligations which he may not care to face.

So where the father of three sons had incurred considerable expense for the marriage of two of his sons for which he sold some of his properties,

(1) Ss. 190, 181.

(2) *Vinayag v. Gopal*, 21 B. 458 O. A. 27 B. 358 P. C.; *Pirjshah v. Mani Bhai*, 36 B. 58 (56).

(3) *Ramalinga v. Virupakshi*, 7 B. 538; *Anand v. Prankisto*, 3 B. I. R. (O. C.) 14; *Rajender v. Sham Chunder*, 6 C. 106; *Shook-moy v. Manohari*, 7 C. 269.

(4) *Radhanath v. Tarucknath*, (1874) 3 C. W. N. 126 (128).

(5) *Chandar v. Kundanlal*, 31 A. 8 (4).

(6) *Rajender v. Sham Chund* 6 C. 106; *Anand v. Prankisto* 3 P. L. R. (O. C.) 14; *Anath Nath v. Mackintosh*, 3 B. L. R. 60.

(7) *Ramalinga v. Virupakshi*, 7 B. 538; *Subhoraya v. Rajaram*, 25 M. 585; *Chandar v. Kundanlal*, 31 A. 3; *Srimohan v. Macgregor*, 28 C. 769 (786); *Muthuraman v. Ponnuswamy*, 29 M. L. J. 214; 29 I. C. (M) 549.

gave them some cash and jewels and separated them from the family. The sons thereafter lived separately while the father and the son lived together. It was held that the transaction was a relinquishment by the separated sons of their interest in the remaining family properties. ⁽¹⁾

Partial partition.

138. (1) Partition may be general or partial. ⁽²⁾

(2) Partition is general where all members join in partitioning their joint property.

(3) It is partial when some of them separate, leaving the rest joint; or where all divide only some of their joint property.

(4) Partial partition cannot be made otherwise than by the agreement of parties, except where it is otherwise indispensable or would be equitable or convenient to the parties without prejudice to the rights of the co-parcenary.

(5) Without prejudice to the generality of the foregoing general rule such partition may be permitted in the following cases :—

- (i) Where partial partition is permitted by any other law.
- (ii) Where different portions of the family property are situate in different districts. ⁽³⁾
- (iii) Where the portion excluded is impartible. ⁽⁴⁾
- (iv) Where the portion excluded has already been partitioned or is the subject of a family arrangement.
- (v) Where the portion excluded is not in the possession of co-parceners. ⁽⁵⁾
- (vi) Where the portion excluded is held jointly with a stranger who has no interest in the family partition. ⁽⁶⁾
- (vii) Where the defendant has no interest in the portion excluded.
- (viii) Where the property was omitted or excluded from a previous partition.

(1) *Rangasamy v. Sundararamanjulu*, 31 M.L.J. 472; 85 I. C. 52.

(2) *Bewun Pershad v. Radha*, 4 M. I. A. 187 (168); *Katama v. Raja of Shivganga* 9 M. I. A. 548 (514); *Chintaman v. Nowlukho*, 1 C. 158 (161) P. C.

(3) *Panchanun v. Shib Ohunder*, 14 C. 895; *Ramacharya v. Anantcharya* 18 B. 389; *Balaram v. Ramachandra* 22 B. 922; *Abdulkarim*

v. Badruddeen 28 M. 216.

(4) *Parvathi v. Thirumalai*, 10 M. 884; *Malikarjuna v. Durga Prasad* 24 M. 147 P. C.

(5) *Narayan v. Pandurany* 12 B.H.C.R. 148; *Kristoyya v. Narasimham* 28 M. 608.

(6) *Purshottam v. Atmaram* 28 B. 597; *Jogendra v. Srish Chandra* 1 I. C. 110; *Kailas v. Nityanand*, 8 I. C. 21.

Illustrations.

(a) *A, B, and C, are three joint brothers. A decides to separate. He cannot compel both B and C to separate from each other*

(b) *A, B, and C, jointly own properties D and E. A claims partition of D. He cannot do so unless B and C agree.*

Synopsis.

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| (1) <i>Partial partition not recognised by texts</i> (1470). | (8) <i>Partial partition allowed where indispensable</i> (1481). |
| (2) <i>Partial partition when refused</i> (1471). | (9) <i>Or where co-parcener affirms alienation</i> (1482). |
| (3) <i>Partial partition permitted</i> (1472-1474). | (10) <i>Suit for partial partition between stranger alienees</i> (1486). |
| (4) <i>Partial partition between co-parceners</i> (1475-1476). | (11) <i>Or where only a portion of joint property is left undivided</i> (1487). |
| (5) <i>Effect of partial partition</i> (1476). | (12) <i>Partition of omitted items</i> (1489). |
| (6) <i>Case for partial partition</i> (1477). | (13) <i>Legal effect of partial partition</i> (1490). |
| (7) <i>Statutory modification of Hindu Law rule against partial partition</i> (1478-1480). | |

1470. Analogous Law.—Hindu Law does not contemplate a partial partition. It contemplates either a complete jointness or a complete severance of joint interest. (1) It has no place for an intermediate stage in which some persons and property remain joint while the rest separate. (2) But such a state is both practical and possible though it cannot be demanded as of right. (3) As West and Buhler observe: "Though partial division is of very frequent occurrence in practice, the law books do not contain any special rules on the subject." (4) The law of partial partition is then based upon general principles and actual decisions which will be presently considered.

Partial partition may, it is said, be demanded as of right by the alienee of a co-parcenary interest who may either sue for the separation of his share in a general partition or only take proceedings to have it ascertained in partition. (5)

1471. Partial partition.—It has already been stated that Hindu Law contemplates a complete partition. It does not contain any rules for a partial partition which owes its recognition to general principles and the decided cases which have always refused to make a partial partition at the instance of one co-parcener against others; nor is the rule confined to co-parcenary property. Even where the parties are only co-sharers or tenants in common, partition of

(1) *Per curiam Iburamsa v Thiruvankatasami* 84 M 269 (270) F. B. Subba Reddi v. Alagammal, 18 M. L. T. 545; 31 I.C. 674; *Amrut v Mukund* 5 N. L. R. 152; 4 I.C. 238; W. and B H. L. 700; Sm. Chan. XIV 10

(2) *Hari Das v. Pron Nath*, 12 C 566; *Jogendra v. Jagadandhu*, 14 C. 122.

(3) *Iburamsa v. Thiruvankatasami*, 84 M. 269 (276, 277) F.B. following and explaining *Hardi Narain v. Ruder Perakash*, 10 C. 626 (687) P.C; *Suraj Bansi v. Sheo Pershad*,

5 C. 148, 174) P.C. *Amrit Rao v. Govind*, 9 N.L.R. 145 contra *Parbati v. Aminudeen* 7 C. 577; *Ramasami v. Alagirisami* 27 M 361.

(4) *Hindu Law*, p. 700.

(5) *Iburamsa v. Thiruvankatasami*, 84 M. 269 (276, 277) F. B. following and explaining *Hardi Narain v. Ruder Perakash*, 10 C. 626 (687) P. C; *Suraj Bansi v. Sheo Persad*, 5 C 148 (174) P. C. *Amrit Rao v. Gobind*, 9 N.L. R. 145; contra *Parbati v. Aminudeen*, 7 C. 577; *Ramasami v. Alagirisami*, 27 M. 361,

certain of the items only has been ordinarily refused (1) though if it could be effected without much inconvenience to other sharers, a partial partition has not been held to be absolutely barred. (2) As was observed in a case : "A member of a joint family cannot, any more than a partner, introduce a stranger into the community ; he cannot for his own benefit alienate or deliver to a stranger a particular portion of the common property without winding up the concern ; and his interest is, therefore, a right to a share of the general assets after the common liabilities have been discharged, and not a right to a share of any specific property of the family. It has accordingly been frequently held that his remedy is a suit for the partition of the whole family property, and not of specific property." (3)

1472. In this view even a purchaser of a co-parcenary interest is **When permitted.** not entitled to have his interest ascertained except in a proceeding for a general partition. This view proceeds on the ground that "since the transferee only acquires an equity to compel a partition he has only a right *in personam* and not a right *in rem* and the transferor remains a member of the family and retains all the rights which attach to membership, including the right to an increased share upon the death of another co-parcener. An alienation by a co-parcener of a particular item of the family property or of a specific share in such an item, differs in some respects from an alienation of the whole or a fraction of the interest of the transferor in the general assets of the family. Since a member of a joint family has no right to a specific share of any particular property of the family, an assignment by him of such a share to a stranger conveys no interest whatever to the transferee. If however, the grantor should subsequently become entitled to the property included in the grant, then on a well settled principle of equity which is embodied in S. 43 of the Transfer of Property Act, 1882, he cannot deny the title to the transferee and is bound to make the grant effectual. The courts have in this case also recognized the right of the transferee to stand in the shoes of the transferor and to enforce his equity by means of a suit for the general partition of the entire family property, and in order to do equity as between the transferor and transferee, will endeavour to marshal the property in such a way as, if possible, to give effect to the alienation; but this is in order to avoid a fraud upon the transferee, and this procedure will not be adopted to the prejudice of the other co-parceners." (4)

1473. The other view has been maintained by a Full Bench of the same court which while refusing a partial partition to a co-parcener, permits it to a stranger alienee. (5) In so holding the court followed the dicta of the Privy Council in which their Lordships held the alienee of a share "entitled to take proceedings to have it ascertained in partition." (6) But in all these cases their Lordships were merely indicating the alienee's right and were not prescribing the procedure. In any case, as pointed out by the same court in

(1) *Parbatī v. Ainuddin*, 7 C. 577 ; *Ramasami v. Alagirisami*, 27 M. 861.

(2) *Radha Kanla v. Bipro Das*, 1 C.L.J. 40; *Syed Habibur Rasul v. Ashita*, 12 C.W.N. 640; *Uma Sundari v. Benode Lal*, 34 C. 1026.

(3) *Manjaya v. Shanmuga*, 38 M. 684 (692) (691) *Narayanaswami v. Tirumal*, 24 M.L.J. 79 (80); *Iburamsa v. Tiruvankatasami*, 34 M. 269 F. B.; *Padata v. Madavarapu*,

2 M.W.N. 982; 12 I. C. (M) 408.

(4) *Manjaya v. Shanmuga*, 38 M. 684 (692, 693).

(5) *Iburamsa v. Tiruvankatasami*, 34 M. 269 (276-277) F. B.

(6) *Hardi Narain v. Ruder Perakash* 10 C. 626 (687) P. C. *Suraj Bansi v. Sheo Pershad*, 5 C. 148 174 P. C. *Devi Dayal v. Jugdeep Narain*, 8. C. 198 (209) P. C.

another case the alienee being clearly entitled to the equity the fact that he sues for a partial partition should not be fatal to his suit. The other co-parceners might be given notice and if they should prefer a general partition it should be decreed. The rule applicable to such cases is that governing partition between tenants in common and not that regulating partition between members of an undivided family. (1)

1474. The true rule appears to be that while the purchaser has no right to maintain a partial partition as held in some cases (2) his right is to have his share ascertained and he is entitled to sue for no more than the ascertainment of his share. If it then appears that this cannot be done without a general partition the court should order it without driving the purchaser to another suit. (3) This course may be necessary if there are equities which the other co-parceners have against the alienor which can only be worked out in a general suit for partition and in working out those equities, the plaintiff's vendor, and hence the plaintiff may be assigned a different item from the item he purported to buy or even a smaller share than those items represented. (4)

There are no doubt cases in which the court has dismissed a suit for partial partition holding it untenable, (5) there are those in which such suit was allowed (6) while there are others in which the court is guided by equity and convenience. (7)

1475. Partial partition between co-parceners.—It has already been stated that co-parceners cannot claim a partition partial as to the persons or the property as of right, though such partitions are sanctioned by usage and may be decreed by consent. (8) Apart from suit, it may be made by arrangement.

But apart from consent or compromise, the court will not entertain a suit for a partial partition (9) unless some properties being previously partitioned, the suit relates only to those which remained undivided (10) or where some of the property is beyond the jurisdiction of the court, or where some of it is in the possession of the mortgagee or some other party and is therefore not available for partition. (11)

(1) *Subba Row v. Ananthanarayana*, 23 M. L. J. 64; 14 I.C. 524; *Ram Mohanlal v. Mulchand*, 28 A. 39; *Padmamani v. Jagadamba*, 6 B.L.R. 134

(2) *Iburamsa v. Thiruvengkatasami*, 34 M. 269 F.B.

(3) *Ranku v. Hukmi* (1916) P.W.R. 15; 35 I.C. 545.

(4) *Padala v. Madavarapu*, 2 M.W.N. 882; 12 I.C. 408; *Venkatarama v. Meera*, 18 M. 275; *Venkayya v. Lakshmayya*, 16 M. 98; *Radha Churn v. Kripa Sindhu*, 5 C. 474; *Parbati v. Amuddeen*, 7 C. 577; *Haridas v. Pran Nath*, 12 C. 566; *Jogendra v. Jugobundhu*, 14 C. 122; *Palani v. Masakonam*, 20 M. 248

(5) *Laljeet v. Rajcomar*, 25 W.R. 353; *Chunder Nath v. Har Narain*, 7 C. 153; *Haridas v. Pran Nath*, 12 C. 566; *Jogendra v. Jugobundhu*, 14 C. 122; *Satyakumar v. Satya Kripal*, 10 C. L. J. 503; *Doman v. Prokash Lal*, 18 I.C. (C) 866; *Nanabhai v. Nathabai*, 7 B.H.C.R. (A.C.) 46; *Hari v. Ganapatray*, 7 B. 272; *Vamanji v. Atmaram*, (1888) B.P.J. 397; *Barabi v. Deb Kamini*, 20 C. 682; *Hemadri v. Ramanikanta*, 24 C. 575; *Radha Kanta v. Bipro Das*, 1 C.L.J. 40;

Habibur v. Ashita, 12 C.W.N. 640; *Ram Mohanlal v. Mulchand*, 28 A. 39; *Shib Sulhaye v. Nursinghi*, 22 W.R. 352, explaining contra in *Nanabhai v. Nathubhai*, 7 B.H.C.R. (A.C.) 46.

(6) *Padmamani v. Jagadamba*, 6 B.L.R. 134; *Subba Row v. Ananthanarayana*, 23 M.L.J. 64; 14 I.C. 524

(7) *Udaram v. Ramu*, 11 B.H.C.R. 76; *Shib Sahay v. Nursing*, 22 W.R. 352; *Hari v. Lakshmi*, 34 M. 402; *Subba Row v. Ananthanarayana*, 23 M.L.J. 64; 14 I.C. 524

(8) *Chandar Shekhar v. Kundan Lal* 81 A. 3; *Manjanatha v. Narayana* 5 M. 862.

(9) *Laljeet v. Rajcomar* 25 W. R. 353; *Haridas v. Pran Nath* 12 C. 566; *Jogendra v. Jugobundhu* 14 C. 122; *Satya Kumar v. Satya Kripal* 10 C. L. J. 503; *Doman v. Prakash Lal* 18 I.C. (C) 866; *Nanabhai v. Nathabai*, 7 B.H.C.R. (A.C.) 46; *Hari v. Ganapatray* 7 B. 272.

(10) *Gavrishankar v. Atmaram*, 18 B. 611; *Purusottam v. Atmaram*, 23 B. 597; *Ajodhya v. Mahadeo*, 14 C. W. N. 221; 3 I. C. (C) 9.

(11) *Gorachand v. Basanti* 15 C. L. J. 258; 12 I. C. 684.

The rule on the subject of partial partition between co-parceners has been thus stated: "Though there can be no compulsory partial partition either in respect of the joint property belonging to the family, or in respect of the persons constituting the undivided family, yet by mutual agreement of parties the partition can be partial either in respect of the property or of the persons constituting the family. And according to usage and custom the remaining members of an undivided family from which one or more have become divided, continue as an undivided family in its normal state and not as members, who after partition have become reunited." (1)

1476. The separation of some members from the joint family has not necessarily the effect of operating as a general partition, though for the purpose of ascertaining the share of the outgoing member it is necessary to ascertain the share of every co-parcener and in fact to effect a general imaginary partition. (2)

This fact supports the presumption that a partition is general both as to the person and the property. (3) But it is merely a presumption and may be disproved by proving the contrary.

There is no presumption that where some only of the members separate, the rest remain joint. An agreement among the remaining co-parceners to remain united or to reunite must be proved like any other fact. (4) As their Lordships said: "It appears to their Lordships that there is no presumption when one co-parcener separates from the others, that the latter remain united. In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact." (5) It must be noted that this case is no authority for the proposition that the separation of one member leads to a separation of all. All it says and means is that the separation of a single member destroys the presumption that the family is joint and that the remaining members cannot be presumed to remain joint. Whether they do so in fact must be proved like any other fact.

1477. Case for partial partition.—A case for partial partition arises where all the co-parceners have alienated their interests, in which case the alienee from one may sue the alienee from the rest for the severance of his share without a general partition. (6)

1478. Partial partition allowed by other law.—The rule against partial partition is now a mere processual law. It is dictated by considerations of convenience and has not been adhered to in certain classes of cases in which

(1) *Hoolas Koonwur v. Man Singh*, 3 Agra 37.

(2) *Singh Iyer v. Venkataramana*, 14 M.L.T. 555; 28 I. C. 6.

(3) *Anandibai v. Hari*, 35 B. 293; *Parbat v. Maharaj*, 6 I. C. (A) 7:5.

(4) *Balabux v. Rukhmabai*, 30 C. 725 P. C.

(5) *Balabux v. Rukhmabai*, 30 C. 725 (786) P. C.; *Chidambaram v. Muthu*, 7 M. L. T. 95; 5 I. C. 764; *Nihal Devi v. Kishore Chand*,

(1910) P. R. 97; 8 I. C. 999; *Surajpal v. Gajraj*, 10 C.L.J. 698; 26 I.C. 600; *Gadian v. Gadian* 1 M. L. W. 799; 26 I. C. 48; *Balakrishna v. Raju*, (1915) M. W. N. 17; 27 I. C. 736.

(6) *Iburamsa v. Thiruvengatasami*, 34 M. 269 F. B. followed in *Amrit Rao v. Govind*, 9 N.L.R. 145; 21 I. C. 590; *Krishna v. Venkata-lakshmi*, 20 M. L. J. 323.

apparently it was considered to lead to inconvenience. (1) But this does not mean that partial partition should be permitted as a matter of course. All it means is that the rule is not inflexible but is subject to well defined exceptions the scope of which should not be enlarged except upon grounds of manifest convenience. (2)

1479. The rule of Hindu Law against a partial partition has been in several respects modified by the statute law relating to the partition of property. For instance special provision is made in the various Land Revenue Acts for the partition of revenue paying estates, of which partition can only be made as therein provided. (3) Ordinarily these Acts recognize a Mahal as a unit for partition and it may then be partitioned, though the family may own several mahals of which piecemeal partition is reprobated by Hindu Law. (4) Then again, partial partition may be rendered necessary by the limited local jurisdiction of the court. Where therefore only some of the property is situate within the local jurisdiction of the court it would entertain a suit for partition of it though it may not comprise the entire estate. Such a case may arise whether some property is situate outside British India, or outside the local jurisdiction of a district court. (5) The same rule extends to the High Courts which are however, empowered, on leave being obtained, to entertain a suit in respect of all properties situate within and without their ordinary original jurisdiction (6) provided that some property is situate within the jurisdiction of the court. (7) Where a suit related to the partition of both moveable and immoveable property the latter being situate wholly beyond the jurisdiction of the High Court, the court will refuse partition as to the immoveable estate which lay beyond it. (8)

1480. If it is, however, necessary for the purpose of doing complete justice between the parties that a suit should be stayed pending the institution of a suit in the court within whose jurisdiction the immoveable property is situate, it would adopt that course. (9) The court has no jurisdiction to grant leave for trial of a partition suit where all the immoveable property is situate beyond its jurisdiction. So where the plaintiff sued for partition of his share in the family property comprising both moveables and immoveables of which the former were situate within and the latter without the jurisdiction of the court, and the Registrar granted leave for trial of the whole suit, in the High Court, it was held that the High Court had no jurisdiction as to the lands and that the leave to sue had been improperly granted by the Registrar. The suit as to the lands was accordingly dismissed. (10)

(1) *Manjaya v. Shanmuga*, 38 M. 684; *Sundaresa v. Krishnamoorthy*, 31 M. J. J. 317; 35 I. C. 577.

(2) *Sundaresa v. Krishnamoorthy*, 31 M. L. J. 317; 35 I. C. 577.

(3) Bengal Act V of 1897; U. P. Act III of 1901; C. P. Act II of 1917; Punjab Act XVII of 1887; Bombay Act V of 1879 (Ss. 118, 117); Madras Reg. XXV of 1802 (Ss. 8, 9); Mad. Reg. II of 1803 (Ss. 17, 18, 20-24); Madras Act II of 1864 (Ss. 44, 46); Mad. Act I of 1876; Assam Reg. 1 of 1885 (Ch. 6).

(4) *Chunder Nath v. Hur Narain* 7 C. 158; *Parbati v. Ainuddin* 7 C. 577; *Mukunda v. Lehuvaux*, 20 C. 879. *Barati v. Deb Kamini* 24 C. 575 explained in *Radalkanta v. Bipro*, 1 C. L. J. 40 (42); *Habibur v. Ashita*,

12 C. W. N. 640.

(5) *Punchann v. Shib Chunder* 14 C. 885; *Balaram v. Ramachandra* 22 B. 922 (925).

(6) *Sarat Chandra v. Mahapat* 87 C. 907 (911); *Matigaru Coal Co. v. Shragers, Ltd.*, 88 C. 824.

(7) *Seshagiri v. Rama Rau* 19 M. 448.

(8) *Jairam v. Atmaram* 4 B. 482; *Balaram v. Ramchandra* 22 B. 922; *Seshagiri v. Rama* 19 M. 448; *Abdul Karim v. Badruddeen* 28 M. 216 (222).

(9) *Subha Rau v. Rama Rau* 8 M. H. O. R. 376; *Pattorav v. Audimulu* 5 M. H. C. R. 419; *Abdul v. Badruddeen* 28 M. 216 (220).

(10) *Seshagiri v. Rama Rau* 19 M. 448; *Jairam v. Atmaram*, 4 B. 482.

1481. Where it is indispensable.—Again, partial partition is the only course possible where the rest of the property is in the

CI. (5) (2). possession of the mortgagee and is therefore not available for present division. (1) In one case it was suggested that where it is so it is still open to the plaintiff to sue for a division of right, though he could not obtain its partition by metes and bounds. But the court held that the plaintiff being entitled to possession on partition cannot be compelled to sue for only a portion of the relief to which he is entitled. (2)

1482. Where co-parcener affirms alienation.—Where the right, title

CI. (5) (3). and interest of a member of a joint Hindu family in specific family property is sold in execution of a decree not binding on the remaining co-parcener, it is competent to such other co-parcener if he chooses to affirm the court sale in respect of that portion of the property, and thus become divided in respect of such portion only of the family property, in which case the purchaser is not driven to the necessity of enforcing his purchase by bringing a suit for a general partition of the whole of the family property. A joint family consisted of a father *A* a son *B* and the latter's son *C*. In execution of a decree against *B* for purposes not binding on *A*, *B*'s interest in a specific portion of the joint property was sold. Subsequently, *A* gifted his moiety in such portion in favour of *C* who sued the purchaser to recover such specific moiety. It was held that the father by making a gift of his moiety had in effect ratified the court sale as effecting a partition of the property to which the sale related, between himself and his son under whom the purchaser claimed. The gift was really one made by a member of an undivided family who had become divided in respect of a portion of the family property, a moiety of which was the subject of the gift. Such a gift was valid. As regards *C* he was entitled not merely to joint possession with the purchaser but to the sole possession of the specific half claimed if the specific half claimed was in excess of the fair half. (3)

1483. The same view has been taken in other cases which proceed upon the principle that though a co-parcener is entitled to enforce a general partition, still it is only his right and he may choose to forego the advantage. Where therefore, a stranger has acquired a co-parcener's interest in a specific property it is for the other co-parceners to affirm or interdict the act and claim by partition to recover from the stranger the property to which the alienation cannot extend. (4)

1484. Such a course is inevitable, since the stranger is not interested in a general partition and the co-parcener does not want it either. So where one of two brothers sold his interest in a house and three shops to the defendant, whereupon the other brother sued him for their partition but the purchaser resisted the suit on the ground that a suit for partial partition was untenable the court overruled the contention holding that the purchaser was not

(1) *Kristayya v. Narasimham*, 28 M. 608.
Balkrishna v. Hari 8 B. H. C. R. (A.C.) 64;
Narayan v. Pandurang 12 B. H. C. R. 148 (155);
Shivmurtappa v. Virappa, 1 Bom. L. R. 620
 (2), *Pattaravij v. Audimulu* 5 M. H. C. R.
 419; *Narayan v. Pandurang*, 12 B. H. C. R.

148 (155) followed *Shivmurtappa v. Virappa*,
 1 Bom. L. R. 620 (625).

(3) *Kadegan v. Periyar*, 18 M. L. J. 477
 followed in *Ibaramsa v. Thiruvankatasami*,
 84 M. 269 I. R.

(4) *Chinna v. Suriya*, 5 M. 196

interested in the rest of the property and the vendor was entitled to the separation of his moiety from that sold off by his brother. (1)

1485. But this is the right of a co-parcener against a stranger purchaser but not *vice versa* unless necessitated by the circumstance of purchase. It is not a right which any co-parcener can enforce against another: "At first sight it may seem strange that the purchaser may not bring a suit for partition in circumstances in which a member of the family other than the vendor may bring such suit. There are reasons, however why the one suit for partial partition should be allowed and the other not. To allow the purchaser from one member of a family to bring a suit for the partition of the particular property purchased might facilitate members of an undivided family in dealing with the property in fraud of the rights of the family. It is not unreasonable that the purchaser should have no greater powers against the family than his vendor. On the other hand, it is to the advantage of the family to be able to ascertain by partition the particular property which the purchaser may retain and to be freed from all relations with a stranger to the family. Nor is the ability to sue for a partition of the particular property altogether disadvantageous to the purchaser, for if all the family property were brought into the suit it might turn out that the purchaser took nothing". (2) Of course where the co-parcener does not affirm the alienation it is open to him to turn out the purchaser in a suit for ejectment. (3)

1486. Suit between stranger alienees.—The same principle justifies a suit for partial partition between two stranger alienees of co-parcenary interests who being each interested only in the specific item of property acquired by him cannot create disruption of the joint family. (4) In such case each purchaser is only entitled to work out the rights, which he has acquired by his purchase. The purchase of either vendee does not give him an equitable right to a marshalling of the parts of the estate in his favour. (5)

The same rule extends to the partition of a property held by a joint family in partnership with a stranger who has no interest in a general partition of the family estate and who could not therefore be made a party in the family partition suit. (6)

1487. A suit for partial partition will lie where it is the only property left undivided. Such suit cannot be defeated by a plea that a partial partition cannot be claimed and that the entire property must be again thrown into the hotchpot. (7) "A whole village or a particular community may have a joint property in a right of common pasturage or a forest, and such common enjoyment may continue even after there has been a private partition among the members of any one or more of the component families. No intention to relinquish a part of the claim can be inferred by the mere non-inclusion of such a common claim in a family partition suit." (8) In such case it is clear that

(1) *Ramcharan v. Jasodha*, 23 A. 50; *Luchmi Narain v. Janki Das*, 28 A. 216; *Subramanya v. Padmanabha*, 19 M. 267.

(2) *Subramanya v. Padmanabha*, 19 M. 267 (268) following *Venkatachella v. Chinnaiya*, 5 M. H. C. R. 166.

(3) *Venkayya v. Lakshmayya*, 16 M. 98.

(4) *Subharazu v. Venkataratnam*, 15 M.

284, *Iburamsa v. Thiruvengatasami*, 34 M. 269 F. B.

(5) *Gadadhar v. Balvant*, (1888) B. P. J. 679.

(6) *Purushottam v. Atmaram*, 28 B. 527 (601).

(7) *Gavri Shankar v. Atmaram*, 18 B. 611.

(8) *Purushottam v. Atmaram*, 28 B. 527 (601).

a co-parcener may sue for the partition of his right against the other co-parceners and strangers who may be jointly interested in partition. A *Vritti* was owned jointly by the two families of *A* and *B*. In 1881 the *Vritti* of *A* was partitioned among its members at the instance of one of its member *C* who sued the other parceners of the family *A* and all members of the family *B* for partition of their joint *Vritti*. The court held that the first partition did not bar the second and that the latter was not obnoxious to the rule against partial partition. (1)

1488. Other cases may be conceived where a partial partition might be maintained even as between co-parceners. So where some of the property had been previously partitioned, the rest being kept joint, there can be no objection to a suit for the partition of the latter. Nor can such suit be resisted on the ground that the entire estate should be re-partitioned.

1489. Partition of omitted items.—Partial partition is inevitable where it is necessary to complete a general partition. Such a case may arise where some items were omitted or excluded from partition. The same rule would hold good where by inadvertance, mistake, or fraud of any of the parties some item was not brought to partition. (2)

1490. Legal effect of partial partition.—The legal effect of a partial partition is not to break up the co-parcenary altogether, since the members continue to remain co-parceners as regards the undivided property with the right of survivorship *inter se* as before, the result being that on death of any member the property kept joint would descend not to his own representatives but would survive to the other members. (3)

So where the husband died a separated member leaving some property undivided, his widow was held to have no right to inherit to the latter. (4) But the case would have been different if the title being divided such property was kept joint for enjoyment. (5)

139. In the absence of any contract to the contrary, co-parceners are entitled to shares at partition according to the following rules :—

(1) Each member is presumed to represent himself and his sons whose share is included in the share allotted to him.

(2) Brothers take equal shares ; and the share of a brother who has died is represented by his sons, grandsons and great grandsons.

(3) As between different branches of a family shares are given *per stirpes* and as between the sons of the same father *per capita*.

But this rule does not apply to a partial partition.

(1) *Purushottam v. Atmaram* 28 B 597(598).

(2) *Jogendra v. Baladeb*, 85 C. 961; *Mukunda v. Jogesh Chandra*, 20 C.W.N. 1276; 1 Pat. L. J. 898.

(3) *Vaidyanath v. Aiyasamy*, 32 M. 191

(4) *Rama Bai v. Jogan*, (1871) B. P. J. 260; (1873) B.P.J. 85

(5) *Rakhmabai v. Joterao* (1872) B.P. J. 236; *Timama v. Anichimani*, (1875) B. P. J. 257; *Suraj v. Desa*, (1881) B. P. J. 123.

Synopsis.

- (1) *Texts on the subject of distribution of shares on partition* (1491). (3) *Division per stirpes and per capita* (1495-1497, 1500-1502).
 (2) *Partition between brothers* (1493). (4) *After-born son* (1498).

1491. Analogous Law.—The mode of distribution stated in the section is supported by the following texts, :—

Texts.

Yajnavalkya :—Among sons by different fathers, the allotment of shares is according to the fathers. ⁽¹⁾

Mayukh :—(Quoting the last.) The meaning is that supposing one father to have one son, another two, or third three, the division takes place by the number of the fathers only, not by the number of the shares. ⁽²⁾

Katyayan :—If an undivided younger brother dies, they should make his son a sharer of the inheritance if he has not obtained a livelihood from his grandfather. If should obtain the share of his father from his paternal uncle, or his (i.e) uncles' son. That very share would indeed, be the legal share of all the brothers, or, even his son would receive a share, beyond such a son succession ceases ⁽³⁾

Mayukh —(Quoting the last says.) The word *Anuj* 'younger brother' is intended to even the elder brother.

Parasar :—(Beyond) means the great grandson. The sons, etc., of the great grandson do not obtain wealth of the great-great-grand father, if the father, grand father, and great grandfather have predeceased such great great grandfather who at his decease has left other sons or other nearer heirs alive. The meaning is that in the absence of sons, grandson, and great grandsons and the like of the deceased, even he (the great grandson) takes. And this does not refer to the undivided but to the reunited, as there is a text of Devala which says "Among family members who having been divided live together the second partition of the heritage takes place (even) up to the fourth in descent. This is the rule." ⁽⁴⁾

Mitakshara :—This unequal distribution ⁽⁵⁾ supposes property by himself acquired. But of the wealth descended to him from his father an unequal partition at his pleasure is not proper, for equal ownership will be declared. ⁽⁶⁾

The author next propounds another period of partition for other persons making it, and a rule respecting the mode "Let sons divide equally both the effects and the debts after (the demise of) their two parents." ⁽⁷⁾

Therefore unequal partition though noticed in codes of law, should not be practised since it is disapproved by the world and is contrary to scripture.

For this reason a restriction is obtained, that brethren should divide only in equal shares ⁽⁸⁾

Dayabhag —26. It might be argued, that the practice of equal partition is indispensable as the only mode authorized by law. For the brethren may consent to the deductions by reason of great veneration (for the eldest). An option exists like that of making or omitting partition.

27. Accordingly, since persons of the present day (who are younger brothers) entertain no great veneration (for their elders) equal distribution is alone seen in the world; as also because elder brothers deserving of deducted allotments are now rare. ⁽⁹⁾

(1) II 120.

(2) Cited and explained in *Umed v Khushalbai* 11, Bom L.R. 396

(3) *Sundar Koer v Rai Sham Krishen*, 84 C. 150 (161) P.C.

(4) Mandlik H. L. pp 44, 45; The construction of Devala is forced. See Mandlik H.L. p 46; W. and B. H. L. (2nd Bk) p. 4.

(5) Referring to Manu IX-112 "The

portion deducted for the eldest is the twentieth part of the heritage with the best of all the chattels; for the middlemost half of that; for the youngest a quarter of it."

(6) Mit i-ii 6 cited and explained in *Lakshman v Ramchandra* 1 B. 561 (568).

(7) Yaj II-118, Mit. 1-iii.7.

(8) Mit- 1-IV-7.

(9) Dayabhag iii-ii-26, 27.

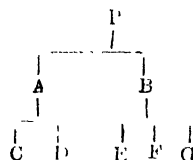
1492. The rule stated in the third clause is drawn from the statement of law by Muttusami Ayyar, J. (1)

1493. Partition between brothers.—The simplest case of partition is that by the father among his sons, or by the sons among themselves. In each case all share equally, the archaic law as to the greater share of the eldest son on the ground of primogeniture being now obsolete. It is declared in the texts and has been so held in several cases. (2) The father has no right to make an unequal distribution of his ancestral property, (3) whether moveable (4) or immoveable. It may be that in some localities or families the ancient custom of the right of primogeniture called *Jethasi haq* still lingers. In one case it was pleaded but the court held the custom not proved. (5)

1494. Now suppose that before the partition some of the brothers were dead. If they left no issue then their shares would naturally devolve on the other co-parceners by survivorship. But if they died leaving issue the latter would take the same share which their father or grandfather would have taken if he were alive. In short they do not take *per capita* but *per stirpes*.

But if in the same case the family was subject to the Dayabhog law, then the deceased brother's share would be taken by his heir, devisee or assignee.

1495. In a Mitakshara family the share of the deceased is not affected by his death if he left a male issue. "The rule is designed to ensure equality of partition in cases of vested interests held in co-parcenary, and to carry out in those cases the principle that those who have capacity to confer equal spiritual benefits on the common ancestor ought to take equal shares. In its simplest form, a joint family consists of a father and his sons, and it obtains a further developement by each son becoming a father, and by each of the male descendants of that son having male issue in his turn. When, therefore a joint family in an advanced stage of developement is broken up by partition, regard is had to the successive vested interests of each branch; and on the division by the stock at each stage, a new branch intervenes, secures equal shares to those who were the sons of the same father and had capacity to confer an equal amount of spiritual benefit upon him." (6) If for instance A and B, two brothers, have each two and three sons C and D, and E, F and G, the fact whether C and D separate from their father A and uncle B or whether A, C and D separate from B and his sons would make no difference in the allotment, if at the time of partition either or both the brothers die, since the share of each branch is a moiety and it must be distributed amongst the sons of A and B with the result that while the two sons of A will each get one-fourth, the three sons of B will only get 2/8 each. If B died and with him



(1) *Manjanatha v. Narayana*, 5 M. 362 (864, 365). To the same effect *Bhimul Dass v. Chamee Lal*, 2 C. 379; *Raj Narain v. Heeralal*, 5 C. 142.

(2) Mit 1-ii-6; 1-iii-1-7; Dayabhog iii 2 26, 27; Mayukh IV-IV-11-17; Smriti Chandrika ii-ii-2; ii-iii-16-24; Dayakram Sangrah VII 18 Virimitoday ii-1-11-14; Madan Ratna Pradip cited in *Talpur Singh v. Phulwan Singh*, 3 B. S.R. 402; 6 I D. (O.S.) 974 F.N. (a) *ib.* p. 976. *Bhyroochund v. Russoominee*, 1 B.S.R. 36; 6 I D. (O.S.) 27; *Neelkamini v. Mune*, *ib.* p. 77; 6

1 D. (O.S.) 58; *Taliwar Singh v. Phulwan Singh* 3 B.S.R. 402; 6 I D. (O.S.) 974; *Lakshman v. Ramchandra* 1 B. 561.

(3) *Lakshman v. Ramchandra*, 1 B. 561 (566) contra *Sudanand v. Bonomalee*, 1 Marsh 317 (320) dissented from in *Sudanand v. Soorjoo*, 11 W R 436.

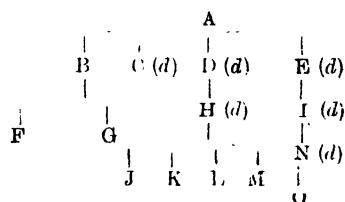
(4) *Lakshman v. Ramchandra* 1 B. 561 (567) (5) *Shoa Buksh v. Puteh Singh*, (Heirs of) 2 B.S.R. 340, 6 I D. (O.S.) 616.

(6) Per Muttusami Ayyar, J. in *Thangabanni v. Ramu*, 5 M. 365 (364).

two of his three sons, then the survivor will get a moiety of his own branch, but if *B* and his three sons were then alive then they will all get the same moiety. This is division *per stirpes*, that is a division according to the stocks. (1) If after living separate from *A*, *B* wishes to effect a partition amongst his three sons. *E*, *F* and *G* each of them will receive a fourth of the half allotted to *B*'s branch, i.e., $\frac{1}{8}$ per head. This is division *per capita*, i.e., according to the number of the sons, the father being entitled to receive one equal share for himself.

1496. The same rule will extend to the sons and grandsons and great grandsons of *E*, *F* and *G*. But since that is the limit of co-parcenary right, if a person dies leaving him surviving his only great-great-grandson, the latter will take no interest in his ancestor's interest which will pass to his collaterals by survivorship.

1497. Such a case may be imagined in the following illustration. *A* dies leaving a son *B*, two grandsons *F* and *G*, and a great great-grandson *O*. Here *A*'s four sons constitute four different branches represented by their descendants but still *E*'s branch takes nothing, since *O* being more than three degrees remote from the common ancestor is not his coparcener and therefore *E*'s $\frac{1}{4}$ share in *A*'s estate passes to *B*, *C* and *D*, the two latter being represented by their descendants. *A*'s estate would then be divided into three parts $\frac{1}{3}$ rd being taken by *B*, $\frac{1}{3}$ rd by *F*, and *G*, i.e., $\frac{1}{3}$ rd each by *F* and *G* and the remaining third by *J*, *K*, *L* and *M*, (i.e., $\frac{1}{12}$ th by each). That is to say while each branch takes *per stirpes* the individuals of each branch take *per capita*.



Now in the same case if the partition were made while *C* and *D* were both alive then *C* and *D*'s share would have been the same, but on a fourth division *inter se* the shares of their descendants would have been correspondingly reduced.

1498. After-born son — Again suppose in the last case that *A* had made a division amongst his two sons *B*, and *C*, and *D* was born after the partition, what is then *D*'s share? It is now settled that he can receive nothing from his separated brothers *B* and *C* (2) if his father had received a share; but if he had reserved nothing for himself then *D* can claim a repartition from his elder brothers *B* and *C* in which case their shares are liable to reduction (3) as previously stated.

1499. Since each father becomes the head of his own branch it follows that there may be branches and sub-branches and while a person may take *per stirpes* in relation to his own ascendants, he may take *per capita* in relation to the members of his own branch.

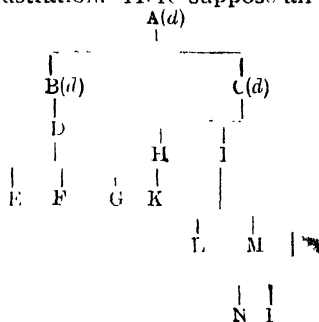
(1) Mit. 1. V-2, *Prajnarain v. Heeralal*, 5 C. 142.

(2) *Ganpat v. Gopal Rao*, 23 B. 636.

(3) *Krishna v. Sami*, 9 M. 64; *Chengama*

v. Munisami, 20 M. 75; *Bishenchand v. Asmaida* 6 A. 560 P.O.; *Ganpat v. Gopal Rao*, 23 B. 636; *Shivajirao v. Vasantrao*, 33 B. 267 (272).

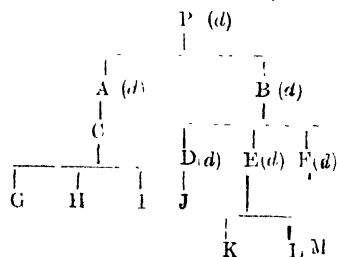
1500. Such a case is imagined in the next illustration. Here suppose all the co-parceners are desirous of effecting a general partition of the estate of *A*. Now since *A* left two sons *B* and *C* his estate is divisible into two moieties one moiety falling to each branch. Then out of *B*'s moiety his sons and grandsons will each receive $\frac{1}{4}$ of $\frac{1}{2} = \frac{1}{8}$ th. And as to *C*'s branch his three sons will each take *per stirpes* $\frac{1}{3}$ rd of $\frac{1}{2} = \frac{1}{6}$ th which will again be subdivided amongst their sons, *H* and *K* taking $\frac{1}{12}$ th each while *I*'s two sons will each receive $\frac{1}{3}$ rd of $\frac{1}{6}$ th = $\frac{1}{18}$ th and *J*'s sons, each $\frac{1}{4}$ th of $\frac{1}{6}$ th = $\frac{1}{24}$ th.



1501. It may however be that some of the members prefer to continue to be joint while the rest desire to separate. In that case division follows the same principle. That is to say, an imaginary partition of all the members is made and the share of each co-parcener ascertained, and the shares of those claiming partition are separated from those continuing to remain joint.

1502. Such a case arose in Madras (1) where the court had to decide upon the following tree.

In 1867 two of *C*'s sons (say *G* and *H*) the two sons of *E* (*K* and *L*) and *M* the son of *F* sued the rest for partition. For the purpose of that suit the property was divided into twelve shares. Of the six shares due to *A*'s branch, three were allotted to *G* and *H* and two to *M*. The remaining 5 shares were enjoyed in common by the rest of the family *C*, *I* and *J* who remained in union.



In 1872 *C* died. In 1879 *I* sued *J* to recover his share of the family property claiming three-fifths of the whole. The subordinate judge had awarded him only a moiety on the ground that the present state of the family alone was to be considered in ascertaining the shares. But the High Court held that *I* was entitled to the $\frac{3}{5}$ ths he had claimed, since the rule that as between different branches division should be *per stirpes*, and as between sons of the same father *per capita* applied only to cases of general partition, and had no application to partial partition. Where a joint family in an advanced state of development is broken up by partition, regard must be had to the successive vested interests of each branch, and in order to secure equality of shares division *per stirpes* at each stage when a new branch intervenes, is necessary. In other words, in such a state of family the members held their shares in *quasi-severalty*, so that on the death of *C*, *I* alone succeeded to his father's share to the exclusion of *J* whose interest was not enlarged by reason of his jointness with *J*.

(1) *Manjanatha v. Narayana*, 5 M. 362.

140. (1) Separation may be proved by any declaration, **Proof of separation.** act or conduct of a party entitled to partition showing an intention inconsistent with jointness.

(2) In particular and without prejudice to the generality of the foregoing rule separation may be presumed from the following facts:—

- (a) Cesser of commensality and joint worship.
- (b) Separate enjoyment of portions of the property, or of their income.
- (c) Division of income.
- (d) Agreement to divide the income in definite shares.
- (e) Separate definement of shares.
- (f) Separate transactions of the co-parceners between themselves with others.

(3) An act of a stranger such as attachment and sale of a co-parcenary interest does not suffice to effect separation.

(4) Conversion of any co-parcener to an alien faith such as Christianity or Mahomedanism has the effect of separating *ipso facto* the convert from the co-parcenary.

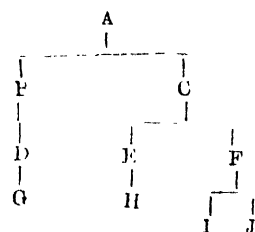
Synopsis.

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|--|---|
| (1) <i>Proof of separation</i> (1503). | (11) <i>Definement of shares</i> (1516-1517). |
| (2) <i>Agreement to hold shares separately</i> (1503). | (12) <i>Independent dealings</i> (1518). |
| (3) <i>Intention, the test of partition</i> (1505). | (13) <i>Stranger's seizure ineffectual</i> (1519). |
| (4) <i>Cesser of commensality</i> (1507). | (14) <i>Purchase in individual names</i> (1520). |
| (5) <i>Cesser of joint worship</i> (1508-1510). | (15) <i>Conversion of co-parcener to alien faith</i> (1522). |
| (6) <i>Relationship of parties</i> (1511). | (16) <i>Intention not effective to create severance, unless unequivocally expressed</i> (1524). |
| (7) <i>Duration of separate living, etc.</i> (1511). | (17) <i>Exclusion of co-parcener</i> (1525). |
| (8) <i>Separate enjoyment</i> (1513). | (18) <i>Evidence of exclusion</i> (1526-1527). |
| (9) <i>Appropriation of profits</i> (1514). | |
| (10) <i>Agreement to divide</i> (1515). | |

1503. Analogous Law.—It has already been stated before than an unequivocal expression of an intention to separate may amount to partition. (1) In that connection cases have been cited illustrative of the rule, stated in clause (1). "The true test of partition of the property, according to Hindu Law is the intention of the family to become separate owners." (2) If the parties

intended to separate but in fact continued to live joint it will be a legal separation. Such was the case of the four joint sharers who drew up a deed by which each was declared as entitled to one-fourth share of the profits of a business and that each would thenceforward contribute one-fourth to the payment of the land revenue which each was to possess to the extent of his share, and it was held that though the co-sharers continued to jointly carry on the business the execution of the deed defining their shares had effected a legal partition. (1) The question in such cases is one of construction. What was the intention of those who submitted to the agreement. Did it merely alter the mode of enjoyment for convenience of management or was it intended to sever the status. Not only the deed but the surrounding circumstances should be taken into consideration. If for instance, there was no immediate necessity for the deed, but nevertheless the parties chose to define their rights it would be strong *prima facie* evidence to hold the undivided shares as the separate property of each co-partner. (2) The father possesses an absolute right to make a partition during his life and the partition so made binds his sons not because the sons are consenting parties to it but because it is the result of a power conferred on him, though subject to certain restrictions in the interests of his family. A document which purported to be a *parikhat* (deed of partition) made by a father, by which he reserved a share to himself and said: "There shall hereafter exist between you (sons of the first wife on the one side and those of the second on the other) only a connection of friendship and no connection whatever in respect of property," it was held to be both in form and substance a partition effected by the father in the exercise of his power, though made in his last illness. (3) In another case the father had three sons, one son by his first wife, two sons by his second wife. He executed a will by which he authorized his executors to effect a partition among his sons when the eldest of them attained the age of majority. The executors did so as directed. Properties were divided into the shares, one of which was allotted to the eldest son, and the two shares to the other two sons. The words used in the deed were that "if any property had been left undivided, it would be divided into three shares by the three parties, and in future the parties shall have no connection in respect of property except relationship by blood." It was held that these words effected a severance in interest as between the sons of the second wife also, though their property was kept together without any division. (4) A similar case went up to the Privy Council and was decided on the following facts: The family tree was as given below :—

E and *F* predeceased *C* who died in 1882 leaving the grandsons *H*, *I*, *J*, who were all minors. In 1883 the minors *H* and *J* applied for a certificate to collect the debts of *C* alleging that *I* who was of full age was about to waste the estate of the minors. *C* opposed this application on the ground that the family was joint. A couple of months later a petition was filed alleging that the parties had arrived at a compromise to which *G*, *H*, *I* and *J* were all parties. A four-annas share was given to *G* and out of the remaining twelve annas, three



(1) *Mahabhar v. Kundun*, 8 W. R. 116 affirmed *O. A. Doorga Pershad v. Kundun*, 21 W. R. 214 P. C.

(2) *Doorga Pershad v. Kundun*, 21 W. R. 214 P. C. To the same effect *Kulponath v.*

Mewah Lal, 8 W. R. 302

(3) *Kandasami v. Doraisami*, 2 M. 347.

(4) *Kamalambal v. Krishnasamy*, (1911) M.W. N. 310; 10 I.C. 385.

annas had been allotted to *I*, a three-annas to *J* and six annas to *H*. The agreement added: "Now all the parties are at liberty to have their respective names registered in the collectorate jointly or separately and to hold possession of the properties according to their respective proportionate shares. Each party shall have in future no claim of any kind whatever on the ground of the shares being more or less . . . Every one of us has, by virtue of this deed, the power either to continue to live together as members of the joint family as before, or to separate his own business none of us having any objection thereto." The District Judge issued a certificate to all the four cousins to collect debts due to the estate of *C* and *P*. After the agreement *G* separated, but *H*, *I* and *J* continued to live together and collected their income and enjoyed their property in all external respects in the same manner as before the execution of the agreement. *H* died in 1886 and *I* in the following year—when the plaintiff who held a mortgage from *C*, executed in 1869, sued *J* and the widows of *H* and *I* and obtained a decree. But on appeal by *J* it was held that the mortgage was not proved against him. He then sued the mortgagee and the widows of *H* and *I* for recovery of this property to which he claimed to succeed by survivorship alleging his jointness with *H* and *I*. The High Court rejected it holding that the agreement had effected a severance *J* relied upon the last clause in the agreement giving the cousins an option to continue joint as to which the Privy Council replied: "They might elect either to have partition of their shares by metes and bounds, or to continue to live together and enjoy their property in common as before. Whether they did one or the other would affect the mode of enjoyment, but not the tenure of the property or their interest in it."

1504. Their Lordships then adverted to the fact of the co-parceners' minority at the time and added that it too was no impediment to a partition. (1) The father executed a document which he called a will whereby he allotted certain shares of the joint property to his son keeping no share for himself. He, however, added that if he found the sons mismanaging the property he would cancel his deed to make a family arrangement which operated from its date. There was nothing in the deed though it was called a will to postpone its operation and then the threat to cancel the shares was inoperative being *in terrorem* and did not suffice to prevent the partition operating *in presenti*. (2)

1505. This view accords with that taken in numerous cases in this country and by the Privy Council. The underlying principle of all these is that if there is an intention to separate, separation may be effected by any overt act, even a declaration or a paper partition, without any change in the mode of living or a division by metes and bounds. On the other hand, there may be a division by metes and bound and no intention to separate; such division though it may be evidence of a family arrangement falls short of a partition. So again a mere declaration to the effect that a certain member is the owner of a particular share, not accompanied by an intention to separate would not constitute a separation of the joint property. (3)

1506. The question then arises how is such an intention to be proved. It is clear that where there is a document, the question of intention is one of construction which may be supported by the evidence of surrounding circumstances and

(1) *Balushen v. Ram Narain*, 30 C. 788 (1917, 752) P. C.: To the same effect *Ram Pershad v. Lakhpath*, 30 C. 231 P. C.; *Raghbir Singh v. Moti*, 35 A. 41 P. C.

(2) *Brijraj v. Sheodan*, 35 A. 337 (352) P. C.

(3) *Hoolash Koor v. Kunsee Prashad* 7 C. 369.

conduct. But if the intention is clear no evidence of conduct is even admissible. Moreover such evidence is only relevant where the deed states that something remains to be done as where it contemplates, the mutation of names, the change of names of the different shops or other consequential acts which the parties treat as essential to complete a partition.

Apart however from deeds, separation may be inferred from acts and conduct enumerated in clause (2).

1507. Cesser of commensality.—Of these, the cesser of commensality and joint worship is important. As the Privy Council

Cl. 2 (a).

said: "Cesser of commensality is an element which may properly be considered in determining the question whether there was partition of joint family property, but it is not conclusive." (1) The evidentiary value of cesser of commensality must naturally depend upon the previous mode of life and occupation of the joint family. In a family possessing properties within a limited area commensality is the rule and cesser an exception. But in a family with numerous members or with scattered possessions it is usual for different members to assume management of different parcels of land which necessitates the cesser of commensality. When a family is large, and is scattered about in different places, it is natural that several members of the family should remain in possession of separate portions of the property for the sake of convenience. Mere separate management cannot give rise to the presumption that the family was divided. (2) So in the trading firms not only is there such cesser, but branch firms carry on independent transactions to all outward appearances and the several branches are even mutually accountable to one another. But they remain still joint, as there is no intention to separate. Whether the cesser was or was not due to separation must then depend upon the circumstances of each case. Even in non-trading families such differences are attributable to the incompatibility of female temperaments. In any case separation cannot be inferred from the mere fact that various members of the family were living in separate houses all of which belonged to the family. (3)

1508. The cesser of joint worship follows the cesser of commensality. In

Cesser of joint worship.

the unsophisticated orthodox families joint worship is yet an index of jointness, though such families are fast disappearing with the advance of western education, the result of which however is to loosen the tie of jointness both in commensality and in estate.

1509. In an orthodox household the family deity is worshipped by all members of a joint family. Even if they separate in mess and residence some arrangement is agreed upon for the joint worship of the household gods. But where this is not possible it must be regarded as yet another circumstance in favour of the disruption of jointness. (4)

1510. Such was the case of two brothers, by name Gannu and Lalji who first separated in mess owing to quarrels between their wives and then gradually

(1) *Anundee v. Khedoolall*, 14 M. I. A. 412; *Ganesh Dutt v. Jeevach Thakurain*, 31 C. 262 (269) P. C.; *Jivubai v. Krishnaji*, 6 Bom. L.R. 351 (355); *Suraj Narain v. Iqbal Narain*, 35 A. 80 P. C.

(2) *Chabbila v. Jadabai*, 3 B.H.C.R. 87

followed in *Murari v. Mukund*, 15 B. 201 (204).

(3) *Sital Prasad v. Bansidhar*, (1882) A.W.N. 168.

(4) *Gannu v. Bhagwati*, 3 I.C. (C) 234 (238).

drifted away from each other till they became separate in mess, residence and business. On his separation from his brother, Lalji acquired a house-site in exchange for his land and built thereon a house of his own, upon which the court said: "This separate acquisition of land for a house in lieu of a specific portion of the paternal land is an indication of an intention on the part of Lalji to separate himself and his family from his brother Gannu and the paternal house." (1) Lalji got his name separately recorded in the land records and began to make separate collections of his revenue, all of which facts strengthened the presumption in favour of separation which the court held proved by the conduct of the parties.

1511 But another material element in considering the evidentiary

Relationship and time material.

value of such cesser is the relationship of the parties and the duration of their separation in mess and worship. As West, J., said: "It is a recognized principle that, when a Hindu family has once been proved to have been joint, it lies on those who assert a subsequent separation to prove it. The state of things shown to have existed is presumed to have continued, until the contrary be shown. But it is not inconsistent with this doctrine and is indeed, obvious that as the course of nature itself brings about inevitable changes in a family, the presumption is one which grows weaker at each stage of descent from the common ancestor. Brothers are for the most part united; second cousins are generally separated. After a considerable lapse of time, testimony of the precise terms on which a partition was effected and of the precise time at which it was made, will, in most cases be wanting. The presumption that the old state of things continued, is at some point met by the presumption that the present state of things had a legal origin, and it cannot be said that the Hindu Law, in the form in which it has come down to this generation, looks on all separation of families with disfavour. Many sages point complacently to the increase of offerings that attends the separate performance of family religious ceremonies and the pressure of modern circumstance tends steadily towards disruption. There may be a separation gradually effected by tacit agreement, as well as one by express contract. (2) Where, therefore, we find descendants in two lines in the fourth, fifth and sixth degree, from a common ancestor the presumption in favour of continued union between the two branches though it has not altogether vanished, has become but a slender one. If it is met by proof of long continued exclusive possession of parcels of the original family estate, of independent dealings with the parcels in its own possession by each branch, of a total separation in food and residence, it cannot in general prevail against the inference which such facts suggest. It would be unreasonable that it should." (3) In this case the plaintiff who was beyond the fourth degree was found to have lived separate for 50 years from the defendant who was within the fourth degree of the common ancestor. They had enjoyed no portion of the family property in common during this time. The court held these facts to rebut the presumption of jointness and dismissed the plaintiff's suit for partition. The same view was taken in another case in which it was found that the several branches of the family had been living separate for 40 or 50 years and either enjoying for that long period separate and distinct portions of the family property, or portions of the property in regular rotation, that they dealt with the separate portions in every

* (1) *Gannu v. Bhagwati*, 3 I. C. (C) 234) Fulton 132.

(238).

(3) *Moro v. Ganesb*, 10 B.H.C.R. 444 (454).

(2) *Doe d. Gulchunder v. Tarachurn*, 1

respect as their own property and, lastly, that in the survey records the lands were entered in the names of the several branches in respect of their one-sixth shares. This evidence as to the mode of enjoyment by the several branches of the family during so long a period was held to establish a tacit agreement of enjoyment according to their shares, and bringing the case within the principle of Appovier's case. (1) So in another case it was laid down that the acts of different members of a family in allowing separate portions of the banks of a tank to be held severally for so long time that no one could tell when such possession began, constituted a separation of the lands which could not be disturbed at the instance of one member, without proof that he had jointly or otherwise held possession of the land in question within 12 years. (2)

1512. An agreement between co-parceners that their property was to be divided and that thenceforward they were to maintain separate accounts and not accountable for the profits and losses of each other is in itself a complete partition. (8)

1513. Separate enjoyment.—Long continued separation in mess and worship can seldom exist without separation in enjoyment of property or income. In order to show separation it may not be necessary to prove a formal partition for it may be that a formal partition was never made, and if made it cannot be proved. In such case the only means of proving partition is by proof of separate enjoyment for a sufficiently long time so as to rebut the presumption of jointness. So where the parties were found to have been in possession of separate lands, enjoying their produce or collecting their rents the court felt justified in presuming a separation. (4) Such presumption will gain in strength if the person in possession has no right to it, as for instance, she was a female who could only be suffered in possession if there was a separation (5) or where members realize their *quota* of rent from the same property. (6) In such and similar cases separate appropriation would be very good evidence of a tacit agreement amongst the members to hold their property according to their separate shares. (7) So where four co-parceners entered into an agreement to have their shares separately recorded in the Collector's registers and to divide the income of their banking business in equal shares which was done the court held it to amount to a clear partition and this view was on appeal affirmed by the Privy Council. (9) Where the parties exercised ownership over the property in certain defined shares of which the collections and management were separate the court held the joint tenancy severed though not immediately followed by a *de facto* actual division of the subject-matter. (9)

The presumption arising from separate enjoyment would be considerably strengthened if it is found that one of the parties in possession of his lot had considerably improved it or had alienated it to other members of the family or to a stranger. (10)

(1) *Appovier v. Rama*, 11 M. I. A. 75 (90) followed in *Murari v. Mukunda*, 15 B. 201 (204, 205).

(2) *Surbessur v. Gossain Dass*, 17 W.R. 210.

(8) *Umatrupagam v. Palanarayana*, 28 I.C. (M) 908.

(4) *Adi Deo v. Dukharan*, 5 A. 582 (541).

(5) *Narayana v. Krishna*, 8 M. 214 (218).

(6) *Kalka Sahay v. Gourree Sunkur*, 12 W.

R. 287.

(7) *Cheytt Narain v. Bunnarce*, 28 W. R. 395 (397).

(8) *Mahabeer v. Kundun*, 8 W. R. 117 affirmed O. A. *Doorga Pershad v. Kundun*, 21 W. R. 214 P. C.

(9) *Mohroo v. Gunsoo*, 8 W. R. 385.

(10) *Anand Kishore v. Draj*, 21 C.L.J. 296; 28 I. C. 580.

1514. Appropriation of profits.—Separate appropriation of profits is good evidence of a tacit agreement amongst the members

Cl. 2 (c).

to hold their property according to their separate shares.⁽¹⁾ So where members of a family were shown to collect their *quota* of rent separately, it was held to be good proof of separation⁽²⁾ being the very reverse of a common chest which is the one index of a normal joint family.⁽³⁾ Where it is found as a fact that the collections and management are separate, only two inferences are possible either that there had been a separation or that it was an arrangement for convenience of management. The latter would be presumed if the profits received by different members were unequal and there was a blending of the funds at times. But if the profits were in set order and received by members without mutual accountability it would be treated as a *prima facie* case of separation.⁽⁴⁾

1515. Agreement to divide.—It has already been stated before that an

Cl. (2) (d).

agreement to divide has the effect of partition. Such agreement may be express or implied. When it is express the question is one of construction. When implied, it is one for inference from the proved and admitted facts and circumstances of each case. The question whether a mere agreement to divide operates as partition was first settled in Appovier's case⁽⁵⁾ in accordance with the current of existing decisions⁽⁶⁾ and has been since followed in numerous cases.⁽⁷⁾ The contrary laid down in some cases⁽⁸⁾ can no longer be maintained.

1516. The definition of shares, if unexplained, would be evidence of partition⁽⁹⁾ and it will be strong if it is followed up by

Cl. 2 (e).

entries of separate interests in the revenue records.⁽¹⁰⁾ The rule was thus stated in Appovier's case :⁽¹¹⁾ "But when the members of the undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt

(1) *Cheyl Narain v. Bunnarce* 23 W R 395; *Mohrao v. Ghansoo* 2 W R 385; *Taghbanand v. Sadhu Churn* 4 C. 425. *Murari v. Mukraol* 15 B. 201.

(2) *Kalka Sahoy v. Gource Sunkur*, 12 W. R. 287.

(3) *Appovier v. Rama Subba*, 8 W. R. 1 P C.; *Mahabeer v. Kundun*, 8 W. R. 116 (120).

(4) *Adi v. Dukharan*, 5 A. 532.

(5) *Appovier v. Rama*, (1866) 11 M. 1 A. 75.

(6) *Prarn Kissen v. Ram Sundaree*, (1842) *Fulton* 110; *Bulakee v. Indurputtee*, 3 W. R. 41; *Badamoo v. Wazeer Singh*, 5 W. R. 78; *Mahabeer v. Kundun*, 8 W. R. 116 (Jackson, J. dubitante) affirmed. O. A. *Doorga Pershad v. Kundun*, 21 W. R. 214 (held that Jackson, J. doubt was unjustified.)

(7) *Kulponath v. Mewch Lali*, 8 W. R. 302; *Debee Pershad v. P'kool Koerce*, 12 W. R. 510; *Bikramjeet v. Phoolhas*, 14 W. R. 340 (345); *Suraneni v. Suraneni*, 3 B. L. R. 41 P. C.; *Doorga Pershad v. Kundun* 21 W. R. 214 P. C.; *Jog Narain v. Girish Chunder* 4 C. 484 P. C.; *Ragnabomunuli v. Sadhu Churn*, 4 C. 425; *Madho v. Mehrban*, 19 C. 157 P. C.; *Budha*

Mal v. Bhagwan Das 18 C. 802 P. C.; *Ram Pershad v. Lakhpati*, 30 C. 281 P. C.; *Balkishen v. Ram Narain* 30 C. 788 P. C.; *Parbati v. Nannihal Singh* 31 C. 412 P. C.; *Girja Bai v. Sadashiv* 43 C. 1031 P. C.; *Ranjit Singh v. Guzraj* L. R. 1 I. A. 9; *Kandasami v. Dorasami* 2 M. 317; *Komalambal v. Krishna swamy* (1911) M. W. N. 310; 10 I. C. 385; *Adi v. Dhukharan* 5 A. 532; *Ramlal v. Debi Dat* 10 A. 490; *Chidambaram v. Nachiar* 2 M. 83 P. C.; *Ananta v. Damodhar* 13 B. 25; *Ramadhuri v. Bisheshwar*, 37 I. C. (O) 111.

(8) *Sheodyal v. Jadoonath* 9 W. R. 61, but see it explained by Wilson, J. in *Taj Protap v. Champa* 12 C. 96; *Phuljhar* (in re) 17 W. R. 102; *Ambika v. Sukhmani* 1 A. 487; *Bobaji v. Kashi Bai* 4 B. 157; *Sakharam v. Har* 6 B. 118 (decree insufficient); *Sudorsanam v. Narasimhulu* 25 M. 149 (150) (mere declaration insufficient-giving of "some trifle" necessary).

(9) *Ram Pershad v. Lakhpati*, 30 C. 281 (258) P.; *Ram Singh v. Tursa*, 17 C. W. N. 1085 P. C.

(10) *Ram Lal v. Debi Dat* 10 A. 490.

(11) *Appovier v. Rama*, 11 M. I. A. 75.

with and in the estate each member has thenceforth a definite and certain share which he may claim the right to receive and to enjoy in severalty, although the property itself has not become actually severed and divided." So where two brothers Gannu and Lalji who were originally joint, owing to disputes between their wives began to drift away from each other till finally they became separate in mess, worship and business. Lalji had built for himself a separate dwelling-house on a site acquired by him. He got his name separately entered in the land records and commenced to make separate realization of his income from which the court presumed separation. (1)

1517. Of course, all these facts may be explained away as consistent with continued jointness. As the Privy Council observed: "It was contended no behalf of the appellants in the present suit that, although the decree in the suit of 1868, may have effected a separation *quod Tundan and Tukan*, it left the plaintiffs united *inter se*: and that this might have been the legal effect of the decree is undeniable. But here again the conduct of the parties must be looked at, in order to arrive at what constitutes the true test of partition of property according to Hindu Law, namely the intention of the members of the family to become separate owners." (2) This may be illustrated by the converse case. One Baijnath died leaving four sons two by each of his two wives. His two sons by his junior wife were minors and she applied for a certificate for managing the property of her minor son. A son by the other wife opposed the application on the ground that the family was joint. On the death of the father the names of all the four sons had been registered with specification of their respective shares and it was contended that this coupled with the application for management amounted to partition. But the court found that the shares of the brothers had to be specified in compliance with the provisions of the Land Registration Act and that the application for management had been made under an erroneous impression that such application was maintainable even as regards a member of a joint family. There was then a division of rights without any intention to divide and the family was therefore held to be joint in spite of the definition of shares. (3)

1518. Independent dealings.—Independent dealings by a member with a stranger, and what is more, with another member of the family showing mutual credits and debits is a very strong index of separation. (4)

This may however be for the facility of accounting, as in the case of banking families with several shops who trade with one another on independent footing though at the close of the year their profits and losses are amalgamated with those of the head shop which prepares a consolidated balance sheet to indicate the progress of business. It is, however, against the rules of co-parcenership that the widow should succeed to her husband. Where it is so, and the other co-parceners have dealings with her as the heir of the husband, it raises a strong *prima facie* case of separation. (5) The mutual dealings between quondam co-parceners are of course

(1) *Gannu v. Bhoqwati*, 3 I. C. (C) 234 (289).

(2) *Ram Pershad v. Lakhpoti*, 30 C. 281 (258) P. C.

(3) *Hoolash Kover v. Kas:ee*, 7 C. 369

(4) *Ram Singh v. Turasa*, 17 C. W. N.

1085 (1088) P. C.; *Munshi Ram v. Govinda*, (1815) P. R. 128, 26 I. C. 390.

(5) *Ram Singh v. Turasa*, 17 C. W. N. 1085 P. C., *Samundram v. Kale Charn*, 13 W. R. 199

far more conclusive than co-parceners' dealings with outsiders. But even in this case it is evidence which must vary in degree according to circumstances. Suppose for instance that a family banker opens independent accounts with different co-parceners who deal with them taking advances and making payments independently of each other, it would be evidence that each had a separate chest which would destroy one symbol of jointness. So again the longer such dealings continue the stronger would be the presumption against jointness. On the other hand, it may be that such dealings are merely resorted to for convenience and in the interest of the joint family. But this must be proved. It cannot be presumed.

* **1519. Stranger's seizure ineffectual**—The last clause states a rule which is a necessary corollary of the main principle that intention is the sole test of partition. Where therefore, there is no intention to separate, an act of the stranger in seizing and selling the undivided interest of a co-parcener in execution of a decree against him has not the effect of legal partition. (1) The case would however, be different where the co-parcener voluntarily sells away his share in all the co-parcenary property in which case the joint tenancy in respect of the share alienated is put an end to and the alienee becomes a tenant in common with the remaining co-parceners. (2)

1520. Definement of shares.—The definement of shares is sufficient to constitute partition provided it is made with that intention. The settlement and other Revenue Officers sometimes allot shares of their own motion to the different members of the family with a view to maintain a record of all shares. If this is not a voluntary act at the instance of the coparceners it cannot constitute separation. But if the sharers get their separate shares recorded in the revenue papers then it would clearly be evidence from which separation might be inferred. (3) But the mere mention of shares in the record of rights or in the mutation register (4) is not sufficient. (5) But in a case where half-brothers claimed a deceased brother's share in certain villages and lands against his widow whose names as also those of his half-brothers had been separately recorded in the revenue records, and it was in evidence that the half-brothers had executed separate mortgages in respect of their respective shares, and they did not go into the witness box to explain how these transactions, though separate were consistent with jointness, the Privy Council held that their acts were only consistent with the hypothesis of separation. (6)

1521. Purchase in individual names.—It is quite common in joint families to make purchases in the name of individual members either for luck or in recognition of their co-parcenary rights, and at times, it is to be feared, from a desire to provide against the rainy day in case the family debts should outgrow its assets. In any case that circumstance alone raises no presumption of

(1) *Secretary of State v. Rangasamy*, 39 M. 831 (584) F. B. overruling *Re Chinnayan* 2 Weir's Cr. R. 48 and following *Re Umayy*, 2 Weir's Cr. R. 48.

(2) *Soundra v. Arumachellam*, 29 M. L. J. 816; *Chinnu v. Kalimuthu*, 35 M. 47; *Srinivasa v. Krishnasamy*, 11 M. L. T. 812 15 I. C. 354.

(3) *Heonee v. Dhurum*, 3 N.W.P.F.C.R. 108.

(4) *Ram Singh v. Thursa*, 17 C.W.N. 1086 P. C.

(5) *Jowar Dhari v. Narsingh*, 1 I. C. 899.

(6) *Ram Singh v. Thursa*, 17 C.W.N. 1086 P. C.

separation, though it is evidence which when taken with other facts may suffice to establish it. But of itself it is insufficient. (1)

1522. Conversion to an alien faith.—It has already been stated before

CL. (4).

that the conversion of a Hindu to another faith such as Brahmoism or Sikhism has not the effect of casting him outside the pale of Hinduism (§ 295). Nor does the conversion of a Hindu to an alien creed deprive him of any right which he possessed before his conversion. The question still remains whether by reason of such conversion he ceases to be a member of the co-parcenary. The question was considered by the Privy Council who said: "What is the position of a member of Hindu family who has become a convert to Christianity. . . . He becomes at once severed from the family, and regarded by them as an outcast. The tie which bound the family together is so far as he is concerned not only loosened but dissolved. The obligations consequent on and connected with the tie must, it seems to their Lordships, be dissolved with it. Parcenership may be put an end to by a severance effected by partition; it must, as their Lordships think, equally be put an end to by severance which the Hindu Law recognizes and creates. Their Lordships, therefore, are of opinion, that upon the conversion of a Hindu to Christianity, the Hindu Law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion or, if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion." (2)

1523. These observations were, however, made in a case in which all members of the family were converts to Christianity. In that case it is clear that all may renounce the religion but continue to preserve their joint status. (3)

The case would, however, be different, where while the family remains Hindu, only some of its members renounce Hinduism. In that case it is possible that by common consent of all the members the family may still continue joint, but in the absence of such consent, conversion will be presumed to effect a severance. (4)

1524. No separation.—It is, of course, obvious that a mere intention to separate cannot have the effect of a separation, unless such intention is expressed so as to disclose a unequivocal intention of separation. This is a question of fact dependent upon the circumstances of each case. The mere separation from commensality does not as a necessary consequence

(1) *Frankishan v. Mothooramohan*, 10 M.I.A. 408; *Gopee Kriai v. Gunga Persaud*, 6 M.I.A. 58; *Luzimen v. Muller* 5 W.R. 67 P.C.; *Cheetha v. Miheta*, 11 M.I.A. 369; *Anrit v. Gauri*, 18 M.I.A. 542; *Pran Nath v. Kashi Nath*, (1864) W.R. 169; *Kishen v. Janooke*, W.R. (F.B.) 8; *Decla v. Toofanee*, 1 W.R. 806; *Nimoney v. Gunga*, 1 W.R. 384; *Gopee v. Bhagwan*, 12 W.R. 7; *Heera v. Bidyadhar*, 21 W.R. 343; *Jugocumba v. Iohinees*, 23 W.R. 429; *Ramphil v. Deguraram*, 8 O. 517; *Narayan v. Anaji*, 5 B. 180; *Cassumbhoy v. Ahmeibhoy*, 12 B. 280 (309); *Balaram v. Ramchandra*, 22 B. 932; *Subhagya v. Chellanna*, 9 M. 477;

Subhagya v. Suragya, 10 M. 251; *Gajender v. Sardar*, 18 A. 176

(2) *Abraham v. Abraham*, 9 M. I. A. 195 (287, 288).

(3) *Ghosul v. Ghosul*, 81 B. 26; dissenting from contra in *Tellis v. Saldhana* 10 M. 69; following *Gajapathi v. Gajapathi*, 14 W. R. (P. C.) 38; *Lopez v. Lopes*, 12 C. 766 (722)

(4) *Kulada v. Haripada*, 40 C. 407 (418, 419); *Gobind v. Abdul Qayyan*, 25 A. 546 (573) reversed O. A. on a different point *Korimuddin v. Gobind*, 81 A. 497 P.C.; *Kannilal v. Gobind*, 38 A. 356 P. C. reversing O. A. *Gobind v. Khunnilal*, 29 A. 437.

effect a division of the joint undivided property, (1) though it is a circumstance which is *prima facie* evidence of separation. Even a formal division between some members would not operate as separation of the rest *inter se* unless they had intended to separate. By an award the property of a joint family consisting of an uncle and two nephews was partitioned, one share being allotted to the uncle and one to the nephews, but nothing was said as to the shares to be taken by the nephews individually nor did they express any desire to separate. It was held that the partition did not effect any separation between the nephews *inter se*. (2) A converse case was that in which there was a partition but the separated member availed himself of the services of his near agnatic relations in the administration of his property and at the same time he gave them maintenance and paid the expenses of their marriage and other ceremonies all of which facts were natural and probable but could not prove jointness in estate. (3) Where members have been in joint enjoyment of the estate for several generations the mere fact that the estate has never been partitioned is no proof of its impartibility nor can such a plea deprive a member of his vested right of partition. (4)

1525. Limitation.—Closely allied to the question of separation is that of exclusion. Though in a normal family the possession of one is the possession of all (5) this presumption cannot be availed of by one against whom exclusion is proved. As exclusion for twelve years suffices to quiet a claim otherwise good for partition, the question whether separation amounted to exclusion cannot be ignored, though what fact converts one into the other cannot be generally stated in the form of an abstract proposition. It may, however, be premised that there can be no exclusion without denial of co-parcenary right. Such denial may be express or implied as if the co-parcener should demand maintenance and it is refused; or that the co-parcener is expelled from the joint family. (6) Such a plea was taken in a suit for partition by the plaintiff whose claim was alleged to be barred by time on the ground that his father was alleged to have been expelled from the family for his misconduct. Both parties adduced voluminous evidence which the Privy Council rejected as equally untrustworthy. There remained the fact that for five years before the suit the plaintiff had reappeared in the village and was recognized as a member of the family, which was held to be sufficient to support his claim to partition. (7)

1526. Where the title is clear the court is loath to presume exclusion from a mere non-participation in profits of the joint property. The rule of the English common law that the entry and possession of one of several owners having a joint title enures for the benefit of all and is tantamount to a possession of them all (8) has been modified in England by statute (9) but since there is no similar statutory modification of the common law applicable to this country the

(1) *Sunaj Narain v. Iqbal Narain*, 35 A 380 P. C.

(2) *Durga Devi v. Bahmulal*, 29 A. 93

(3) *Deoki Singh v. Anupa*, 10 C.W.N. 338 P.C. 16 M.L.J. 109

(4) *Durrjao Singh v. Dari Singh*, 18 B L R. 165 (168) P. C.

(5) *Parmanand v. Krishna*, 14 C.T.J. 183, 12 I. C. 6

(6) *Jeolal v. Loke Narayan*, 16 C.W.N. 466 P.C.; 15 I. C. 184.

(7) *Jeolal v. Loke Narayan* 16 C.W.N.

466 P. C. 15 I. C. 184

(8) *Per Wood V C in Thomas v. Thomas* 2 K. and J. 79 69 E. R. 70. (83) followed in *Corea v. Appuhamy* (1912) A. C. 230 (236).

(9) 3 and 4 Wm. IV—C—27 S. 12 under which the entry of one does no longer vest the possession in all. On the contrary the statute makes the title of such person separate from the date of entry *Per West, J. in Dadooba v. Krishna*, 7 B. 31 (39); *Per Lord Macnaghten in Corea v. Appuhamy* (1912) A. C. 230 (236).

English common law rule still obtains here, (1) the result being that while in England possession is *prima facie* exclusive and adverse, possession here is never so treated if it can be traceable to any lawful title. Even as between tenants in common the possession of one is not necessarily adverse to the rest unless there is ouster. (2)

1527. This was settled by Privy Council in an appeal from Ceylon in which a co-parcener had set his possession as adverse to the rest upon which the Privy Council observed: "Entering into possession and having a lawful title to enter he could not divest himself of that title by pretending that he had no title at all. His title must have endured for the benefit of his co-proprietors. . . His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result." (3)

Parties to partition

141. (1) Any person entitled to claim partition may sue for it.

(2) All persons entitled to a share therein are necessary parties.

(3) But a person in possession of any property under the joint family is not a necessary party.

Illustrations.

(a) *A, B and C are co-parceners. B is their mother who is also entitled to a share. A wishes to separate from B and C. He must sue both B and C impleading his mother D.* (4).

(b) *A, B and C are co-parceners. D the wife of a predeceased brother is in possession of a village given to her out of the family estate in lieu of her maintenance. A sues for a general partition. D is not a necessary party as she has no right to a share.*

Synopsis.

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| (1) <i>Parties to a partition</i> (1528). | (5) <i>Mortgagee of joint family property, not a necessary party</i> (1532). |
| (2) <i>All sharers to be impleaded</i> (1528-1529). | (6) <i>Lessee, when a necessary party</i> (1533). |
| (3) <i>Necessary parties</i> (1530). | |
| (4) <i>Unnecessary parties</i> (1531). | |

1528. Analogous Law.—Partition suits are subject to the modern statutory procedure which has abrogated the Hindu processual law on the subject.

The rule as to the joinder of parties in partition suits is thus stated: "It is a general principle of law that a litigation can never result in an adjudication which will be binding upon others than the parties to the suit, and their privies in blood or in estate. To this general rule proceedings *in rem* form no

(1) Per Lord Macnaghten in *Corea v Appulamy*, (1912) A.C. 280 (236) a case from Ceylon.

(2) *Gangadhar v Parashram*, 14 B. 286. *Dandkhan v Govinda*, 5 N. L. R. 41.

(3) *Corea v Appulamy*, (1912) A.C. 280 (236) followed in *Faizuddin v. Reju*, 21 C.L.J. 192; *Biseshwar v Bhagabati*, 24 C.L.J. 38; 35 I.C.

26; *Jogendra v Baladeb*, 35 C. 961. *Ram Parson v Kalab Husam*, 36 I.C. (A) 109. *Ahmar v. Ramulal*, 37 A. 208; *Asghar v Akbar Husam*, 36 I.C. (O.) 743; *Morian v Kadir*, 29 I.C. (M) 275.

(4) *Toril Bhosun v Taraprasanno*, 4 C 756.

exception for in those proceedings the subject of the litigation is itself a party and being itself bound by the result, all interests in it must be likewise bound. A suit for partition is sometimes spoken of as a proceeding *in rem*; but ordinarily it is not such a proceeding, for the process is not served upon the land nor is the land a party defendant, nor is the final judgment binding on any of the co-tenants who were not brought within the jurisdiction of the court by some service of process, actual or constructive. It is, therefore indispensable that all the co-tenants, not uniting in the petition be made parties defendants." (1) So elsewhere it is said: "A decree for partition cannot be made, unless all persons interested in the premises are made parties to the suit; and the party applying for a partition of lands must not only have a present estate in the premises of which partition is sought, as a joint tenant or tenant in common, but he must also be actually or constructively in the possession of his undivided share or interest in such premises. Because if there is adverse possession, valid and succeeding, the only proper course for the court to pursue is to dismiss the bill as having been prematurely filed." (2) This necessity for impleading all persons entitled to a share is obvious, since in a suit for partition by a person, his share cannot be ascertained without hearing the other sharers. The *quantum* of the plaintiff's share can only be determined with reference to the number of sharers and their respective shares. (8)

1529. So the Privy Council observed: "If any co-sharer applied for a partition of a property, he must make the other co-sharers defendants, because the partition which is made in his favour is a partition against his co-sharers. That which gives him a portion of the property takes away all right which they would otherwise have to that portion and therefore it is a decree against them and in favour of himself." (4)

Only sharers and not all possible claimants should be arrayed in a partition suit. For instance, in a partition between the father and his sons, the sons who have separated from their father have no shares. (5) They need not then be joined. The persons entitled to claim partition are set out in S. 134. They are necessary parties. So are the persons entitled to a share, such as the wife, mother (6) or grandmother, the unmarried sister (7) enunciated in S. 136. They are equally necessary parties.

Purchasers of undivided shares should also be impleaded. (8)

But a mere maintenance grantee is not a necessary or proper party. (9)

The case of mortgagees and lessees will be presently considered.

1530. Necessary parties.—It is a general rule that all persons interested ought to be made parties to a suit, however numerous they may be, so that the

(1) Freeman's Co-tenancy and Partition (2nd Ed.) 463.

(2) Knapp's Partition p. 1.

(3) *Ashidbai v. Abdulla*, 8 Bom. L. R. 758; *Pahaladi v. Luchmunbutty*, 12 W. R. 256.

(4) *Nalini Kanta v. Sarnamoyi*, 19 C. W. N. 531 (534) P. C. 24 I. C. 293.

(5) *Ganesli v. Govind Rao*, (1898) B. P. J. 288.

(6) *Torii v. Taraprosanna*, 4 C. 756; *Laljeet v. Raj Coommar*, 20 W. R. 886 (840).

(7) *Laljeet v. Raj Coommar*, 20 W. R. 886 (840).

(8) *Pahaladhi v. Luchmunbutty*, 12 W. R. 256; *Laljeet v. Raj Coommar*, 20 W. R. 886 (840); *Nalini Kanta v. Sarnamoyi*, 19 C. W. N. 531; *Sadu v. Ram*, 16 B. 608; *Lakshman v. Gopal*, 28 B. 386 (398); *Vinayak v. Ramkrishna*, (1880) B. P. J. 180 (purchasers of co-parcenary interest must be made parties to a family partition).

(9) *Sabla Prasad v. Dharm Kirti*, 35 A. 107 (108).

court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested and that the orders of the court may be safely executed by those who are compelled to obey them and future litigation may be prevented. (1) It is in obedience to this rule that in partition suits all known co-sharers must be before the court. (2) The term "known co-sharers" covers all who are known to have an interest in the property, and it is not limited to those whose names may have been recorded under any Act. (3) Where it cannot be ascertained with precision that any co-parcener is alive, then both the unascertained co-parcener and his legal representatives should be impleaded as defendants. (4) The owner of twelve annas share in a joint zamindari granted to the plaintiff a *mukarari* lease of his share in a small portion of land within the Zamindari. The owners of the remaining four annas share granted *patni* of his share in the whole zamindari to the defendant. The plaintiff brought a suit against the defendant for partition of the small plot of land. It was held that such a suit was not maintainable without the zamindars as parties, for if such a claim were allowed the defendants might in respect of the same estate be subjected to many claims for partition at the suit of persons in the plaintiff's position. (5) So where the plaintiffs sued for the partition of certain *Jamas* to a half share of which they were entitled as tenants under the owner of a share of the proprietary title. The title to possession of the remaining half share of the *Jamas* was in S, the owner of the remaining half share of the proprietary title. The proprietors as between themselves were undivided in respect of the *Jamas*. The suit had been brought against S alone. The first court decreed the suit, but the lower Appellate Court set aside the decree and remanded the suit for the purpose of giving the plaintiff an opportunity to bring M on the record. It was held that M was, if not a necessary party, at least a proper party to the suit as his presence was necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in it. (6)

1531. Unnecessary parties.—In a partition of tenancy rights the landlord is not a necessary party. (7) But a permanent lease holder is a necessary party to a partition suit between two grantees (8) the decision being made on the ground that any other course would lead to multifariousness. In a partition of proprietary rights the mortgagee of a share is not a necessary party since such mortgagee is on partition entitled to the share allotted to his co-sharer in lieu of that mortgaged to him. (9) In a suit for partition by *putnidars* against *darputnidars* under his co-*putnidars* the co-*putnidars* must be made parties; but a *darputnidar* is not a necessary party. (10)

1532. Mortgagee.—It has already been stated that a "mortgagee is not a necessary party to a partition suit, but he may, and frequently, does obtain leave to attend the proceedings as a *quasi* party." (11)

(1) Mitford on Pleading p 190 cited per Sir Lawrence Jenkins, C. J. in *Chudasama v. Partap Singh*, 28 B 209 (213, 214).

(2) *Pahaladi v. Luchmunbutty*, 12 W R. 256 (939); *Kali Kanta v. Gouri Prasad*, 17 C. 906 followed in *Chudasama v. Partapsingh*, 28 B 209. (214).

(3) *Chudasama v. Partap Singh*, 28 B. 209 (214) a case under the Gujrat Taluqdar's Act Bom. Act VI of 1888 S. 12 set out in 28 B 209 note; *Uchhap v. Talikan*, 9 C P L R 98

(4) *Srinath v. Probodh*, 11 C L J. 580 : 6 I. C. 244.

(5) *Parbati v. Ainuddin*, 7 C 577 (580, 581).

(6) *Indu Bhushan v. Sailaja*, 7 I C (C) 382

(7) *Indu Bhushan v. Sailaja*, 7 I. C. (C) 382.

(8) *Parbati v. Ainuddin*, 7 C. 577

(9) *Narendra v. Sroda Kanto*, 6 I C. 829.

(10) *Upendra v Mhd. Faiz*, 12 C. W. N. 570.

(11) Per Sale, J. in *Khetterpal v. Khelal*, 21 C. 904 (909).

1533. Lessee.—An ordinary lessee is not a necessary party to a partition suit between his lessors. But a permanent lessee may be regarded as a purchaser and will be entitled to similar privileges and subject to similar liabilities. (1) Such is a *mukarari* (2) or a *putni* lease in Bengal. (3)

Suit for partition **142.** (1) Except as otherwise provided in this behalf, a suit for partition must relate to all property partible at the time and subject to the jurisdiction of the court in which the suit is instituted.

(2) Where however, such property is situate within the jurisdiction of more than one court suits may be brought in the several courts possessing the requisite jurisdiction.

Synopsis.

- (1) *Partition suits* (1534). *of the court* (1536).
 (2) *Partition must be exhaustive* (4) *Procedure in partition suits*
 (1535). (1537-1539).
 (3) *Property outside the jurisdiction*

1534. Analogous Law.—"The ordinary rule is that if persons are entitled beneficially to shares in an estate they may have a partition." (4) S. 134 enumerates those persons who are all entitled to sue for partition. It is not necessary that they should all jointly claim partition. Every member is individually entitled to the partition of his share, which he may put in suit. But persons merely entitled to a share at partition are not entitled to sue for it. Nor are the minors who may, however, be allowed partition in certain cases already stated (§§ 1425, 1431).

1535. Partition must be exhaustive.—"Once is a partition made." (5)
GI (1). Consequently, the plaintiff is ordinarily bound to bring his suit for a general partition which should include all property then available for partition. The only exceptions to this rule are those enumerated in S. 138.

A member of an undivided family cannot sue his co-sharers for his share in a single item of joint property such as a house (6) or an undivided field. He must sue for a general partition. (7)

It follows that a co-parcener cannot sue another to account to him for the income of the joint property so long as the family continues joint. But if the family has become separate there is then of course no objection to a suit

(1) *Dildar v. Bhopani*, 34 C. 878
 (2) *Bhagwat Sahai v. Bepin Behari*, 37 C. 918 P. C.

(3) *Uma Sundari v. Benode Lal*, 31 C 1026; *Hemadri v. Ramani*, 24 C. 575 (531) F. B. (dissenting from *Mukundo v. Leuranx*, 23 C. 379) followed in *Kishore v. Girdhari*, 1 Pat. L. J. 441. 20 C. W. N. 1896; 95 I. C. 861.
 (4) Per Lord Hobhouse in *Shankar v. Hardeo*, 16 C. 397 (405) P. C.

(5) *Manu X. 47*; *Dadajee v. Wital*, Bom. S. R. 151; *Nanabhai v. Nathabhai*, 7 B. H.

C. R. (A. C.) 46; *Narayan v. Nana*, *ib* p. 178; *Trimbak v. Narayan*, 11 B. H. C. R. 71; *Shirmurtappa v. Virappa*, 24 B. 128; *Anandi Bai v. Hari*, 35 B. 298, *Padmamani v. Jagadamba*, 6 B. L. R. 140, *Haridas v. Pran Nath*, 12 C. 566; *Jogendro v. Jugobundhu*, 14 C. 122

(6) *Venkayya v. Lakshmayya*, 16 M. 98.
 (7) *Nanabhai v. Nathubhai*, 7 B. H. C. R. (A. C.) 46; *Chhet Narain v. Bumsasi*, 28 W. R. 395; *Haridass v. Pran Nath*, 12 C. 566.

instituted by one for unauthorized receipts by the other. A formal partition is not necessary. (1)

1536. In such cases the plaintiff may, but is not bound, to institute several suits at the same time in order to bring all the family property into a single partition. But as will be presently seen all such properties must necessarily be taken into account in a satisfactory division of shares. (2) If, therefore, some of this property is situate beyond the jurisdiction of the court it may stay proceedings till the other property is satisfactorily disposed of, or in the case of the High Court, it may grant leave to include it in the same suit. (3)

1537. Procedure in partition suits.—The plaintiff entitled to partition cannot sue for a mere declaration of his title (4) or for accounts of any or all of the properties, (5) though he may sue for joint possession, (6) or restoration of his previous *khas* possession. (7)

The first thing that the court has to see is that the suit is properly laid. In an ordinary suit for division of rights or enjoyment, when there is no question of exclusion from joint possession the court fee of Rs. 10 should suffice. (8) The value for purpose of the court's jurisdiction is the value of the plaintiff's share in the estate. (9)

1538. It is the duty of the plaintiff to sue and of the court to see that he has sued for a complete partition. If he has omitted to sue for it, it is his duty to explain. All co-parceners must be impleaded in the suit whether they admit or object to partition. The plaintiff's right to partition depends upon his title and not upon the defendant's refusal to give him his share. He need not therefore state more than that he has a share and that he wishes for its separation. (10) But if the plaintiff is a minor, then he must show cause why his share should be partitioned; for he cannot obtain a partition as a matter of course (§ 1425).

If the defendants admit his claim, and there is nothing to go before the Commissioner or the Collector, the court may at once pass a final decree. It is not bound to decree the claim in two stages in every case.

If the defendants contest the suit, it must be tried like any other suit. If the defence is that the plaintiff is suing for partition, while he is keeping back the property in his possession which must have been put into the hotchpot the court may compel him to do so, or throw out his claim. (11) If the defendants wish their own shares to be ascertained and partitioned off they will be permitted

(1) *Penta v. Mudiya*, 19 M. L. J. 399, 4 I. C. 34 (head note misleading).

(2) *Hari v. Ganpat*, 7 B. 272 (278); *Dalaram v. Ramchand*, 22 B. 922 (928).

(3) *Padmanani v. Jagadamba*, 6 B. L. R. 184.

(4) *Shashi Bhushan v. Jotindra*, 38 C. 681.

(5) *Pirithu Rai v. Jawahir Singh* 14 C. 493 P. C.; *Gavri Shankar v. Atmaram* 18 B. 611; *Ganpat v. Annaji* 23 B. 144; but see *Penta v. Mudiya* 19 M. L. J. 399; 4 I. C. 34.

(6) *Huloodhur v. Guroo* 20 W. R. 126. See cases cited in 1 Gour's Law of Transfer

4th Ed. §§ 738, 740.

(7) *Watson Co. v. Ramchand* 18 C. 10 (21) P. C.; *Luchmeswar v. Manwar*, 19 C. 253 P. C. and cases cited in 1 Gour's Law of Transfer (4th Ed.) §§ 741-744.

(8) *Mohebdro v. Ashutosh* 20 C. 762.

(9) *Velu v. Kumaravelu* 20 M. 289.

(10) *Mitta v. Neerunjun* 22 W. R. 437; *Shama Scandere v. Jardine Skinner Co.*, 12 W. R. 160.

(11) *Mahbub v. Abdul*, (1912) P. L. B. 84; 13 I. C. 819.

to do so on payment of the requisite court fee. (1) In such case the parties are in the position of cross claimants and each will have to prove his case and will be allotted his share. (2) Where the plaintiff's title is denied, the first thing he must do is to prove it. If he is found to have no share at all, there is no suit for partition and consequently no necessity to determine the defendant's share. (3) But it is open to the plaintiff to claim partition or in the alternative, possession of the property bequeathed to him in his father's will. If the partition fails because he has failed to bring the property in his possession into hotchpot it is no reason for not investigating his alternative claim. (4) Where the plaintiff denies the existence of other properties the court should direct an enquiry into the existence (5) and if the plaintiff expresses his willingness to bring it into hotchpot, his suit should not be dismissed. (6) A suit for partition may be dismissed because the plaintiff was governed by the Aliyasana Law which does not admit of the right to partition (7) though it admits of a family arrangement for the separate enjoyment of property. (8) *Prima facie* however all joint property is subject to partition and the onus of proof is on the party seeking to except any property from the general rule. (9)

1539. Even though the land is in the possession of tenants entitled to be possession under subsisting leases, that would not be a bar to a partition of the property among the members of the family. (10) Where a co-parcener's interest in co-parcenary property is sold at the instance of his creditor, the balance of the sale proceeds does not cease to be co-parcenary property and is therefore partible. (11)

The dismissal of a suit for partial partition does not bar another suit for a general partition of the property. (12)

A partition is limited to the interest of the person demanding it and has no enforced general operation against those who desire to live in union. (13)

143. (1) Every person entitled to a share may demand the partition of his share *in specie* and such partition may be made except in the circumstances next following:—

- (2) Where the thing is by its nature indivisible.
- (3) Or where its partition *in specie* will destroy its intrinsic value or be otherwise inconvenient.
- (4) Where its sale is demanded and justified by the Partition Act.

- (1) *Abu v. Amin*, (1875) B. P. J. 218; *Sadraddin v. Nuruddin*, 29 B. 79.
- (2) *Khorshed v. Nabee Fatima*, 3 C. 551. *Shimurleppa v. Virappa* 24 B. 128.
- (3) *Ashid Bai v. Abdulla*, 8 Bom. L. R. 758; *Mewa Singh v. Basant Singh*, 28 C. L. J. 580 P. C.; 48 I. C. 540.
- (4) *Gansham v. Saraswati Bai* (1892) B. P. J. 415.
- (5) *Sri Mohan v. MacGregor*, 28 C. 769 (789).
- (6) *Venkata v. Bhashya Karlu*, 25 M. 367
- P. C.
- (7) *Munda v. Timmaju*, 1 M. H. C. B. 380; *Timmappa v. Mahalinga*, 4 M. H. C. R. 28.
- (8) *Sanlu v. Pultomma*, 14 M. 289.
- (9) *Luximon v. Mullar*, 5 W. R. 67. (P. C.)
- (10) *Suryanarayana v. Sammana*, 25 M. 504.
- (11) *Krishnaswami v. Rajagopala*, 18 M. 78.
- (12) *Jogendra v. Jugobundha*, 14 C. 122.
- (13) *Ganpat v. Gopal Rao*, 1 Bm. L. R. 128.

Synopsis.

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| (1) <i>Mode of partition</i> (1540). | (4) <i>Service mam</i> (1544). |
| (2) <i>Adjustment of equities</i> (1541). | (5) <i>Costs of suit</i> (1545). |
| (3) <i>Partition of religious office</i> (1542). | (6) <i>The Partition Act</i> (1546). |

1540. Analogous Law.—*Prima facie* all property is partible *in specie* and must be so partitioned. "It is an elementary principle that in case of partition where several persons are co-owners or co-sharers of immoveable property, partition should be effected between them by giving to each his share *in specie* as far as practicable." (1) The right of each sharer is to his slice of the property, not merely its money value, and it is a matter of common experience that great importance is attached in this country to the possession of a share *in specie* by a co-sharer of property which has belonged to the family of which he is a member, or which has descended from an ancestor. The law gives effect to this sentiment as far as possible." (2) This rule is however subject to several exceptions, which may be stated: (1) If a property can be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made; if on the contrary no partition can be made without destroying the intrinsic value, then a money compensation should be given instead of the share which would fall to a party by partition. (3) (2) If one of the co-parceners wishes to keep the property entire, an opportunity should be afforded to him to do so, if he can agree on the subject with his co-parceners. (4) If they cannot agree it may be sold under the Partition Act.

1541. From S. 4 of the Partition Act the court will enforce the principle of equity in all partition cases, that when it is convenient to divide a property, it must be left in possession of the person in occupation, and the other person who cannot conveniently get actual possession compensated. So where the defendants in a suit for partition were found to have built a dwelling house on a plot of 7 *cottahs* of land without opposition from the plaintiff who was a stranger and owned only a one-tenth share in it and in an adjoining plot of 1 *bigha* 6 *cottahs*, the court disallowed the partition of the plots by metes and bounds but gave the defendant option to buy up the plaintiff's shares at a proper valuation. (5) But convenience must raise a special equity against partition *in specie*. (6)

1542. Partition of religious office.—The sacred texts treat hereditary offices, whether religious or secular as naturally indivisible, but modern custom has sanctioned their partition such as can be had of such property, by means of performance of the duties of the office and the enjoyment of the emoluments by the different co-parceners in rotation. (7)

1543. Religious office.—A religious office such that of a family priest is both inalienable and indivisible both because it includes a right of personal service as also on the ground of public policy. But a distribution of duties by rotation is nevertheless recognized as permissible as also the relinquishment of duties by one member in favour of other members of the same family

(1) *Mahomed v. Haji*, 7 Bom. L. R. 482.(2) *Debindra v. Hari Das*, 7 I. C. (C) 844; *Mahomed v. Haji*, 7 Bom. L. R. 482.(3) *Ashanullah v. Kali Kinkur*, 10 C. 675.(4) *Raj Coomaree v. Gopal Chunder*, 3 C.(5) *Basunta v. Moti Lal*, 15 C.W. N. 555; *Debindra v. Haridas*, 7 I. C. 844.(6) *Baja Khan v. Birju*, (1878) P.R. 15.(7) *Mancharam v. Pranshankar*, 6 B. 298; *Trimbal v. Lakshman*, 20 B. 495 (501).

and if so permitted by custom, even in favour of other persons of the priestly caste. (1) Such are also the *Muths* which are associations of Sanyasis or celebraies devoted to Divine worship who impart *updes* or religious instructions to deserving candidates. The house in which they live are also called *Muths*. They are in the nature of colleges for the performance of religious exercise and instruction and are by their very nature impartible and inalienable. (2) The *pattam* or office of dignity in a family governed by the Aliyasantana Law is indivisible and whether the family be divided or not, when no special arrangement has been made about it, the *pattam* descends to the eldest male of the surviving members of the family. (3) Priestly offerings are indivisible though members of a family may agree among themselves to throw their individual earnings into the common chest in which case the family earnings become their joint property and are as such partible. (4) Where a joint family consisting of three members asked for partition of their properties consisting amongst others, of family books in which the names of pilgrims were recorded it was held that the first step was actually to divide the books into three portions. In making this division the guiding principle should be to ascertain the number of entries in each book, and it may be possible to give to each party a number of leaves containing as nearly as possible the same number of entries as to any other co-parcener. The second step to be taken was to have certified copies prepared by the entries of these books and to give them to each of the parties. The result would be that each party would have one-third of the entries in original and two-thirds in certified copies. (5)

1544. Service inam.—Inam villages granted by Government to the grantee and his male heirs for services rendered to the State, are not by the Hindu Law in force in the Southern Mahratta country, distinguishable from other ancestral real estates and are divisible among the heirs of the grantee. (6) The enfranchisement of village service inams does not alter its incidents since the enfranchisement has merely the effect of a separating the land from the office and imposing thereon a quit rent instead of the full assessment. The effect of enfranchisement and the issue of a title is to exonerate the inam from the conditions of service and convert it into ordinary property subject to the payment of quit rent and not to resume the same from the family or person entitled to the hereditary office and to make a fresh grant of the same. (7)

1545. Costs.—As the plaintiff in a partition suit commences it for his own advantage, convenience and security and as the defendant, as joint owner holds his undivided share always subject to the right of the plaintiff to demand partition, the parties' costs suit up to the stage of the preliminary decree, and the costs of the partition should be divided between the parties in proportion to their respective shares in the estate. (8) If, however, there has been a frivolous contest the party by reason of whose opposition unnecessary costs are incurred may be made liable. (9)

1546. Partition Act.—In making a partition the court may resort to the provisions of the Partition Act which empower it to order a sale instead of partition by metes and bounds. The provisions of this Act run as follows:—

(1) *Manghirmal v. Vilhalram*, 5 S. L. R. 14 I. C. 677.

(2) *Sethurama v. Meruswamier*, 20 M. L. J. 108; 4 I. C. 76.

(3) *Tinappa v. Mahalinga*, 4 M. C. II. R. 28.

(4) *Narayan v. Chulban*, 15 C. L. J. 376.

(5) *Narayan v. Chulban*, 15 C. L. J. 376;

(6) *Bedhroo v. Nurning*, 6 M. I. A. 426.

(7) *Gunnioyan v. Komakchi*, 26 M. 889.

(8) *Shama Soonduree v. Jardine Skinner & Co.*, 14 W. R. 161 (160).

(9) *Dildar v. Bhuvani*, 24 C. 878; *Shanmugam v. Mira*, 21 I. C. (M.) 746.

THE PARTITION ACT, 1893.

(ACT IV OF 1893.)

(PASSED ON THE 9TH MARCH 1893.)

An Act to amend the law relating to partition. Whereas it is expedient to amend the law relating to partition, it is hereby enacted as follows :

Title, extent, commencement and saving.

1. (1) This Act may be called the Partition Act, 1893 ;

(2) It extends to the whole of British India ; and

(3) It shall come into force at once.

(4) But nothing herein contained shall be deemed to affect any local law providing for the partition of immoveable property paying revenue to Government.

[**Notes.**—This act amends so much of Hindu Law as is inconsistent with its provisions. The act applies to all partitions except only those which are by the several enactments placed within the special jurisdiction of Revenue officers.]

2. Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the court that by reason of the nature of the share-holders therein or of any other special circumstance, a division of the property, and distribution of the proceeds would be more beneficial for all the share-holders, the court may, if it thinks fit, on the request of any such share-holders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.

[**Notes.**—The "decree" in the section includes a preliminary decree. (1) This section may be resorted to even after the preliminary decree for partition. (2) Under this section a co-parcener who applies for sale has no right to buy up the share or shares of the remaining co-sharers who have not applied under S. 2 to have his share converted into money. (3)]

Mortgagee rights in a revenue paying estate may be sold under this Act. They are not excluded by anything contained in the U. P. Land Revenue Act, 1901. (4)

To vest the court with power to sell under this section, there must be a request by a party or parties interested in the property to the extent of one moiety or upwards. Otherwise, the sale if any, made is a nullity. (5)

(1) *Sepahdar v. Badi Bi*, 12 M. L. T. 887 ; 17 I. C. 284.

(2) *Khivodechandra v. Saroda Prasad*, 12 C. L. J. 525 ; 7 I. C. (C) 436 ; *Hiramoni v. Badha Churn*, 5 C. W. N. 128 ; *Hirakere v. Trikamdas*, 32 B 103 ; *Kadir v. Abdul*, 24 M. 689.

(3) *Jamandas v. Mulchanā*, 7 S. L. R. 117 ; 24 I. C. 273.

(4) U. P. Act 111 of 1901 § 107 ; *Banka Lal v. Shanti Prasad*, 35 A 387 (388).

(5) *Banka Lal v. Shanti Prasad*, 35 A. 387 (388).

A lessee for a term of years may, it is said, maintain a partition suit and apply for sale under this Act. (1)

3. (1) If, in any case in which the court is requested under the foregoing section to direct a sale, any other share-holder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such share-holder at the price so ascertained, and may give all necessary and proper directions in that behalf.

(2) If two or more share-holders severally apply for leave to buy as provided in sub-section (1) the court shall order a sale of the share or shares to the share-holder who offers to pay the highest price above the valuation made by the court.

(3) If no such share-holder be willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incidental to the application or applications.

[**Notes :—**The party applying for sale cannot obtain leave to purchase the share of the other party entitled to partition. Under the section the court cannot sell the whole of the property in question at a valuation but only the share or shares of the applicant or applicants for sale. (2);

4. (1) Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the court shall, if any member of the family being a share-holder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub-section (1) two or more members of the family being such share-holders severally undertake to buy such share the court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.

[**Notes.**—This section may be regarded as a corollary to S. 44 of the Transfer of Property Act.]

The object of this section is to provide an alternative course by which a plaintiff claiming partition by metes and bounds may be compelled at the option of the defendant whether he himself likes it or not, to forego his legal right to such partition and to accept pecuniary compensation in respect thereof. Enacted as the section is for the benefit of defendants, and involving as it does a statutory interference with the plaintiff's legal rights it should be strictly construed. The words "shall undertake" mean something more than a mere

(1) *Kalichurn v. Mohananda*, 29 I. C. (C) 467; *Rajendra v. Satischandra*, 15 I. C. (C) 380 (Partition of occupancy holding in Bengal); *Bhaqwant v. Bipin Behary*, 37 C. 918 (Mokuraidars may partition their interest);

Christian v. Tekaitni, 18 C. W. N. 611 (life-interest partible)

(2) *Mangal v. Rupchand*, (1895) A. W. N. 231

offer to purchase, conveying as it does the sense of an unconditional offer from which the person making it will not be permitted to resile. On such understanding being given, the court is bound to execute a deed of sale. (1)

The "undivided family" *quit* the dwelling house is sufficient. (2) This must be decided before the preliminary decree. (3) An application under S. 2 or this section may be made after the preliminary decree. (4) The term "family" as used here should be liberally construed as including a group of persons related by blood who live in one house or under one head or management. It should not be understood in its narrower sense as denoting a body of persons who can trace their descent from a common ancestor. (5) It is the ownership and not occupation that gives the right. (6)

The valuation is to be made according to the highest bid among co-sharers. (7) It is open to the court, which has fixed a time within which the price of a share of the property which is to be partitioned is to be paid, to afterwards extend the time. (8) Where the nature of the property to be divided is such that a division thereof, amongst all the share-holders, cannot reasonably or conveniently be made, the proper course to follow is to direct a sale of the property among the co-sharers; and it should be given to that share-holder who offers to pay the highest price above the valuation made by the court. The defendant cannot be compelled to transfer his share at a valuation to the plaintiff merely because the latter happens to have possession of the property at the time when he commenced the action. (9)

5. In any suit for partition a request for sale may be made or an undertaking, or application for leave to buy may be given or made on behalf of any party under disability by any person authorized to act on behalf of such party in such suit, but the court shall not be bound to comply with any such undertaking or application unless it is of opinion that the sale or purchase will be for the benefit of the party under such disability.

6. (1) Every sale under S. 2 shall be subject to a reserved bidding and the amount of such bidding shall be fixed by the court in such manner as it may think fit and may be varied from time to time.

(2) On any such sale, any of the share-holders shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purchase money or any part thereof instead of paying the same into court, as to the court may seem reasonable.

(1) *Illias v. Bulagichand*, 39 A. 572.

(2) *Khirode chandra v. Saroda Prasad*, 12 C. L. J. 525; 7 I C (C) 436 (410); *Sultan Begam v. Debi Prasad*, 80 A. 924 F. B. overruling *Hasmat v. Mhd. Umar*, 29 A 308; *Kalka Prasad v. Banki Lal*, 9 O.C. 166; *Kundan Das v. Dammal*, 9 S.L.R. 84, 30 I.C. 936.

(3) *Satyha Kumar v. Satya Kirpal*, 10 C.L J. 508; 8 I. C. 247.

(4) *Hira Moni v. Radha Churn*, 5 C.W.N. 128; *Khirode v. Saroda Prasad*, 7 I C. (C) 436;

Hira Kore v. Prihandas, 32 B 108; *Kadir v. Abdul Rahman*, 24 M 639. *Abdus Samad v. Abdur Razzaq*, 21 A. 409.

(5) *Khirode chandra v. Saroda Prasad*, 7 I C. (C) 436 (439)

(6) *Vaman v. Vasudev*, 23 B 73.

(7) *Debendra v. Haridas*, 7 I C. (C) 844.

(8) *Muhammad v. Kallu*, 7 A. L. J. 474

(9) *Debendra v. Hari Das*, 15 C. W. N. 352; 7 I C. 844

(3) If two or more persons of whom one is a share-holder in the property, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the share-holder.

Procedure to be followed in case of sales. 7. Save as herein before provided, when any property is directed to be sold under this Act, the following procedure shall as far as practicable be adopted namely:

(a) If the property be sold under a decree or order of the High Court of Calcutta, Madras or Bombay in the exercise of its original jurisdiction or of the Court of the Recorder of Rangoon, the procedure of such court in its original Civil jurisdiction for the sale of property by the Registrar.

(b) If the property be sold under a decree or order of any other court, such procedure as the High Court may from time to time by rules prescribe in this behalf, and until such rules are made, the procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees.

8. Any order for sale made by the court under Ss. 2, 3 or 4 shall be deemed to be a decree within the meaning of S. 2 of the Code of Civil Procedure.

9. In any suit for partition the court may, if it shall think fit, make a decree for a partition of part of the property to which the suit relates and a sale of the remainder under this Act.

10. This Act shall apply to suits instituted before the commencement thereof, in which no scheme for the partition of the property has been finally approved by the court.

Mutual non-liability to account.

143. (1) Partition must be made only of such property as is available at the date of demand.

(2) In the absence of fraud or misappropriation the manager is not liable to account to the co-parceners for past transactions or to pay them mesne profits in respect of property in his possession.

(3) Provided that if partition is demanded and refused or a co-parcener is excluded from joint or separate possession to which he was entitled under an arrangement, he may be allowed mesne profits from the date of such refusal or exclusion.

(4) Nor are the other members entitled to the cost of improvement or are accountable for the profits made from property in their separate possession.

Synopsis.

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| (1) <i>Partition decreed with reference to existing assets</i> (1547). | <i>arises</i> (1548). |
| (2) <i>Right to mesne profits when</i> | (3) <i>Accounts of private dealings</i> (1549). |

1547. Analogous Law.—It is a general rule that a partition must be made *rebus sic stantibus* as on the date of demand or suit for partition, and that no claimant can demand an account of back profits of the properties purchased and sold by the manager prior to the date of claim ⁽¹⁾ it being assumed that all past transactions were consented to or acquiesced in by the other co-parceners. As observed in a case.—“The broad and general rule is that while there is a manager of a Hindu family, he and he alone is responsible, and that those who seek partition must take the estate as they find it when partition is asked for. That general rule has its exceptions engrafted upon it in favour of the minor, for it is said that the rule rests upon the acquiescence or presumed acquiescence of all adult members of the family in the management, and no such acquiescence can be presumed in the case of minors.” ⁽²⁾ But this does not imply that a minor is entitled to call for account. The only occasion for accounts arises when the manager is shewn to have been guilty of fraud or misappropriation. Otherwise there is no liability to account for past transactions; though the court is justified in decreeing mesne profits as from the date of the suit too. ⁽³⁾ But this does not mean that there should be no accounts at all; or that the co-parceners are bound to accept the *ipse dixit* of the manager. The co-parceners are entitled to challenge the manager's statement as to the existence of assets, but the inquiry must be confined to the existing assets ⁽⁴⁾ in the hands of the manager and of the other members. The parties have no right to look back and claim relief against past inequality and enjoyment of the members or other matters.

1548. Mesne profits.—Since the possession of one is the possession of all, no co-parcener can claim mesne profits from the manager for a period preceding the date of partition. The only exceptions allowed are when a co-parcener was disturbed in his possession of any specific share or property to which he was entitled under a family arrangement when he becomes entitled both to profits and partition. ⁽⁵⁾ Mesne profits would be allowed as a matter of course where the members hold their property in *quasi*-severalty. Such are co-parceners in Bengal ⁽⁶⁾ but even under the Mitakshara the position of the manager might be reduced to that of an agent in which case he would clearly be accountable to the other members. But such a case is only conceivable in a quasi-co-parcenary which is a creature of contract and not one of law. ⁽⁷⁾ Even in a normal family accounts might be ordered where one member of the family has been

(1) *Davilaram v. Narayanarav*, (1877) B P J. 175; *Narayan v. Nathojji*, 28 B. 201; *Pranjiwan Das v. Ichharani*, 39 B. 734; *Bal Krishna v. Muthusami*, 32 M. 271; *Chuckun v. Poram Chunder*, 9 W. R. 483; *Obhoy Chunder v. Paroo Mohun*, 18 W. R. 75 F B; *Bhowani Prasad v. Juggernath*, 13 C. W. N. 309; 8 I. C. 241; *Parmeshwar v. Gobind*, 43 C. 459 (464, 465).

(2) *Haridas v. Narotam*, 14 Bom. L. R. 287 (247).

(3) *Shankar Baksh v. Hardeo*, 16 C. 397 P. C.; *Konekrav v. Gurrav* 5 B. 589 (595); *Ranganmani v. Kashi Nath*, 8 B. L. R. (O. C.); *Lakshman v. Ramchandra*, 1 B. 561 (569) affirmed O. A. 5 B. 48 F. C.

(4) *Bhowani Prasad v. Juggernath*, 13 C. W. N. 309; 8 I. C. 241; *Parmeshwar v. Gobind* 43 C. 459; *Balakrishna v. Muthusami*, 32 M. 271; *Lakshman v. Ramchandra*, 1 B. 561 P. C.; *Konekrav v. Gurrav*, 5 B. 589; *Nanabhai v. Nathubhai*, (1880) B P J. 154; *Vithoba v. Govind*, (1890) B P J. 322; *Narayan v. Nabai*, 28 B. 201.

(5) *Shankar Baksh v. Hardeo*, 16 C. 397 P. C.

(6) *Abhaychandra v. Pyari Mohan*, 5 B.L.R. 347; explained in *Balakrishna v. Muthusami*, 32 M. 271 (274).

(7) *Setrucherla v. Setrucherla*, 22 M. 470 (475) P. C.

entirely excluded from the enjoyment of the property. (1) So again it is a case for account where a member has demanded his share and it has been improperly refused, since such demand is sufficient to constitute partition, the members refusing, being taken to hold adversely to the claimant from the date of refusal. Since the institution of a suit for partition is such a demand, the plaintiff would be entitled to an account of mesne profits from that date (2) or from the date of refusal or exclusion, if not earlier. (3)

1549. Accounts of private dealings.—Where one co-parcener had agreed to pay his debt due to another co-parcener by setting it off against his share it is a claim which may be adjusted in a suit for partition. (4)

**Provision for debts,
maintenance and
ceremonies**

144. In every partition provision should first be made for the payments of—

(a) All family debts.

(b) Maintenance of members entitled to it.

(c) Upnayan and the marriage expenses of members payable by the joint family.

(d) Such religious and other ceremonies for which the joint property is liable.

Synopsis.

- (1) *Provision for family charges on a partition* (1550). (3) *Upnayan and marriage of co-parceners, etc.* (1552-1553).
(2) *Family debts* (1551). (4) *Ceremonial expenses* (1554).

1550. Analogous Law.—At the threshold of partition stand certain family charges which must be first met before the co-parcenership is broken up by partition. Of these the family debts, that is to say such debts as are legally and properly payable out of the joint funds must be first met. (6)

1551. Shortly stated these are debts incurred by the manager for family necessity or benefit, and those incurred by the father and such as are not illegal or immoral. In a composite family consisting of sons and collaterals, it is manifest that while some debts might be binding on the joint family as a whole, there might be others which would be only on the sons. These would have to be apportioned in accordance with the liability of members

An account will also have to be taken of debts due to the family which will have to be partitioned as actionable claims. (6)

1552. Provision for Upnayan and Marriage.—

Cl. (c). The rule stated in this clause is in accordance with the following texts :—

- (1) *Kimkrav v. Gurrav*, 5 B. 589 (595).
(2) *Krishna v. Subbanna*, 7 M. 564; *Bala-krishna v. Mulhusani*, 32 M. 271 (274).
(3) *Gangaram v. Sikaram*, 6 C. W. N. 698 P. C.; *Krishna v. Subbanna* 7 M. 561; *Bala-krishna v. Mulhusani*, 32 M. 271 (274).

- (4) *Khandubhai v. Balwant Rao*, (1898) B.P.J. 367.
(5) *Dwarka Nath v. Bujyeshi*, 9 C. W. N. 879; *Tarachand v. Reeb Ram*, 3 M. H. C. R. 177 (181).
(6) *Lakshman v. Ramchandra*, 1 B. 561.

Narad :—40. For those whose initiatory ceremonies have not been regularly performed by the father, those ceremonies must be completed by the brethren out of the patrimony. (1)

41. If no wealth of the father exists the ceremonies of brethren must, without fail, be defrayed by the brethren already initiated contributing funds out of their own portion. (2)

To the same effect are the placita in *Yajnavalkya*, (3) the *Mitakshara* (4) and the *Dayabhag*. (5)

The text bearing on the subject of the sister's marriage expenses runs as follows:—

Mitakshara :—5. In regard to unmarried sisters, the author states a different rule. "But sisters should be disposed of in marriage giving them as an allotment, the fourth part of a brother's own share". (6)

6. The purport of the passage is this: Sisters also, who are not already married, must be disposed of in marriage, by the brethren contributing a fourth part out of their own allotments. (7)

1553. In a partition provision must be made for the expenses of the Upnayan and marriage of male co-parceners as well as for the expenses of the marriage of the unmarried sisters out of the family property whether it is ancestral or separate, or self-acquired property of the father of the parties. A brother who has had his own marriage performed at the family expense is not entitled to object to a similar provision being made for the other brothers. (8)

The *quantum* of cost must depend upon the wealth and social position of the family. While the Upnayan and marriage of every co-parcener is a necessary religious rite and as such a charge on the family estate, the same cannot be predicated of every female member of the family. For instance while in a family comprising collaterals the marriage of sisters is a necessary charge on the joint estate, that of the co-parcener's daughter is a charge upon his own individual share and can be deducted out of the joint fund. (9)

1554. Ceremonial expenses.—The religious or other ceremonial expenses chargeable to the joint property must be arranged for before partition of the corpus. Such are the expenses for the performance of the funeral and obsequial rites of the father (10) and the mother (11), the initiation ceremony of the brothers (12) though not of their sons (13) and indeed any charities in accordance with the practice of the family. Where the father makes a partition among his sons he possesses the right to make such provision for charities as he may in his discretion consider necessary to a reasonable extent. (14)

(1) *Narad* IV 40 cited per *ouriam* in *Srinivasa v. Thiruvengadathayangar*, 38 M 556 (578) dissenting from *contra* in *Smriti Chandrika* *ib.* p. 579; and *Govindarazulu v. Devira* 27 M. 206 following *Kameswara v. Veerachariu*, 34 M 422 F B.; *Gopala Krishnanaraju v. Venkatanarasuraju* (1912) M. W. N. 908.

(2) *Narad* IV—41

(3) *Yaj.* ii.—125 cited in *Mit* 1 7-3

(4) *Mit.* 1 7-3, 4

(5) *Dayabhag* III—II—41; 3 Dig 96, 97.

(6) *Yaj.* ii 125.

(7) *Mit* 1 VII 6.

(8) *Srinivasa v. Thiruvengadathayangar*, 38 M. 556 (576)

(9) *Jairam v. Nathu*, 31 B 54

(10) *Vappuluri v. Gornallu*, 34 M 288.

(11) *Vaidyanatha v. Ayyasamy*, 32 M 191 (200).

(12) *Mit.* 1 7-3, 4; *Dayabhag* III—II—41; 3 Dig 96, 97.

(13) *Jairam v. Nathu*, 31 B. 54

(14) *Murugaya v. Palaniyandi*, 31 M. L. J 147, 36 I. C. 507

145. In a partition by metes and bounds the allotment of shares should be made as far as possible in conformity with the following rules :—

**Equities on distri-
bution of shares.** (1) The separate possession of co-parceners of any property or which they have improved at their own expense should not be disturbed.

(2) The predilection of co-parceners to any property should be respected.

(3) Shares should be made as compact and convenient as the nature of the property would allow.

(4) The *bona fide* transferee of a defined portion of co-parcenary property should be protected in his right as far as possible.

(5) Inequalities of shares may be removed by payment of owelty.

Synopsis.

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| (1) <i>Equities on distribution of shares</i> (1555). | (5) <i>Meaning of improvements</i> (1559). |
| (2) <i>Maintenance of the status quo</i> (1556). | (6) <i>Division into compact and convenient shares</i> (1560). |
| (3) <i>Compensation for improvements</i> (1557). | (7) <i>Good faith</i> (1561). |
| (4) <i>Choice of property</i> (1558). | (8) <i>Transferee protected</i> (1562). |
| | (9) <i>Owelty</i> (1563). |

1555. Analogous Law.—The rules here set out are condensed from the several Partition Acts relating to revenue paying estates and the cases in which they have been recognized. They are all rules conformable to natural equity which supplements all law, sacred and secular.

1556. Maintenance of the status quo.—It is a cardinal rule of all partitions that it should follow the line of least resistance, maintaining the *status quo ante* as far as possible and only deviating therefrom wherever it is necessary to equalize the shares. Where, therefore, a co-parcener has been in separate possession of any portion of the joint property and has improved it at his own cost it is both just and natural that he should claim to retain the status quo so far as the property in his possession is concerned. (1) This is in accordance with Hindu law under which if one build a house on ancestral land with separate funds of his own, the other members of the family have only a claim on him for other similar land equal to their respective shares. (2) Where a co-parcener had been in previous possession of a certain piece of land it should be allotted to him as a whole if possible. But it should not be sub-divided. (3) It is a well known

(1) *Ram Jowappa v. Anril Ram*, (1885) P. v. *Hagriba*, 6 B. H. C. R. (A. C.) 54.

Re. 9 Rev. (3) *Pudo Monee v. Dwarka Nath*, 25

(2) 2 Mac H. L. 152 followed in *Vithoba* W. R. 335 (342).

principle of equity which must be adopted in all partition cases, that, when it is inconvenient to divide a property it must be left in the possession of the person in occupation, and the other persons who cannot conveniently get actual possession compensated. (1)

1557. Compensation for improvements—Where for any cause a co-parcener is not able to secure possession of the property which he had improved at his own cost, he would be allowed compensation for improvements, according to the general principle thus enunciated: "Where one tenant in common lays out money in improvements on the estate, although the money so paid does not in strictness, constitute a lien on the estate, yet a court of equity will not grant a partition without first directing an account and a suitable compensation. To entitle the tenant in common to an allowance on a partition, in equity, for the improvements made on the premises, it does not appear to be necessary for him to show the assent of his co-tenants to such improvements, or a promise on their part; nor is it necessary for him to show a previous request to join in the improvements and their refusal."

1558. Choice of property.—It is equally just that each co-parcener should be given the choice to choose his own share. But this again is an equity and not his right. (3) Consequently, where parties cannot agree amongst themselves as to any item of property, the court may order the sale instead of division of the property in accordance with the provisions of the Partition Act. (4)

1559. "A tenant-in-common in possession will be allowed for substantial and useful improvements but not for such improvements as are merely ornamental. The reason why a tenant in common will be allowed for improvements that are necessary and substantial improvements is because the possession of one tenant-in-common is the possession of that of his co-tenants. The court can properly render a judgment declaring that partition should be made; and also providing for an account between the parties in respect to the matters pertaining to the estate and in respect to the rents and profits already received. If there is inequality of value between one portion that cannot be divided, and another portion that can be, the commissioner may make such allotment of parcels as will produce equality by awarding proper compensation in money." (5) It has been held in the Punjab that a sharer cannot be allotted a greater share on account of his improvements. (6) But if he is entitled to compensation, a larger share may be only a measure of it.

1560. Compact and convenient shares.—It goes without saying that the very object of partition is to ensure the better enjoyment of the property which requires that the property should be divided into compact and convenient shares. As Story says: "A court of equity will assign to the parties respectively such parts of the estate as would best accommodate them, and be of most value to them with reference to their respective situations, in relation to the property before the

(1) *Basunia v. Moti Lal*, 15 C. W. N. 555 N; 11 I. C. 370.

(2) *Freeman's Partition*, § 510.

(3) *Narayan v. Chellan*, 15 C. L. J. 376 following *Durjendra v. Purnenda*, 11 C. L. J. 189 (196); *Leigh v. Dickson*, 15 Q. B. D. 60;

Bruckwood v. Young, 2 Com. L. R. 387.

(4) S. 2, Act IV of 1893.

(5) *Knapp on Partition*, p. 375.

(6) *Ameerchand v. Majasing*, (1866) P. R. 16.

partition. For, in all cases of partition, a court of equity does not act merely in a ministerial character and in obedience to the call of parties, who have a right to the partition; but it founds itself upon its general jurisdiction as a court of equity, and administers its relief *ex equo et bono* according to its own notions of general justice and equity between the parties. It will therefore, by its decree adjust all the equitable rights of the parties interested in the estate; and will if necessary for the purpose, give special instructions to the commissioners, and nominate the commissioners instead of allowing them to be nominated by the parties." (1) Partition must study the general convenience of all co-sharers and the special convenience of the sharer who has a special equity to any property. Where therefore, on half the land the defendant had constructed a costly building from the joint funds of the family, the court directed that the land be treated as joint family land, but that the price of one-third of half the land was made payable to the other co-sharers. (2) Here there was some equity apart from individual convenience which is no sufficient answer to a claim for partition of land by metes and bounds. (3) Where at the time of the partition of a dwelling house the brothers were found to have entered into an arrangement under which each was allowed an equal use of a single latrine in the house, the arrangement was held to amount to a partition which could not be interfered with except by re-opening the entire partition. It was further held that the Partition Act did not apply to such a case. (4)

1561. But of course such improvements should have been made in good faith. But "the only good faith required in such improvement is that they should be made honestly for the purpose of improving the property and not for embarrassing his co-tenants or encumbering their estate, or hindering partition."

But "if one joint tenant, or tenant-in-common, covers the whole of the estate with valuable improvements, so that it is impossible for his co-tenant to obtain his share of the estate without including a part of the improvement so made, the tenant making the improvements would not be entitled to compensation therefor, notwithstanding they may have added greatly to the value of the land; because it would be the improver's own folly to extend his own improvements over the whole estate, and because it would be unjust to permit a co-tenant at his pleasure to charge another co-tenant with improvements he may not have desired. In such a case, the improver stands as a mere volunteer and cannot without the consent of his co-tenant, lay the foundation for charging him with improvements."

1562. Transferee protected.—When a co-parcener has affected to transfer any specific item of co-parcenary property it is but equitable to the *bona fide* transferee that he should not suffer by any distribution of shares. Consequently it has been held that where a stranger has acquired any interest in co-parcenary property it is but equitable that in the distribution of shares such property should as far as possible be

(1) *Eq Juris* (2nd Eng Ed) p. 634.

(2) *Narayan v. Chuchan*, 15 C. L. J. 376 (879).

(3) *Ram Pershad v. Court of Wards*, 21 W. R. 152 (partition of a compound); *Huri-*

dhor v. Ramnath, 1 Hay 71; *Thuboo v. Khooob Lall*, 22 W. R. 294 (of a dwelling house).

(4) *Jadia v. Baldeo*, 17 C. P. L. R. 46.

the pendency of the appeal, the court will have to alter the shares and allotments. ⁽¹⁾

Re union.

151. (1) A person may re-unite after partition with his father, brother or uncle :

(2) Provided that under the Mithila school any late co-parceners may re-unite.

Synopsis.

(1) *Texts on re-union* (1584).

(4) *Minor incompetent to re-unite*

(2) *Who may re-unite* (1586-1587).

(1589).

(3) *Proof of re-union* (1588).

1584. Analogous Law.—The law of re-union is

Texts.

founded on the text of Brihaspati ⁽²⁾ explained in the following texts :—

Manu :—210. If brothers once divided and living again together as parceners, make a second partition, the shares must in that case be equal : and the first born shall have no right of deduction.

211. Should the eldest or youngest of several brothers be deprived of his share by a civil death on his entrance into the fourth order, or should any one of them die, his vested interest in a share shall not wholly be lost

212 But, if he have neither son, nor wife, nor daughter, nor father, nor mother, his uterine brothers and sisters, and such brothers as were re-united after a separation, shall assemble and divide his share equally ⁽³⁾

Yajnavalkya :—Effects which had been divided and which are again mixed together are termed re-united, and he to whom such appertain is a re-united parcener ⁽⁴⁾

Mitakshara :—2. Effects which had been divided and which are again mixed together are termed re-united. He to whom such appertain is a re-united parcener.

3. That cannot take place with any person indifferently but with a father, a brother or a paternal uncle, as Brihaspati declares :—

“He who being once separated dwells again through affection with his father, brother or paternal uncle is termed re-united.” ⁽⁵⁾

Yivad Chintamani :—The first principle of re union is common consent of both the parties, and it may be either with the co heirs or with a stranger after the partition of wealth ⁽⁶⁾

Mayukh :—(After citing the *Mitakshara* and *Brihaspati*.) Union may take place even with a wife, a paternal grandfather, a brother's grandson, and the rest, according to the rule that the subject and the predicate should inhere in the same object observable in the text : “He who having been separated again dwells together is re-united” ⁽⁷⁾ ⁽⁸⁾

Dayabhag :—(After quoting *Brihaspati*.) A special association among persons other than the relations here enumerated, is not to be acknowledged as a re union of parceners. for the enumeration would be unmeaning. ⁽⁹⁾

Dayakram Sangrah :—3. Therefore, where a person has once become disunited from his father and the rest, afterwards, the former partition is annulled by mutual consent of the separated parties, and in consequence of an agreement being concluded to the following

(1) *Sanguli v. Moohan*, 16 M. 350 (353) followed in *Ramanadan v. Pulikutti*, 21 M. 288 (290) ; *Ram Ratan v. Sahu*, 6 C. L. J. 74 (79).

(2) *Vishvanath v. Krishna*, 3 B. H. C. R. (A. C.) 69 (74).

(3) *Manu* IX—210—212.

(4) *Yaj.* II-9.

(5) *Mit.* I-IX-2, 8 cited and followed in

Balabux v. Bihlmubai, 30 C. 725 (734) P.C.

(6) *Vachaspati Misra's Vivad Chintamani* (Tagore's Tr.) 80

(7) संस्कृत *Sanskrit*-put together, re-united (hence the term *Sanskrit*-put together)

(8) *Mayukh* IV-9 1.

(9) *Dayabhag* XII-4

effect, 'the wealth which is thine is mine—that which is mine is thine', they resolve on dwelling in the same abode. This is considered re-union.

4. Here since the father and the others are particularly specified re-union takes place with those who are alone described, and not with nephews and the rest, who are not named. Otherwise the specific mention of father and the others would be unmeaning. Such is the opinion according to the Dayabhag.

5. The followers of the Mithila school are of opinion that the use of the term father and the rest is illustrative and that re-union takes place when those whose right to a share of the common property is established by their birth re-associate after having once separated. Consequently that re-union can occur with nephews and the rest. (1)

1585. It will be thus seen that both under the Mitakshara and the Dayabhag or the Bengal school of law, re-union is only possible with the father, brother or uncle. (2) It is not possible even between first cousins. (3) But there may be re-union between brothers whether of the whole blood or of the half blood. The only exception is the Mithila school which allows re-union between any co-parceners.

1586. Who may re-unite.—As regards the Mayukh, since it yields to the Mitakshara it cannot sanction a departure at variance with the latter. The texts before cited contemplate a limited and an unlimited re-union. In the first case re-union is only possible with the father, brother or paternal uncle, in the latter case all co-parceners who divided could re-unite. The latter view has been abandoned everywhere outside the Mithila country where such unlimited re-union is still conceivable.

1587. Even as regards the former there can be no re-union, unless there had been a previous union and separation. (4) If therefore the father and son were separate from the rest of the family re-union is possible with them and the family. (5) It is not necessary that the separation should be by a formal partition nor need the re-union be in a formal manner. What is however necessary is, that there must be an intention to re-unite. (6) Re-union cannot be presumed from the fact that the relations had postponed an apportionment of lands in severalty from motives of convenience. In order to constitute re-union four things are essential: (1)—a previous state of union; (2)—re-union, by those who have made a partition; (3)—an intention to re-unite; and (4)—the requisite relationship. Where, therefore, the sons take under their father's bequest, the sons cannot re-unite because the first two conditions in their case are wanting. (7) Again, since re-union must be made, by the very persons who made the partition, it follows that their descendants cannot re-unite. (8) They may of course re-unite in fact, but their re-union will not be a re-union in law reconstituting a co-parcenary with a right of survivorship.

1588. The question whether there has been a re-union is thus a question of fact, (9) but a fact which depends upon the proof of the intention to constitute re-union. The mere fact that two relations continue to live jointly after a partition is merely evidence which may establish re-union, but it has not necessarily that result. (10) For instance, where after partition in distinct shares

(1) Ch. V-8-5.

(2) *Basanta v. Jogendra*, 33 C. 371.

(3) *Basanta v. Jogendra*, 33 C. 371.

(4) *Balabux v. Rukhmabai*, 80 C. 725 P. C. explained in *Akshay v. Hari Das*, 35 C. 721 (723).

(5) *Akshay v. Hari Das*, 35 C. 721 (723).

(6) *Prankishen v. Mothooramohun*, 11 M. I. A. 403 (406); *Lakshmi Bai v. Ganpat*, 4 B. H. C. R. 150 (156) O. A. 5 B. H. C. R. (O. C.)

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(7) *Lakshmbai v. Ganpat*, 4 B. H. C. R. 150 (156).

(8) *Vishvanath v. Krishnaji*, 8 B. H. C. R. 69.

(9) *Raghbir Singh v. Moti Kumwar*, 85 A. 41 (47) P. C.; *Balabux v. Rukhmabai*, 80 C. 725 (738) P. C.

(10) *Kula v. Kula*, 2 M. H. C. R. 235 (237); *Ram Huree v. Trihee Ram*, 15 W. R. 442

amongst brothers, some of whom were minors, the minor brothers continued to live jointly with one of the adult brothers, that fact would not constitute a re-union since the minors were incapable of exercising any volition in favour of a re-union. (1) Even if the minors had been adults the mere fact of commensality would not prove re-union. For instance, where after a partition three brothers agreed that their separate shares should be kept joint and that the eldest should manage the same, the true effect of the agreement was held not to leave the family as a joint family but to render the eldest brother accountable for receipts and expenditure on the footing of ordinary agency and not of joint family management. (2) What was wanting in this case, it may be asked, to constitute a re-union? Only this, that the brothers did not amalgamate their shares, but merely kept them joint. In other words they agreed to be partners but not co-parceners. In order to constitute a re-union after partition, there should be a junction of estate and a re-union of property. "The property which is mine is thine, and that which is thine is mine." 3)

1589. While the minority of a co-parcener is no obstacle to a valid partition, it is an obstacle to a subsequent re-union, since in order to constitute a re-union there must be an agreement which the minor cannot enter into nor can any one on his behalf. As the Privy Council remarked of a re-union pleaded with a minor—"It is difficult also to see how an agreement for that purpose could have been made by or on behalf of the appellant during his minority." (4) Re-union is brought about through "affection" and it is not to the minor's benefit that his share should be placed in jeopardy in an affectionate compact.

152. (1) Subject to the following modifications, a re-unioned family is, for the purpose of succession, treated as a joint family.

Succession amongst re-unioned relations.

(2) In a re-union between brothers of the whole blood and those of half-blood the former succeed to each other in preference to the latter.

(3) Where brothers of the whole blood remain separate and only those of the half-blood re-unite, brothers of the whole blood and those of the half-blood and their descendants inherit together.

(4) Where only some brothers of the half-blood re-unite, those not re-united do not inherit.

Synopsis.

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|--|---|
| (1) <i>Texts on succession among re-unioned co-parceners</i> (1590). | (1591). |
| (2) <i>Effect of re-union</i> (1591). | (4) <i>Competition between divided full brother and re-unioned half-brother</i> (1592). |
| (3) <i>Re-union, a ground of preference</i> | |

(1) *Kuta v. Kuta*, 2 M. H. C. R. 295; *Gopal v. Kenaram*, 7 W. R. 85; *Rusi Mendli v. Sundar*, 37 C. 708 (707).

(2) *Satrucherla v. Satrucherla*, 22 M. 470 P. C.

(3) *Dayabhag* XI-1.80 cited in *Gopal v.*

Kenaram, 7 W. R. 95; *Prankishen v. Mothooramohun*, 10 M.I.A. 403 (406); *Ram Hurse v. Trihee Ram*, 15 W. R. 442.

(4) *Balabaz v. Rukhmabai*, 30 C. 725 (734, 735) P. C.; *Rusi Mendli v. Sundar Mendli*, 6 I. C. 441.

1590. Analogous Law.—In strict logic a re-united family should be on the same footing as one which never separated. But that it is not so, is proved by the following texts :—

Manu :—If re-united co-parceners make a fresh partition, the shares must be equal. The right of the law of primogeniture does not then apply. ⁽¹⁾

Yajñavalkya :—188. A re-united brother shall keep the share of his re-united co-heir who is deceased, or shall deliver it to a son subsequently born. But an uterine or whole brother shall thus retain or deliver the allotment of his uterine relation

139. A half brother being again associated may take the succession, not a half-brother though not re-united; but one united by blood though not by co-parcenary may obtain the property and not exclusively to the son of a different mother. ⁽²⁾

Mitākshara :—6 The allotment of a re-united brother of the whole blood, who is deceased, shall be delivered by the surviving re-united brothers of the whole blood to a son born subsequently. But on the failure of such issue he shall retain it. Thus if there be brothers of the whole blood, an uterine or whole brother being a re-united parcener, not a half-brother who is so, takes the estate of the re-united uterine brother. This is an exception to what has been said before ⁽³⁾

Dayabhag :—39. If there be competition between claimants of equal degree whether brothers of the whole blood or brothers of the half-blood, or sons of such brothers, or uncles, or the like, the re-united parcener shall take the heritage, for the text does not specify the particular relation and all these relations were premised in the preceding text and a question arises regarding all of them : therefore the text must be considered as not relating expressly to brothers. ⁽⁴⁾

1591. Succession in re-united families.—Re-united members and their issue are co-parceners in a re-united family, ⁽⁵⁾ and however remote, succeed to the property of one another by survivorship. ⁽⁶⁾ This mode of succession is not confined to the members who actually re-united, since the son of a re-united member born after the re-union becomes re-united and takes by survivorship. ⁽⁷⁾

In other words, on a re-union taking place, not only the parties re-uniting but their descendants and representatives however remote, will remain joint and succeed to one another on that footing of jointness until a fresh partition takes place, exactly in the same manner as in the ordinary case of a joint family the members remain joint until partition. ⁽⁸⁾ And this would be not without standing that the portions brought in as re-union were unequal. ⁽⁹⁾ And in a competition for the succession to the estate of a deceased relative among those who stand in an equal degree of relationship to him, those descended from a re-united parcener are to be preferred to those who are descended from an unassociated parcener. ⁽¹⁰⁾ In such cases re-union is a ground for preference. ⁽¹¹⁾

1592. But in a competition between uterine and non-uterine brothers another idea influences the decision, namely, the superior efficacy of the funeral obligations offered by the uterine brother. That furnishes a ground of preference in his favour. If the re-united parcener is a brother of the whole blood

(1) Manu IX-210.

(2) Yaj. II-188, 189.

(3) *I.e.*, by Yaj. II-89 See *supra* Mit. II IX-1, 6.

(4) Dayabhag XI-VI-39. There is a long disquisition in Dayabhag on the rights of re-united kinsmen. See XI-Sect. I-1-20-80.

(5) *Krishnaya v. Venkatramayya*, 19 M. L. J. 723.

(6) *Samudrala v. Samudrala*, 88 M. 165 distinguishing *Ramasami v. Venkatasami*, 16 M. 440 following *Prankishen v. Mothooramohun*, 17 C. 33 (85).

(7) *Samudrala v. Samudrala*, 33 M. 165.

(8) Mit II-IX, 2 Mo. H. L. 172, 173; *Mayukh IV-IX*; Dayabhag XI-vi-89; *Dayakramasangrah V-8*; Viv. Ch. p. 304; 2 Dig. 561 562; *Tasachand v. Pudum*, 5 W. R. 249 (250); *Abbaicharan v. Mangal*, 19 C. 684; *Amritav v. Abaji*, (1878) B. P. J. 293.

(9) (1869) Bom. R. A. 96 of 1869 decided in 4th July 1871; *Amrit Rao v. Abaji*, (1878) B. P. J. 293.

(10) *Jadub v. Bendobhary*, 1 Hyde, 214; *Kesahrom v. Nandkishor*, 8 B. L. K. (A. C) 7; *Abbaicharan v. Mongal*, 19 C. 684 (687).

(11) *Ramasami v. Venkatesam*, 16 M. 440.

both cases of succession concur. They conflict where there is a competition between a re-united brother of the half-blood and a separated brother of the whole blood. The rule of equal division is the outcome of the desire to give effect to both principles.

In a case the adopted son of a re-united half-brother was held to succeed equally with two unassociated full brothers. ⁽¹⁾

Burden of proving re-union. **153.** He who relies upon re-union must prove it.

1593. Analogous Law.—It has already been stated that re-unions are nowadays rare, though not obsolete, ⁽²⁾ since the causes which lead to partition are not easy to eliminate nor is the state of independence born of partition easily forsaken. As the crux of partition is the intention so is that of re-union. ⁽³⁾ After a partition once completed the presumption in favour of jointness vanishes. ⁽⁴⁾ Consequently he who relies upon a re-union must prove it like any other fact. ⁽⁵⁾ It is said that after partition there is a presumption against a re-union. ⁽⁶⁾ At any rate, there is no presumption that when some separate the rest remain united and in the absence of a presumption either way, the fact of re-union must be clearly proved. ⁽⁷⁾

(1) *Mayukh IV-IX-18*; *Ramutami v. Venkatesan*, 16 M. 440

(2) Sir F. Mac Considerations on H. L. 107; *Tarachand v. Pudum*, 5 W. R. 249; in *Gopal v. Kenaram*, 7 W. R. 85 re-union was proved.

(3) *Ramhari v. Tribe Ram*, 7 B. L. R. 886; *Rusi Mendli v. Sunder*, 37 C. 703; *Parbhu v. Jwala*, 2 A. L. J. 467.

(4) *Anandibai v. Hari*, 85 B. 293.

(5) *Gopal v. Kenaram*, 7 W. R. 85; *Balabux v. Rukhmabai*, 30 C. 725 (786) P. C.; *Rusi Mendli v. Sunder Mendli*, 6 I. C (C) 441; *Parbati v. Maharaj Singh*, 6 I. C. (A) 795.

(6) *Amam Singai v. Chaitulal*, (1879) C. P. S. C. Pt. VIII-No 12.

(7) *Balakrishnan v. Ramnarain*, 30 C. 788 P. C.; *Balabux v. Rukhmabai*, 30 C. 725 P. C.; *Parbati v. Maharaj Singh*, 6 I. C. (A) 795.

CHAPTER XII.

IMPARTIBLE ESTATES.

1594. Topical Introduction.—The law relating to impartible estates has been casually referred to in the preceeding discussion whenever it became necessary to contrast and compare it with other species of property and rights.

The subject, however, forms an important branch of Hindu Law and merits separate treatment.

Impartible estates may owe their origin to (1) the sovereign grant, (2) law creating them, or (3) custom.

Hindu text books are silent on the subject of impartible estates, though they contain faint traces of that right out of which has been evolved the present law on the subject. Manu alludes to such a right in the following texts:—

Manu :—106 By the eldest, at the moment of his birth, the father, having begotten a son, discharges his debt to his own progenitors : the eldest son, therefore, ought before partition, to manage the whole patrimony.

119. Let them never divide the value of a single goat or sheep, or a single beast with uncloven hoofs ; a single goat or sheep remaining after an equal distribution belongs to the first born

125. As between sons, born of wives equal in their class and without any other distinction, there can be no seniority in right of the mother ; but the seniority ordained by the law, is according to the birth (1).

1595. Quoting the last text the Privy Council said : “ Now when it is said, that the single goat or sheep is to belong to one son, it is apparently for the same reason that a zamindari so descends, *viz.*, that the subject is in its nature impartible, and therefore, the rule that is laid down with reference to one impartible subject, *viz.*, that it belongs to the first-born, appears by reasonable and just implication, to be the rule applicable to all such subjects. And which of several sons is to be deemed to be the first-born is declared by S. 125 above cited. There can be no seniority in right of the mother, but the seniority ordained by law is according to birth.” (2)

1596. Impartible estates in their inception owe their existence to royal grants made for reasons which might have been political, military, religious or personal. Political grants were made from state policy to allies, servants and dependents for support and service. Military grants were made to vassal chiefs on condition of military service. Religious endowments were prompted by piety. They form an important branch of Hindu Law and form the subject of a separate chapter. Personal grants were service grants made to friends, servants and dependants, their duration depending on their nature and terms.

Incidents of impartible estate.

154. An impartible estate is subject to the following incidents:—

(1) The estate is held by one person at a time.

(1) Manu IX-106, 119, 125.

(2) *Ramalakshmi v. Shivanatha*, 14 M.

I. A. 570 (598).

(2) The holder for the time being is the sole owner of the estate which he may relinquish, transfer or devise in favour of any one at his discretion.

(3) Succession to the estate is ordinarily by primogeniture determined by the personal law adapted to the tenure.

(4) The successor takes the estate subject to the burdens created and the debts payable by his predecessor.

(5) The heir—apparent has merely a *spes successionis* which he cannot partition, transfer or devise, nor is it liable to be sold in execution of a decree against him.

(6) The sons and brothers of the holder are entitled to maintenance, the right of other relations to maintenance being determined by custom.

(7) The estate does not lose its incidents of impartibility by the mere discontinuance of service attaching thereto, or by the fact that it is regranted after confiscation.

Illustrations.

(a) *A, B and C are three members of a joint family. An impartible estate is granted to A. It is A's separate property, though he remains joint with B and C as regards the other estate.*

(b) *In the last case A has sons D and E. On A's death his eldest son D will succeed to A's impartible estate and will be a co-parcener with B, C and E in the joint estate.*

(c) *A, B and C are members of a co-parcenary. A is the holder of an impartible estate. On his death the estate will devolve on his widow to the exclusion of B and C.*

(d) *A is the holder of an impartible estate. He becomes a rebel whereupon his estate is confiscated by Government who regrants it to his brother C. It remains an impartible estate in the hands of C.*

(e) *But if in the last case, the regrant is to "C and his heirs" then the estate loses its impartibility, for the "heir" of C cannot come in if the estate remain impartible.*

(f) *A obtains a service grant which is impartible. A discontinues the service. It does not affect the impartibility of his estate.*

Synopsis.

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| (1) <i>Incidents of impartible estate</i> (1597-1598). | (8) <i>Origin of impartible estates</i> (1619-1620). |
| (2) <i>Single holder</i> (1599). | (9) <i>Effect of confiscation and re-grant</i> (1624-1625). |
| (3) <i>Proof of impartibility</i> (1600). | (10) <i>Jagirs</i> (1621-1623). |
| (4) <i>Impartibility by law</i> (1601-1606). | (11) <i>Ghatwals</i> (1626-1628). |
| (5) <i>By grant</i> (1607-1611). | (12) <i>Saranjams</i> (1629). |
| (6) <i>Custom</i> (1612-1618). | (13) <i>Vatans</i> (1630-1631). |
| (7) <i>Evidence of custom of impartibility</i> (1614-1618). | (14) <i>Polham</i> (1632). |

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| (15) <i>Impartible rights</i> (1633). | (20) <i>Case-law on the subject</i> (1640-1641). |
| (16) <i>Personal property of impartible holder</i> (1634). | (21) <i>Successor has only a spes successionis</i> (1644). |
| (17) <i>Holder, the sole owner</i> (1635). | (22) <i>Right of members to maintenance</i> (1645). |
| (18) <i>Succession by primogeniture determined by personal law</i> (1636-1638). | (23) <i>Maintenance Grants</i> (1646-1648). |
| (19) <i>Liability of successor for debts of previous holder</i> (1639-1643). | (24) <i>Their incidents</i> (1647-1648). |
| | (25) <i>Discontinuance of service in service estates</i> (1649). |

1597. Analogous Law.—The several clauses of this section are supported by the undernoted cases. (1)

Some of them are interdependant. As for instance, the first two clauses, though the rule stated in clause (2) was not readily recognized as flowing out of clause (1), it being held that the mere fact that the estate was subject to the law of impartibility did not destroy the co-parcenary rights of other members who, except for that incident, remained co-parceners in the estate and other members of the families were entitled to all other co-parcenary rights. Consequently, it was not open to the holder to alien his estate beyond his own life-time. This view was even taken by the Privy Council in its earlier cases ⁽²⁾ but their Lordships have now definitely affirmed against any right of co-parcenary in an impartible estate. ⁽³⁾ The other members of the family have then no right, not even the right of maintenance unless it is sanctioned by custom.

1598. As the holder is the absolute owner of the estate, it follows that he can alien or demise it at his discretion either to the next heir or to a rank outsider, unless the estate is also inalienable, in which case his power of alienation is subject to the rule already considered.

These and other clauses will now be more minutely examined.

1599. Single holder.—It is of the essence of an impartible estate that it must be held by a single person. Such person may be real or juridical, e.g., a corporation or an idol, but in each case the holder can have no partners or sharers, since partners or sharers possess the right of enforcing partition.

1600. Proof of impartibility.—An estate may become impartible by law, grant, or by its nature or custom.

(1) Cl. (1) *Ramlakshmi v. Sivanatha*, 14 M. I.A. 570; *Yarlagadda v. Yarlagadda*, 24 M. 147 (155) P.C.; *Rama Rao v. Raja of Pittapur*, 41 M. 778 (786) P.C.

Cl. (2) *Sarkaj Kuvuri v. Deoraj*, 10 A. 272, P.C.; *Venkata v. Court of Wards*, 22 M. 383 P.C.; *Rama Rao v. Raja of Pittapur*, 41 M. 778 P.C. approving *Bachoo v. Mankoribai*, 29 B. 51 (58); *Muthuswamy v. Bangarammal*, 9 M.L.T. 159; 8 I. C. 382

Cl. (3) *Tagore v. Tagore*, 9 B.L. R. 377 (393, 394) P.C.

Cl. (4) *Porbati v. Jagdis*, 29 C. 438 P.C.

Cl. (5) *Laliteswar v. Rameswar*, 36 C. 481.

Cl. (6) *Nulmony v. Hingoo*, 5 C. 256 (259) P.C., followed in *Rama Rao v. Raja of Pittapur*, 41 M. 778 (786) P.C.

Cl. (7) *Savitri v. Anand Rao*, 12 B. H. C. R. 224; *Radha Bai v. Anant Rao*, 9 B. 198; *Itam Rao v. Yeshwant Rao*, 10 B. 327.

(2) *Uddor v. Jadubai*, 5 C. 118 P.C.

(3) *Venkata v. Court of Wards*, 22 M. 383 P.C.; *Rama Rao v. Raja of Pittapur*, 41 M. 778 (784) P.C.

1601. Where impartibility is created by law the question is simply reduced to one of construction. The Madras Impartible
(1) **By law.** Estates Act (1) and the Oudh Estates Act (2) are instances of such law declaring the estates therein mentioned as impartible.

1602. Of these, the Madras Act declares certain estates to be impartible, as to which it provides as follows: "The proprietor of an impartible estate shall be incapable of alienating or binding by his debts such estate or any part thereof beyond his own life-time unless the alienation shall be made, or the debt incurred, under circumstances which would entitle the managing member of a joint Hindu family, not being the father or grandfather of the other co-parceners, to make an alienation of the joint property, or incur a debt binding on the shares of the other co-parceners independent of their consent." (3)

1603. It will be noted that this section enacts a view of law which has since been definitely overruled by the Privy Council according to whose view there is no co-parcenary in an impartible estate the holder of which may alienate to any one at his discretion. But this contingency was present in the minds of the legislature who have added the following saving clause, "The Act shall not affect alienations made or debts incurred before the coming into force of this Act and shall cease to apply to estates or parts of estates which may hereafter be lawfully alienated otherwise than by temporary transfer."

1604. The Oudh Estates Act was intended to safeguard the impartibility of the Oudh Taluqdars to whom their previous estates had been regranted after the re-occupation of Oudh by the British Government after the mutiny in 1858. The estates are impartible and only alienable within limits, while succession to them is subject to the rule of primogeniture. (4)

1605. It has been held in Patna that there is a custom which has attained the status of a *lex loci* in Chota Nagpur that grants made by the Maharaja of Chota Nagpur are themselves impartible, and as regards succession, subject to the rule of primogeniture. This is the more so if the grantee is a relation. (5)

1606. Of the same kind though not belonging to the same class is the impartible tenure created by statute. Such is the tenure of a "protected Thekadar" under the Central Provinces Land Revenue Act (6) which constitutes it both impartible and inalienable. These subordinate estates are the creatures of contract, though their indivisibility is a creature of law. And so is their succession. In so far as they are impartible they will possess the same incidents except so far as they are varied by the statute creating them or the custom if any, modifying them.

1607. Again, an estate may be impartible by the terms and nature of the grant. It has already been stated that a person cannot
(2) **By grant.** alter the ordinary incidents of impartibility by transferring it to another on that condition. The subject has no

(1) Mad. Act II of 1904

(2) I of 1869.

(3) S. 7, Mad. Act II of 1904.

(4) S. 22, Act I of 1869.

(5) *Kopilnath v. Government*, 22 W. R. 17.
Gajendranath v. Mathuranath, 20 C.W.N. 876.
1 Pat. L. J. 109; 35 I. C. 388.

(6) S. 68 (4) (a), C. P. Land Rev. Act,

XVIII of 1881) re-enacted as S. 109 C.P. Act II of 1917. The view that coparcenary rights exist in such tenure taken in *Fugwa v. Budhram*, 10 N. L. R. 64 is inconsistent with the view of the Privy Council in *Ramrao v. Raja of Pittapur*, 41 M. 778 P.C. and the provisions of the statute

such right. (1) Where, therefore the estate was partible, the mere fact that the other members of the family treated it as impartible does not convert it into an impartible estate, (2) which is an anomalous estate and must be proved by evidence which is both clear and unambiguous. Where such estate was granted by a sanad the question is reduced to the examination of its terms.

1608. Where, however, the nature of the grant is a matter of inference, the question will often depend upon the nature of the grant and the intention of the grantor must be deduced from the correspondence preceding it and the subsequent conduct of the parties. These principles were put to the test in the case of the Hansapur zamindari, which was confiscated by the East India Company, and afterwards for 20 years the Government realized and appropriated its revenues, after which, as a matter of grace and favour, it was conferred on one Chattardharee Sahee, but upon what terms, it was not stated. As the Privy Council observed: "We have no evidence of the intention of the grantors except that which is to be collected from the proceedings and correspondence already referred to, nor have we any record of the proceedings before the Governor-General, or any means of knowing the precise grounds on which Lord Cornwallis's Government repeated the recommendation of the Board of Revenue and determined to confer the property on Chattardharee Sahee. Again, it cannot be denied that in these proceedings the term 'Raj' is never used, or that in some of them the subject of the grant is spoken of as 'the land in Hansapur which belonged to Raja Fattah Sahee.' On the other hand, there is no expressed intention to alter the nature of the tenure. The estate, whilst it was in the hands of the Company had never been broken up. The policy of the decennial settlement was to form a body of landholders by ascertaining in whom the zamindari interest in the soil actually was, and making with those persons a permanent settlement of the Government Revenue, so as to give them the greatest fixity of tenure. In the absence of all evidence to the contrary, it must be presumed, that the settlement was made precisely as it would have been made had the estate continued in the line of Raja Fattah Sahee, and therefore, that the subject conferred on Chattardharee Sahee was the old zamindari with all its incidents, excepting at most, its descendible quality. It seems to follow that the intention to alter that quality, if it existed, would have been expressed. Again, the selection of a member of the old family next in succession to the excluded line, though it cannot make ancestral that which was self-acquired, is a very strong circumstance in favour of the hypothesis that the intention of the Government was to restore the zamindari as it had existed before the confiscation or attachment, making no further change than was involved in the forfeiture of the rights of Raja Fattah Sahee and his descendants, and in the substitution by an act of power, of the person next in the order of succession, and consequently, that the transaction was not so much the creation of a new tenure, as the change of the tenant by the exercise of a *vis major*." (3)

1609. This case is then an authority for the proposition that the confiscation of an impartible estate by the paramount power and its regrant to a member has not necessarily the effect of destroying its impartibility. It has

(1) S.1 Crown Grants Act (XV of 1895); *Sheo Singh v. Raghubans*, 27 A. 684 (653) P. C. ;
Talore v. Talore, 9 B.L.R. 377 P.C.
 (2) *Rajnalakshmi v. Suryanarayan*, 3 M.

L.J. 100 ; *Shanker v. Hardeo*, 16 C. 397 P. C.
Peroz Shah v. Mamibhai, 36 B. 53 (56).
 (3) *Beer Parlab v. Rajender*, 12 M. I. A. 1 (35, 36).

been so held in several cases.⁽¹⁾ This was emphasised by the same tribunal in a case in which the estate in suit, which was originally impartible, was afterwards formally settled by the Government in 1814 in order that the character and rights of the poligar might be better defined by a *sanad-i-milkat* and in 1867 a sanad in common form was granted to the then poligar conferring on him the rights of a zamindar under Regulation XXV of 1802 in 65 villages named in the sanads which was expressed to be granted in lieu of all former privileges. It contained no clause as to impartibility but merely declared that the grantee continuing to perform the special stipulations, and to perform the duties of allegiance to the British Government, its laws and regulations, was thereby authorised and empowered to hold in perpetuity to his heirs, successors, and assigns at the permanent assessment therein named, the zamindari of Udayarpalayam. It was held that the conferral by the sanad in the common form had not of itself, and apart from other circumstances, the effect of destroying its pristine impartibility.⁽²⁾

If the estate was initially impartible, the mere fact that it was partitioned as an act of the paramount power or of rebellion does not destroy its impartibility.⁽³⁾

1610. Nor does the fact that such an estate is split up and re-granted to two separate relations has that effect. This was settled in the Bettia Raj case which was seized by the East India Company and the holder driven out of the country for acts of rebellion. Subsequently, they effected a division of the Raj estate, reinstating in one portion of it the heir of the former holder, and granting the other portion to members of another branch of the same family. The Privy Council followed the principle enunciated in the Hunsapur case and said: "The Government held itself at liberty to divide the Sirkar into two portions, and to grant one portion away from the heir of the former owner of the estate, and it was equally at liberty to grant the whole away from him, though from reasons of policy, it preferred to extend its favour to him in a certain measure. It cannot be doubted that the grant of the Maitu and Balera to Shrikishan and Alidhut was a direct exercise of sovereign authority and proceeded from grace and favour alone, and if so, it is difficult to avoid the conclusion that the reinstatement of the heir of Raja Jugal Kishore in a portion of his father's former estate also bore that character. Following the judgment of this Board in the Hunsapur case⁽⁴⁾ their Lordships think that the present Bettia Raj must be taken to have been the separate and self-acquired property of Birshona Singh, though with all the incidents of the family tenure of the old estate as an impartible Raj."⁽⁵⁾ In the Tamkoti Raj case the estate was situated in the two districts of Saran and Gorakhpur. After the battle of Buxar in 1764 the property in Saran was confiscated by the British Government but the Gorakhpur property was then in territory belonging to the Nawab Wazir of Oudh which was not ceded to the British Government until 1801. It was held that the confiscation of the Saran property did not affect the Gorakhpur property. It was further held that its impartibility was not affected by the fact that it was held by other relations in lieu of maintenance.⁽⁶⁾

(1) *Katama v. Raja of Siraganga*, 9 M.L.A. 589; *Venkata v. Court of Wards*, 2 M. 128 P.C. The Ramnad case, 24 M. 618 (624); *Dinkara v. Bhaskara*, 11 M.L.J. 29. The Udayarpalayam case 24 M. 552-O. A. 28 M. 508 (515, 516) P. C. *Ramnandan v. Janaki*, 29 O. 828 P.C.; *Sarabjit v. Indrajit*, 27 A. 208.

(2) *Thola v. Thola*, (The Udayarpalayam

case) 24 M. 562 affirmed O. A. 28 M. 508 (515, 516) P.C.

(3) The Ramnad case, 24 M. 618 (634, 685).

(4) *Beer Partab v. Rajewler*, 12 M. I. A. 1.

(5) *Ram Nandan v. Janaki*, 29 C. 828 (851)

P. C.

(6) *Sarabjit v. Indrajit*, 27 A. 208 (241).

1611. This raises the question whether maintenance grants carved out of impartible estates are also impartible. The question is again one of intention. If the subject of the grant was to remain in the grantor, the grantee only getting the benefit of the usufruct for maintenance, it is clear that neither is the incident of the property altered nor are the grantees even entitled to partition *inter se*.⁽¹⁾ But it does not thence follow that the grant is by reason of this fact inalienable⁽²⁾ unless, of course, the grant was limited to the grantee personally. But where the grant is intended to or has the effect of conveying an estate in land, a separate and independent estate comes into existence and as all property is *prima facie* partible, it becomes equally partible since the incident of impartibility which attached to the parent estate does not persist in all derivative estates carved out therefrom.⁽³⁾ But as will be presently seen such estate may also be customarily impartible. Such are the jagirs granted by the Maharaja of Chota Nagpur where such custom has attained the notoriety of a *lex loci*.⁽⁴⁾

1612. An estate may be shown to be impartible by custom in which case the custom alleged must be strictly proved unless it is so notorious as to have passed into a *lex loci* of which the court will take judicial notice. Such a custom was found to exist in Chota Nagpur where all grants made by the Maharaja of Chota Nagpur, whether to relations or to outsiders, are presumably impartible, more especially if they are in favour of a relation, and subject to the rule of descent by primogeniture.⁽⁵⁾ But where custom has to be proved, it must be of course, proved by clear evidence. And except in the case of Rajas of ancient families, the courts are loath to admit a custom in favour of impartibility. As the Privy Council observed: "There is no doubt that the general law with respect to inheritance as well as with respect to other matters, may in the case of great families, where it is shown that the usage has prevailed for a very long series of years, be controlled, unless there be positive law to the contrary."⁽⁶⁾ Referring to this case, the Bombay court observed: "I apprehend that the same law would unhesitatingly be applied to some classes of Thakurs and chiefs in this Presidency, among whom, by settled custom, the principality descends indivisible to the eldest son. But it would be a dangerous doctrine that any petty family—and in the case under consideration a third of the family property is valued for the purpose of the suit at little more than Rs. 500—is at liberty to make a law for itself, and thus to set aside the general law of the country."⁽⁷⁾ To put it differently, the custom of impartibility can only be annexed to estates of the nature of Raj; it cannot be attached to any petty estate.

1613. The custom is the survival of the great sovereignties which existed in this country both under the Hindu and the Mohammadan kings. The evidence is the evidence of *Gaddinashin*⁽⁸⁾ and it must be shown that the

(1) *Rameshwar v. Sibendar*, 32 C. 683 affirm ed O. A. *Durga Dut v. Rameshwar*, 36 C. 943 (952) P. C.

(2) *Udaya v. Jadabial*, 8 C. 199 P.C., *Sartajkuari v. Deoraj*, 10 A. 272 (288; 289) P. C. Venkata v. *Court of Wards*, 22 M. 388 P. C. followed in *Durga Dut v. Rameshwar*, 36 C. 948 (952) P. C.; *Ramchandra v. Mudeshwar*, 38 C. 1158.

(3) *Poteswari v. Rudra Narain*, 1 A.L.J. 548

(4) *Gajendra v. Mathura Nath*, 20 C.W.N.

876; 1 Pat. L. J. 109; 35 I.C. 388.

(5) *Kopinath v. Government*, 22 W. R. 17; *Gajendra v. Mathuranath*, 20 C. W. N. 876; 1 Pat. L. J. 109; 35 I. C. 382; *Ramcharan v. Harihar*, 35 I.C. (Pat.) 892.

(6) *Ganesa Datta v. Mahashwar*, 6 M.I.A. 164 (187) applied in *Basvant Rao v. Mantappa*, 1 B. H. C. R. (App) 42 (47).

(7) *Basvant Rao v. Mantappa*, 1 B.H.C.R. (App.) 42 (47).

(8) "Sitting upon the throne"

estate is of the nature of a Raj in which one person alone is the Gaddinashin. This was pointed out by the Privy Council in two cases in one of which Lord Hobhouse said: "The other remark is a suggestion that there is no necessary connection between Gaddinashini and primogeniture. That may be so; but it is impossible to read the evidence without seeing that witnesses on both sides treat the two as identical or the former as proving the latter. Not a single question is put to any witness who has affirmed or denied Gaddinashini for the purpose of disconnecting it from primogeniture. . . . Their Lordships think that when the witnesses affirm or deny Gaddinashini they mean to affirm or deny primogeniture; and their constant identification of the two things shows how closely they are connected in the minds of the families of that part of the country. The custom of Gaddinashini has clearly an important bearing on that of primogeniture though the connection between them may not be a necessary one." (1) In another case their Lordships quoted this passage and the following from the judgment of the Allahabad High Court over which they were sitting in appeal: "In order to constitute that a valid argument it ought to have been shown not only that Gaddinashini and the presentations of nazars was the ordinary concomitant of the possession of an impartible Raj but also that it was an exclusive attribute of families in whom the custom of primogeniture prevails." (2) The nature of the evidence necessary to establish a custom has already been discussed (S. 9).

1614. It will suffice if some cases are here passed in review to indicate generally the evidence which the court treats as sufficient and that which it rejects as insufficient.

The following case illustrates the difficulty which besets the proof of custom. The plaintiff sued his brother for partition of the family estate. The defendant pleaded a *privilegium* in his family of inheritance by primogeniture. The Subordinate Judge who tried the case found such custom proved. The High Court held it not proved. The evidence adduced to prove it comprised an entry in the *wajibularz*, the early history of the family contained in an official publication and oral evidence of witnesses who gave it as their opinion that the estate was impartible. The High Court dismissed them with the remark that they were either interested or depended upon the *wajibularz*. Accordingly they decreed the claim; but on appeal the Privy Council reversed them holding the custom proved by the following facts:—

(1) That for a period of nearly 80 years from the time of the British occupation, the enjoyment had been consistent with the alleged custom.

(2) That as such, for three generations, there had been successive descents of the estate to an eldest son.

(3) There had been a persistent tradition of impartibility of the estate.

(4) The evidence of 56 witnesses who gave it as their independent opinion based on hearsay but not mere repetition of hearsay. Though the oral evidence without the other facts would not have sufficed to establish custom it corroborated these facts which went far to prove it. In the result they held the custom proved and dismissed the suit with costs. (8) In another case they

(1) *Nitri Pal v. Jai Pal*, 19 A. 1 P. C.

(2) *Garuradhvaj v. Superandhwaj*, 28 A. 87 (50) P. C. reversing O. A. *Superandh-*

waj v. Garuradhvaj, 15 A. 147

(3) *Garuradhvaj v. Superandhwaj*, 28 A. 87 (52) P. C.

upheld a similar custom in favour of lineal primogeniture on the following evidence:—(i) judgments in three cases in which the custom was held proved; (ii) oral evidence on both sides which declared that there was such a tradition in the family; (iii) a procedure conferred or marked by the titles of honour given to the sons of the holder; (iv) opinions of defendant's witnesses who supported his plea of impartibility by an expression of their opinion as to his family and the families belonging to the same group. On the other hand, there was the record of heirs stated in an official document by a late holder on the requisition of the authorities of that time. The High Court upheld the custom and the Privy Council upheld the High Court mainly relying upon the judgments and the special marks of respect shown to the sons of the holder. Referring to the judgments, their Lordships said: "These decrees do not, of course, bind the parties to the present suit, but they go a long way to show the prevalence of the custom among families having a common origin and settled in the same part of the country." (1) The appellant pressed the declaration of heirs made in the official record; but their Lordships admitted its importance but declined to accept it as laying down any positive rule of succession in the family.

1615. The court is justified in inferring custom from a uniform practice lasting for a considerable period. So where it was found that the practice in a *Deshphande vatan* had been for a century and a half without interruption or dispute of any kind whatever, to have the performance of the services of the *vatan* and the bulk of the property in the hands of the elder branch, the younger branches being provided only with maintenance, the court held the practice as more probably due in its origin to a family or local usage, than a mere arrangement determinable at the will of any members of the family. (2)

1616. It is held by the Privy Council (3) and it is enacted in S. 110 of the Evidence Act that where a person is found in possession of land receiving rent and paying revenue, he is presumed to be its owner and as such entitled to exercise all the rights incident to the ownership. As Sir Barnes Peacock said: "In England proof of the possession of land or the receipt of rent from the person in possession is *prima facie* evidence of a seizin in fee. In India the proof of possession or of receipt of rent by a person who pays the land revenue immediately to Government is *prima facie* evidence of an estate of inheritance in the case of an ordinary zamindari. The evidence is still stronger if it be proved that the estate has passed on one or more occasions from ancestor to heir. There is no difference in this respect between a polliam (or a Jagir) and an ordinary zamindari. The only difference between a polliam or zamindari which is permanently settled and one that is not is that, in the former, the Government is precluded for ever from raising the revenue: and in the latter, the Government may or may not have that power." (4)

1617. Where all the lines of evidence, of differing degrees of value, converged towards the same result, *viz.*, the existence of a custom impartibility and of primogeniture, the Privy Council held the custom established, adding "Perhaps no one of them would, if standing alone, be conclusive in favour of the defendant's case; but taken as a whole they are conclusive." (5) This

(1) *Mohesh Chunder v. Satrugshan*, 29 C. 848 (854) P.C.

(2) *Ramarao v. Yeshwantrao*, 10 B. 827.

(3) *Oolagappa v. Arbulnot*, 14 B.L.R. 115

(189) P.C.

(4) *Collector v. Lehmanani*, 14 B.L.R. 115

(139) P.C.

(5) *Nitra Pal v. Jai Pal*, 19 A. 1 (16) P.C.

case is instructive. The plaintiff, a younger son, sued for partition his brother, who claimed to succeed to his father's estate by primogeniture. The parties were Rajputs and the property in suit a village of which the plaintiff claimed a third share valued at Rs. 47,125. The evidence adduced in support of impartibility was as follows:—

(1) Former claim to partition made by a junior member, which was referred to an arbitrator who held the estate impartible, but made a division of the property between the claimants. The High Court found that this award was treated as a dead letter.

(2) The ceremonial of *Gaddinashini*.

(3) Entries in the *wajibularz* to the effect that the head of the family held the office of the lambardar.

(4) The evidence of the genealogist which proved the pedigree.

(5) Oral evidence of relations, with the exception of actual claimants, in favour of the custom.

The Subordinate Judge who tried the case dismissed the suit holding the custom proved. On appeal the High Court held the custom not established, but their decree was in turn reversed by the Privy Council who held the custom made out; and to the several items of evidence animadverted upon by the High Court replied to the following effect: (1) The High Court had held the award inoperative, but their Lordships held that the more material fact was that it held the estate impartible. (2) As to the *Gaddinashini* ceremony, the High Court while admitting its performance on two occasions attenuated its significance by remarking that it was probably invented to lend colour to the custom alleged. The Privy Council held that there was nothing to suggest the faking of this evidence. (3) As regards the *wajibularz* entries the High Court dismissed them with the remark that the choice of lambardar had nothing to do with the succession to the estate. To this their Lordships replied: "A lambardar represents the estate in all transactions with the Government. It is of importance that he should be of capacity for business, and it is usual in a joint family to appoint one of the elder members of the family. When it is found that the office devolves by primogeniture in a family (and there is no suggestion that the *wajibularz* speaks falsely) it seems to their Lordships a material circumstance to aid the conclusion that the estate devolves in the same way in the family." (4) As to the evidence of the genealogist, the High Court held that it proved the pedigree but did not prove the custom. The Privy Council, however, observed that though they hesitated to attach importance to expressions therein, such as "succeeded to the Gaddi" or the title of "Rao" prefixed to the head of each generation, still Bhairon represented with fidelity the traditions and belief in the Umargarh family, and that the family was a noble one of very long standing in the country. As to the oral evidence their Lordships held that it at least proved a persistent tradition and taken all in all, supported the custom. The High Court had referred to the plaintiff's evidence against its existence. But to this their Lordships remarked: "The High Court say that the plaintiff's witnesses must have known of the custom if it had existed, and ought to be believed. But people who knew

nothing of the *gaddi* custom or of actual installations are not likely to have known or cared anything about the custom of inheritance. There need be no imputation of their veracity, for, with the exception of Hari Ram, they only speak to negatives, and are guilty of nothing worse than the common error of assuming the non-existence of that which is not known to them." (1)

1618. It need scarcely be added that where it is sought to prove a custom in one family by proof of custom in another family, the two families must be shown to belong to one group or otherwise connected by relationship or territorial affinity. (2)

1619. Impartible estates owe their origin to the feudal tenures which conquerors in the East and the West created by distributing and settling the conquered lands amongst their allies and dependants either as a reward for past support or on condition of future service. These subordinate chieftainships were in the nature of personal grants held during the pleasure of the sovereign and were naturally impartible. As the grants multiplied and the occasion for service disappeared the grantees became released from the condition of military service, but the chieftains naturally kept up the dignity of their Raj by copying in its Government and devolution the example of their sovereign. When on discontinuance of the native rule the country passed to the East India Company, the latter scrupulously maintained the old tradition and on the Government being directly taken over by the British Crown an inquiry was set on foot and the *status quo ante* maintained and assured by the issue of Patents or Sanads under the hand of the Settlement and other responsible officers.

1620. Now as there is a distinction between the public and the private property of a Hindu sovereign, his Raj and the public property going to the succeeding Rajah, while his personal and private property going to another set of heirs, the same distinction was observed in the case of the smaller chieftainships. (3) Impartible estates are variously called. They are known as Raj in the North and Polliam in the South. But an estate may be impartible though it is neither. (4) Some of these are called Jagirs or Inams, others Taluqs or Tahuts, while in some parts they pass by the title of zamindars.

1621. Of these the Jagirs (5) occupy an important place in the land tenures of India. "The Mogal Empire recognized a definite portion of its own dominions as that which was directly managed by the Emperor's officers, and another area as that available for the assignment of the revenue spoken of. And when certain offices or titles were conferred, a fixed grant went with them as an appanage. Such grants were called *Jagire*. They were at first always for life, and resumable with the office. Nearly all later Governments have adopted the '*Jagir*' but chiefly to support troops, or to reward a service of some kind.

(1) *Ntira Pal v. Jai Pal*, 19 A. 1 (16) P.C.

(2) *Rup Singh v. Rani Baisni*, 7 A 1 (19) P. C.

(3) *Secretary of State v. Kamachee*, 7 M.I.A. 476.

(4) *Chintaman v. Nowlukho*, 1 C. 158 P. C. reversing *O. A. Natukhee v. Chundhry*, 20 W. R. 247.

(5) Contracted from *Jai-land* and *Gir holder*, i.e., landholder.

They are still granted by our own Government, but as a reward for services in the past, and not with the obligation of military service. In time it was thought beneath the dignity of the ruler to resume, and so the grant became permanent and hereditary. Possibly this stage was hastened by the fact that the Government—both Hindu and Mahomedan—had always been accustomed to grant smaller holdings of land, free of revenue, to pious purposes, to support temples, mosques, schools, or bridges and tanks, and these were called 'inam' or "muafi" and were usually hereditary and permanent as long as the object was fulfilled. As the inam was permanent, so the Jagir grew to be so in many cases. Possibly, also, it was the decline of power which caused jagirs to be irregularly granted, and thus to become permanent. When a disorganized Government desires to reward a worthy (or an unworthy) servant, it generally has its treasury empty, and the easiest plan (though true policy would suggest a cash pension for life or lives) would be to give a man a grant by way of assignment, and allow him to collect what revenue he could off the area." (1)

Jagirs were at times also clearance leases with the express object that the grantees should settle the waste.

Where however the Jagirs were granted as a reward for military or other service they were naturally personal and impartible in their character but the fact whether they retained or lost their impartibility, depended upon their subsequent history.

1622. Ordinarily, a Jagir is the grant of the royal share of the revenue and not of the soil, and is presumed to enure only for the life of the grantee. Unless it is a grant to the grantee "and his heirs" there is nothing to control the ordinary meaning of words, in which case he takes an absolute interest. The principle that Jagirs are to be considered life tenures only "unless otherwise expressed in the grant" was expressly laid down in the Bengal Regulations (3) and is the law in other parts of India. (4) So Melvill, J. had held in an earlier case that "the grant in Jagir or Saranjam was very rarely a grant of the soil, and the burden of proving that it was in any particular case a grant of the soil lay very heavily upon the party alleging it." (5)

1623. In this respect a Jagir and a Saranjam differ from an *Inam* which is a grant of the soil and is generally alienable at the pleasure of the holder. (6)

Where the Jagir is merely a life estate it follows that it is not liable in the hands of a successor in title for the mortgage debts of his predecessor (7)

And being a personal tenure, it is not partible.

Where a Jagir is granted in perpetuity and partakes of the nature of a Raj, it retains its incident of impartibility unless there is anything in the grant to make it partible.

(1) Baden Powell's *Land systems of British India*, pp. 189, 190.

(2) *Guru Rao v. Secretary of State*, 41 B. 408.

(3) *Beng. Reg XXXVI of 1798*, S. 15.

(4) *Per Lord Hobhouse in Dosi Bai v. Ishwardas*, 15 B. 222 (227, 228) P.C. affirming O.A. 9 B. 561. To the same effect *Ramchand*

v. Venkatarav, 6 B. 598; *Gulabdas v. Collector*, 3 B. 186 P.C., *Narain Krishna v. Ramnarav*, 4 B.H.C.R. (A.C.) 1 (24).

(5) *Ramchand v. Venkatarav*, 6 B. 598.

(6) *Krishnarav v. Ramnarav*, 4 B.H.C.R. (A.O.) 1; *Suryanarayana v. Patanna*, 41 M. 1012 (1021) P.C.

(7) *Gulab Das v. Collector*, 3 B. 186 P.C.

1624. It has been said that a mere regrant does not make an impartible estate partible unless the intention to make it partible is clearly expressed. Such a case was decided by the Privy Council upon the following facts. In 1783 an impartible zamindari in the Madras Presidency was confiscated by the Government on account of the rebellion of the zamindar. In the following year it was restored to the eldest son of the former zamindar as it existed prior to the confiscation. In 1793 the estate was again resumed by the Government for arrears of revenue and in 1802 two new zamindaris were carved out of it one of which was granted to the second son of the zamindar, who was deprived of possession in 1783 at a fixed revenue. The *sanad* by which it was granted contained *inter alia* the following clause:—"You shall be at liberty to transfer, without the previous consent of Government or any other authority, to whomsoever you may think proper, either by gift, sale, or otherwise your proprietary right in the whole or any part of your zamindari continuing to perform the above stipulations, and to perform the duties of allegiance to Government, you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns, at the permanent assessment herein named." It was held that the words "heirs" used in the *sanad* must mean the heirs of the grantee, according to the ordinary rules of inheritance of the Hindu Law, and that the estate so granted was no longer impartible and subject to primogeniture. "If the Government had intended to make the estate impartible, and to limit the succession to a single heir according to the rule of primogeniture, instead of to the heirs of the grantee, according to the rule of Hindu Law, there is no doubt they would have expressed their intention in unambiguous language." (1)

1625. Their Lordships fortified their conclusion by adverting to the fact that there was no state policy which required that the new estate should be indivisible. "In the former state of things indivisibility and impartibility and descent to a single heir were the ancient nature of the tenure, and with good reason when the estate was subject to military service, and under the Government of a chieftain, and was in the nature of a Raj or principality, but when the ancient zamindari was resumed and two new estates were created out of it, of which the zamindars ceased to be liable to military service or to be independent chiefs, but held merely as ordinary zamindars subject to the payment of a fixed assessment of revenue, there was no reason why the rule of impartibility or descendibility to a single heir, according to the rule of primogeniture should be extended to the newly created estates." (2) Of course if in this case the estate had been restored entire without any qualifying words in the regrant then the estate would have continued to retain its ancient attribute of impartibility though it was no longer supported by any state policy. (3) Even the grant of a *sanad* to "Padmatur . . . to be the present zamindar of Shivgunga; and the said Governor in Council hereby requires and commands all the inhabitants of Shivgunga to respect the rights and authority of the said Padmatur" would not detract from its pristine impartibility. (4)

1626. Ghatwal. (5).—The Ghatwals were originally keepers of the ghats or passes in the hilly tracts of Chota Nagpur, Monghyr, Birbhum and the Santal

(1) *Venkata v. Narayana*, 6 C L. R. 153 (159) C. P.

(2) *Venkata v. Narayana*, 6 C L. R. 115 (158) P. C.

(3) *Mallikarjuna v. Durga*, 13 M. 406

(422) P. C.

(4) *Muttu v. Dora Singha*, 8 M. 290 (806) P. C.

(5) Lit. *Ghat* a mountain pass and wall belonging to-keeper of a pass.

Parganas latterly recognized as chiefs of the areas over which they had become established. For a time they served as a frontier police. Their tenure is in part regulated by the statutory law and varies so much that it is not possible to generalize upon their modern incidents. Ordinarily, however, they are perpetual holdings subject to the condition of service. (1) They are in the nature of jagirs which, though hereditary are not subject to the ordinary rules of inheritance according to Hindu or the Mahomedan law but are subject to the condition of recognition by the Government. As such they are incapable of partition upon the death of the holder and alienation during his life. (2)

1627 Where the Ghatwal is unable to render service, a deputy might be appointed on his behalf. but his incapacity to render service does not render his estate liable to forfeiture. (3) But where he is dismissed for misconduct it has the effect of the forfeiture of his tenure, since the right to possess the land depends upon the tenure of the office. (4) Succession to Ghatwalis is regulated solely by the nature of the Ghatwali tenure which descends undivided to the party who succeeds to and holds the tenure as Ghatwal. A woman is not incapable of holding a Ghatwal tenure. (5) And although in custom it descends from father to son, no succession is legal or valid till confirmed by the zamindar and reported by him to the Government authorities. Where Government has dispensed with the service of the Ghatwals, the zamindar is under no obligation to continue to appoint, and may on a vacancy occurring, settle the tenure as he pleases. (6)

Succession to a Ghatwal is by primogeniture (7)

1628. A Ghatwal tenure is as regards its alienability subject to variable incidents. For instance such a tenure in Kharagpur is not inalienable, and may be transferred by the Ghatwal or sold in execution of a decree against him, if such transfer or sale is assented to by the zamindar. And when once it is established that the ghatwal had the power of alienation, that power forms an integral portion of his right and interest in the Ghatwali, and must not, in the absence of evidence, be limited to an alienation for his own life and no longer. (8)

1629. Saranjams. (9)---Saranjams are jagirs, and as such ordinarily imply the grant of the royal share of the revenue and not of the soil. (10) They were originally grants of jagirs granted for the support of troops. They were confined to the Nasik and Khandesh districts in the Northern and to the south Maratha country. No condition of service being required, they have been commuted to a money payment; and the grant is a personal distinction for life or lives, or in perpetuity as the case may be. (11) A Saranjam given for the support of a distinguished family is generally in its nature impartible and inalienable. (12)

(1) *Leelanund v. Monorunjan* 5 W.R. 101.

(2) *Nilmoni v. Bukronath* 9 C. 187 P.C.

Kali Pershad v. Anand Roy, 15 C. 471 P.C.

(8) *Jogendra v. Kalicharn*, 9 C.W.N. 668.

(4) *Debee v. Sree Kishen*, 1 W. R. 321 ;

Secretary of State v. Puran Singh, 5. C 740.

(5) *Kusloora v. Monohur*, (1864) W.R. 39 ;

Doorga v. Doorga, 20 W. R. 154.

(6) *Mahbub v. Pakshi*, 10 W. R. 179.

(7) *Kali Pershad v. Anand Roy*, 15 C. 471

P.C.

(8) *Kali Pershad v. Anand Roy*, 15 C. 471

P.C.

(9) Persian word, meaning "Supply of provisions" for troops, or the performance of particular duty—*Mukasa* has much the same meaning.

(10) *Gururao v Secretary of State*, 41 B. 408.

(11) 3 Baden Powell's Land Tenures of British India, p. 800.

(12) *Ramchandra v. Saharam*, 2 B. 346; *Gururao v. Secretary of State*, 41 B. 408 P.C.

1630. Vatan.—A vatan was a grant of land made by the sovereign in lieu of service. As such it was a service-grant, and was both impartible and subject to the law of primogeniture. A vatan was a public office. As in the case of the other service tenures, the vatan tenure became hereditary without retaining its initial association with service. So where it was found that in a Deshpande vatan, for over 150 years the performance of the services of the vatan and the bulk of the property was confined to the elder branch, the younger branch being provided only with maintenance, it was held that such practice being more probably due in its origin to a family or local usage, than a mere arrangement determinable at the will of any members of the family, ought to be recognised and acted upon as a legal and valid custom. (1)

1631. The Taluquaders of Oudh like the Subedars of the South were at first officials and afterwards lessees of the tracts or taluqs from which they were authorised to collect land revenue for payment into the royal treasury. (2) They are now subject to statutory control. (3)

1632. Polliam.—An impartible estate is known as a Raj in Northern India, while it is called a *Polliam* in the Southern Peninsula. (4) This term was thus defined by the Privy Council: A *Polliam* is in the nature of a Raj; it may belong to an undivided family; but it is not the subject of partition; it can be held by only one member of the family at a time, who is styled the *Poligar*, the other members of the family being entitled to a maintenance or allowance out of the estate." (5) The polligars were originally petty chieftains occupying hilly or forest tracts and nominally owing allegiance and paying tribute and service to the paramount power, but really free of outside control. On the transfer of the government of the country to the British, the Polliams were settled but though naturally impartible, their other incidents do not appear to have been clearly defined. So quoting the High Court, the Privy Council said "The existence of a proprietary estate in polliams or other lands not permanently assessed, and the tenure by which it has been held, are in our opinion matters judicially determinable on legal evidence, just as the right to any other property." (6)

1633. Impartible rights.—Personal rights are naturally impartible. Such is the right of a priest to serve his *yajamans* (7) though the acquisitions made by him might be partible. (8) The Patam or office of dignity in a family governed by the Aliyasantana Law is indivisible and whether the family be divided or not, in the absence of any arrangement made for its devolution, the *Pattam* descends to the eldest male of the surviving members of the family. (9)

(1) *Ramrao v. Yeshwantrao*, 10 B. 327.

(2) 2 Baden Powell's Land Systems of British India, p. 214.

(3) Oudh Estates Act (1 of 1869) amended by (X of 1885).

(4) *Chintamani v. Nowlukho*, 1. C. 153 P.C. The history of the Polliams of Southern India will be found given in the fifth report of the Select Committee of the House of Commons presented to Parliament presented in 1812 (reprinted Cambray) and in the Madura Manual. The account given in the fifth report was adopted by Lord Kingsdown in

Kooldeep Narain v. Government, 14 M. I. A. 247.

(5) *Naraguntly v. Venjama*, 9 M. I. A. 66 (86).

(6) *Collector v. Lekamani*, 14 B. L. R. 115 (187) P. C.

(7) Cf. *Becharam v. Thakooram*, 10 W. R. 114; *Ghelabai v. Hargovan*, 86 B. 94; *Manghermal v. Vitthal Ram*, 5 S. L. R. 107; 18 I. C. 226.

(8) *Khadroo v. Deo Ravee*, 5 W. R. 229.

(9) *Timmappa v. Mahalinga*, 4 M. H. C. R. 28.

1634. Personal property of impartible holder.—The rule of impartibility applicable to zamindaris does not extend to the personal property of the zamindar left at his death, which is divisible amongst his co-parceners in accordance with the ordinary law. (1)

The question whether an estate is partible or impartible is a mixed question of law and fact. (2)

1635. Holder sole owner.—The history of this clause has been already given (§§ 1597-1598). It is now settled by the court of ultimate appeal that in impartible properties there is no co-parcenary. (3) The contrary had been laid down previously in some cases (4) But this position was abandoned in 1888 when the Privy Council definitely laid down the contrary. (5) and this view has been confirmed by that high tribunal in several cases. *Sartaj Kuari's* case is thus a land mark in the history of impartible estates cutting as it does at the very root of all previous decisions on the subject. Even in some later cases the same view was reiterated (6) but all these must be taken to have been overruled by the view reaffirmed by the Privy Council against the succession *by personal law*. But though the estate is held by a single person in his individual right with no co-parcenary interest in the other relations, the law of succession is ordinarily the personal law of the holder varied by the impartible nature of the estate which is customarily subject to the rule of primogeniture. But this is only the ordinary and not the invariable rule, there being always no possibility of any co-parcenary rights existing as regards an impartible estate.

It then follows that there can be no devolution by survivorship and that succession to the estate must, as a rule, follow the custom which brings such estate into existence.

1636. Succession by primogeniture determined by personal law.—

Cl. (3). But though the estate is held by a single person in his individual right with no co-parcenary interest in the other relations, the law of succession is ordinarily the personal law of the holder varied by the impartible nature of the estate which is customarily subject to the rules of primogeniture. But this is only the ordinary and not the invariable rule, it being always a matter of evidence in each case as to what is the governing rule of succession. In one case it was said: "According to the decision in the Shivunga case which as their Lordships understand, is not now disputed, the fact of the Raj being impartible

(1) *Maharajulengaru v. Puntulu*, 5 M. H. C. R. 81.

(2) *Muthu v. Dora Singha*, 3 M. 290 P. C.

(3) *Venkata v. Court of Wards*, 22 M. 888 P. C. explained in *Bachoo v. Mankeri Bai*, 29 B. 51 (58) approved in *Rama Rao v. Raja of Pittapur*, 41 M. 778 (784) P. C.

(4) *Naragunth v. Vengama*, 9 M. I. A. 66 (86); *Katama v. Raja of Shivgunga*, 9 M. I. A. (589) 589. *Neelkisto v. Beer Chander*, 12 M. I. A. 523 (540); *Yenumala v. Yenumala*, 13 M. I. A. 888 (389); *Chintamani v. Nowlukho*, 1 C. 1:8 P. C. *Raghunadh v. Brozo Kishore*, 1 M. 69 P. C. followed in *Surendra v. Sailjah*, 18 C. 385; *Chandra v. Girijabai*, 14 B. 468; *Anaji v. Ratnaji*, 21 B. 319; *Payapa v. Appana*, 23 B. 327. To the same effect *Gavuri Devamma v. Ramandora*,

6 M. H. C. R. 93; *Muttayan v. Sivagiri*, 3 M. 370; *Naragunth v. Venkatachala*, 4 M. 250; (266) *Shriganga v. Lakshmana*, 9 M. 188; *Pettachi v. Chinnaambiari*, 10 M. 241; *Siva Subramaniya v. Krishna Ammal*, 18 M. 287; *Nachaiappa v. Sivasubramaniya Pandya*, 29 M. 453; *Raja of Kalahasti v. Achigadu*, 30 M. 454; contra *Nachaiappa v. Chinnayagami*, 29 M. 159; *Ram Rao v. Raja of Pittapur*, 39 M. 396 approved O. A. 41 M. 778 (786) P. C.

(5) *Sartaj Kuari v. Deoraj*, 10 A. 272 P. C.; *Venkata v. Court of Wards*, 22 M. 888 P. C.; *Rama Rao v. Raja of Pittapur*, 41 M. 778 (784) P. C.

(6) *Kalukrishna v. Raghunath*, 31 C. 224 (227); *Laksheshwar v. Rameshwar*, 36 C. 481 (487); *Indar v. Harpal*, 34 A. 189; *Harpal v. Bishan*, 6 A. L. J. 758; 3 I. C. 907.

does not affect the rule of succession. In considering who is to succeed on the death of the Raja, the rules which govern the succession to a partible estate are to be looked at, and therefore, the question in this case is, what would be the right of succession supposing instead of being an impartible estate it were a partible one." (1) On the strength of this case the Madras court deduced the following principles: "The first of them, is that a rule of succession in regard to succession to impartible property is to be found in the Mitakshara law applicable to partible property, subject to such modifications as naturally flow from the character of the property as an impartible estate. The second principle is that the only modifications which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir, when there are several heirs of the same class who would be entitled to succeed to the property if it were partible under the general Hindu Law. We have first to ascertain the class—, and we have next to select a single heir by applying the special rule." (2) Though the rule of primogeniture generally guides the descent of impartible estate, yet a family usage of selection without reference to that rule may be established by evidence (3)

1637. For the purpose of determining the heir the estate must be regarded as the self-acquisition of the holder. On his death, his eldest son, and if he dies without male issue, his widow and not his collateral, will succeed to his estate. (4) Women are not precluded by any rule of descent from succeeding to an impartible estate (5) though they may be excluded by custom. But whoever relies upon such custom must prove it. (6) The holder is entitled to adopt a son but the adopted son acquires no greater right in the estate than the natural son. (7)

1638. Where an impartible estate becomes vested in the daughter's son of the original holder, it will devolve on his death on his own son and not on another daughter's son of the original holder. There is no authority for the contention that when an impartible estate becomes obstructed by being vested in a female heir, it becomes always obstructed heritage, so that on the death of each succeeding holder (whether male or female) the true successor is the heir of the original unobstructed owner. (8)

1639. Successor pays debts.—As regards the incumbrances and debts of the holder they must be discharged by the successor in accordance with the equitable maxim, that he who takes the benefit must also bear the burden. But this rule does not solve all the questions that may arise in practice. For instance:—(i) Is the successor's liability to pay the debts of his predecessor unlimited or to any extent limited; (ii) Is he for instance, entitled to show with the son that his predecessor had incurred the debts for an illegal or immoral purpose; (iii) Is his liability limited to the extent of the personal assets of the late holder; (iv)

(1) *Jugendro v. Nityanand*, 18 C. 151 (154) P. C. followed in *Parbati v. Chandarpal*, 31 A 457 (476) P. C.

(2) *Subramanya v. Siva*, 17 M. 316 (325) cited with approval in *Parbati v. Chandarpal*, 31 A. 457 (476) P. C.; *Visvanathanam v. Kamu*, 24 M. L. J. 211. To the same effect *Muttuvaduganada v. Periasami*, 16 M 11 affirmed O. A. 19 M. 451 P. C.

(3) *Ishri Singh v. Baldeo Singh*, 10 C. 792 P. C.

(4) *Periasami v. Periasami*, 1 M. 312 P.C.; *Doorga v. Doorga*, 4 C 190 (202) P.C.

(5) *Katama v. Raja of Shivgunga*, 9 M I.A. 543; *The Collector of Madura v Veeracanu*, 9 M.I.A. 446

(6) *Ramanandan v Janki*, 29 C. 828 P.C.

(7) *Venkatapur v. Court of Wards*, 24 M. 383 P.C.

(8) *Muthu v. Udayana*, 6 M L.J. 149.

Is there any difference between the secured and the unsecured debts. All these questions have become somewhat further complicated by the changed view of the court as regards the nature of the estate. Cases which were decided in the light of previous cases which classes an impartible estate as a species of joint property and the holder a life tenant, must necessarily be now applied with caution. The earlier Madras view, since overruled, was that since the holder was merely a life tenant his successor was not liable to pay his debts even if they were legal and secured by a decree and the successor was his son. ⁽¹⁾ But in a later case Muttuswami Aiyar, J. supported this view as follows : " It seems to us that a zamindar represents the estate during his life for all practical purposes, and that after his death, since it has been decided that the estate does not constitute assets which can be seized in execution, it is open to the creditor by a separate suit to enforce the debt, so far as it is binding on him against the successor. The effect of recent decisions is that a son, even in his father's life-time, is debarred from setting up that the whole undivided ancestral property is not liable for his father's first debts, but it is only after the father's death, when the whole estate has passed to him by survivorship, that he is under a distinct obligation to discharge the debt out of it." ⁽²⁾ When the holder's interest was sold in execution of a decree against him the purchaser was held to acquire only the life-interest of his judgment debtor. ⁽³⁾ Even the Privy Council had to accede to this view in a case decided in 1903 in conformity with the view current in 1876 when the holder's right title and interest was sold on the ground that the rights of the parties to a contract are to be judged by that law by which they intended, or rather by which they may justly be presumed to have bound themselves. ⁽⁴⁾

1640. But as already observed the status of the holder of an impartible estate was materially altered by the exposition of law in *Sartaj Kuwari's case* ⁽⁵⁾ which laid down the following principles : -

(1) That there is no co-parcenary in an impartible estate, the holder of which is the absolute owner for the time being.

(2) That an estate may be impartible, but it is not necessarily inalienable. Its inalienability depends upon the nature of the tenure or custom.

(3) That succession to an impartible estate is regulated by custom dependant upon the nature of the tenure, or by the personal law modified to suit an impartible tenure.

1641. This case pointed only to one conclusion, namely that the successor must pay all lawful debts whether secured or unsecured of the late holder. But the courts do not appear to be agreed on the subject; for while this view has been taken in some cases the contrary has been also laid down in other cases which follow the view of the estate which is no longer tenable.

(1) *Arbuthnot v. Oclagappa*, 5 M. H. C. R. 88 P. C.; *Kosala v. Saluckai*, 8 M. H. C. R. 189; *Zamindar of Sivagiri v. Alwar*, 8 M. 42.

(2) *Arunachala v. Zamindar of Sivagiri*, 7 M. 828 (385).

(3) *Shivgunga Zamindar v. Lakshmana*, 9 M. 188; *Abdul Aziz v. Appayyaswami*, 17 M. 181 P. C.

(4) Per Willes, J. in *Lloyd v. Gulber*, 6 B. & S. 100 (183) cited and followed in *Abdul Aziz v. Appayyasami*, 27 M. 181 (142, 143) P. C. contra *Nayamaru v. Errappa*, 29 M. 481.

(5) *Sartaj Kuwari v. Deoraj*, 10 A. 272 P. C.

1642. In these cases it has been held that since the heir succeeds to an impartible estate by the law of survivorship he takes it free of all debt since the successor does not inherit his predecessor's estate nor can he be chargeable with his liability. ⁽¹⁾ These conflicting views were partially justified by the conflicting views of the nature of an impartible estate taken by the Privy Council. That high tribunal has, however, now settled the nature of such estates, the result of which is to simplify the liability of the successor for the debts of his predecessor, the rule being that the successor is liable to pay all lawful debts of the previous holder whether secured or unsecured and whether or not supported by legal necessity.

1643. Though the execution of a promissory note by the previous holder might suggest *prima facie* that the creditor looked to his personal credit, it is still competent to him to show that the estate was intended to be equally bound. ⁽²⁾

In one case it was held that where the undivided brother succeeded to a zamindari, he was not liable for his predecessor's debts, since he must be deemed to have succeeded to it by a mode of devolution resembling survivorship and that therefore the estate in his hands could not be treated as assets for the payment of the unsecured debts of the last holder. ⁽³⁾ But in view of the fact now settled that there can be no succession to an impartible estate by survivorship, this view of the successor's liability can no longer be maintained.

1644. Spes successionis.—From the fact that the holder is the absolute owner of the estate it follows that his successor has
 Cl. (5). nothing but an expectancy or a *spes successionis* which is not property within the contemplation of law so as to be the subject of partition or alienation. ⁽⁴⁾

1645. Right of members to maintenance.—So long as an impartible
 Cl. (6). estate was held to be the subject of co-parcenary rights the courts were bound to hold that all co-parceners were entitled to maintenance. ⁽⁵⁾ But the Privy Council have now settled down to a conclusion that there is no co-parcenary in an impartible estate. As such the members of the holder's family have no legal claim to maintenance. Any claim they may have must be founded on custom, which recognizes the claim of sons and brothers. But in the case of other relations it must be proved. So their Lordships said: "Their Lordships do not doubt that the right of sons to maintenance in an impartible zamindari has been so often recognized that it would not be necessary to prove that custom in each case." ⁽⁶⁾ And the same rule would apply to the brothers. ⁽⁷⁾ But "we can find no invariable or certain custom that any below the first generation from the last Raja can claim maintenance as a right." ⁽⁸⁾ Their right to

(1) *Raja of Kalahasti v. Achigadulu*, 90 M. 454; *Mondaleswar v. Prayag*, 32 M. 429; *Malkaraja of Bobbili v. Kaminayani*, 21 M. L. J. 598; 8 I. C. 860 contra *Nachiappa v. Thinnayasami*, 29 M. 458.

(2) *Harpal v. Bishan* 6 A. L. J. 758; *Inder v. Harpal*, 34 A. 79 (84); *Durga v. Chintamani*, 31 C. 214.

(3) *Maharaja of Bobbili v. Kaminayani*, 21 M. L. J. 598; 8 I. C. 860.

(4) *Nachiappa v. Sivasubramaninpandia*,

29 M. 458.

(5) S. 6 (a) Transfer of Property Act *Laliteswar v. Rameswar*, 36 C. 481.

(6) *Himmat Singh v. Ganpat Singh*, 12 B. H. C. R. 94; *Ramachandra v. Sakharam*, 2 B. 846; *Chettikulam v. Chettikulam*, 4 I. C. (M) 302.

(7) *Rama Rao v. Raja of Pittapur*, 41 M. 778 (785) P. C.

(8) *Nimrony v. Hingoo Lal*, 5 C. 258 (259) P. C. followed in *Rama Rao v. Raja of Pittapur*, 41 M. 778 (785) P. C.

maintenance must then depend upon custom which must be alleged and proved. The amount of maintenance of the members must be proportionate to their wants and their position in life. (1)

1646. Maintenance grants.—The question of maintenance suggests another question—that of maintenance grants. The holder of an impartible and inalienable estate is not precluded from making grants of land in perpetuity (2) of subordinate tenures which may be both alienable and heritable. The question is one of construction and intention. But a maintenance grant is presumably intended to continue only for the life of the grantee, such intention being presumable from the object of it which was only the grantee's maintenance. It will be so even if in certain documents connected with the grant, the grantee was described as "proprietor" and as holding "for ever." (3)

1647. Custom sometimes modifies the terms of a grant by superadding to it incidents of its own. So when the proprietor of Chota Nagpur Raj granted a village to a priest by a sanad which provided that the grantee and his "*al aulad*" (descendants) were to possess and enjoy the property, it was held that though the term "*al aulad*" would etymologically include both the female as well as the male descendants, yet according to the custom proved to have prevailed at the time of the grant and subsequently in that part of the country, the words must be interpreted to mean lineal male descendants only. (4) In some cases as in the case of grants by the Maharaja of Chota Nagpur (5) or the Maharaja of Darbhanga (6) the grants are themselves impartible.

1648. In the absence of family usage or custom, a maintenance grant is alienable. (7) A maintenance grant to the grantor's sons and his descendants is ancestral property in the hands of the grantee, so that the latter cannot alienate it to the detriment of his descendants except as allowed by law. (8) (For further information on the subject of maintenance, see Ch. VII.)

The word "grant" as used in legal transactions in India is not to be understood in its technical English meaning of a conveyance at common law of remainders, reversions and incorporeal hereditaments which do not lie in livery or of which livery could not be given. (9)

1649. Discontinuance of service.—A service estate does not cease to be impartible by discontinuance of the service attaching thereto. In fact a large number of existing impartible estates were at one time held on service tenures; but their release from service does not alter their established incident of impartibility. (10) Nor does the fact that the estate was regranted after its confiscation by Government suffice to alter its impartibility unless that incident was altered expressly or by necessary implication.

(1) *Mahesh v. Dirgpal*, 21 A. 232.

(2) *Narayan v. Lokenath*, 7 C. 461.

(3) *Rameshwar v. Arjun Singh*, 23 A. 194
P.C.; *Bunijad Husain v. Haji Unisa*, 95 I.C.
(O) 764.

(4) *Perkash v. Rameshwar*, 31 C. 561
(570).

(5) *Gajendra v. Mathuranath*, 20 C.W.N.
876; 1 Pat. L.J. 109; 35 I.C. 888. *Rama-
charan v. Harihar*, 35 I.C. (Pat.) 892.

(6) *Durga Dut v. Rameshwar*, 36 C. 948

P.C. in which, however, the impartibility
was admitted.

(7) *Sashi v. Jagoti*, 44 C. 555 P.C.

(8) *Durga Dut v. Rameshwar*, 36 C. 948
(952) P.C.

(9) *Hazarimal v. Aliani*, 18 I.C. 625.

(10) *Rajkishan Singh v. Ramijoy*, 1 C. 186
P.C.; *Beer Pratap v. Rajendra*, 12 M. I. A. 1;
Savitri Bai v. Anandrao, 12 B. H. C. R. 224
(226); *Radha Bhai v. Anant Rao*, 9 B. 198;
Ram Rao v. Yeswanth Rao, 10 B. 327.

155. (1) An impartible estate is not necessarily inalienable, though it may be so created by the terms of the grant, law, or custom.

Inalienable estate.

(2) He who alleges its inalienability must prove it.

(3) Where an estate is alienable, the extent of its alienability must be determined by the law or custom which creates it.

Synopsis.

- (1) *Impartible estate, not necessarily inalienable* (1650). (1651).
 (2) *Custom or tenure, proof of* (1651). (3) *Alienation for necessity* (1651).

1650. Analogous Law -- Though estates which are impartible are also at times inalienable, inalienability is not a necessary adjunct of impartibility and it cannot be inferred from the mere absence of alienation without any evidence of facts which would make it probable that an alienation would have been made. (1) Inalienability may be inferred from some speciality in the tenure. (2)

1651. An estate inalienable by custom may be alienated for necessity. (8) It has been held by a long series of decisions that the zamindaris in the Madras Presidency are alienable as well as impartible. As such the court will presume alienability without proof of a custom to that effect. (4) The Ghatwali tenures are impartible, but while those in the Khargpur district are alienable (5) those elsewhere are inalienable. (6)

156. (1) Property acquired by the holder of an impartible estate out of its income does not partake of its character but is his self-acquisition unless it is intentionally incorporated with it.

(2) An accretion so made to an impartible estate also becomes impartible.

Illustration.

A the holder of an impartible Raj acquires mouzas B, C, and D out of its income. B, C, and D, are managed by the same staff and their collection papers kept with those of the Raj. This is insufficient to show A's intention to treat B, C, and D as a part of his Raj.

Synopsis.

- (1) *Acquisitions by holder of impartible estate* (1652). (1652).
 (2) *Incorporation with the impartible estate, evidence of* (1653). (3) *Succession to acquisitions* (1653).

(1) *Durga Dut v. Rameshwar*, 36 C. 948 P. C.; *Sariaj Kuari v. Doeraj*, 10 A. 272 P. C.; *Venkataswamy v. Court of Wards*, 22 M. 388 P. C.
 (2) *Rupasingh v. Pirbhoo*, 21 A. 557.

(3) *Gopal v. Raghunath*, 32 C. 158.
 (4) *Venkatswamy v. Court of Wards*, 22 M. 383 P. C.
 (5) *Kali Pershad v. Anand*, 15 C. 111 P. C.
 (6) *Nilmoni v. Bakramath*, 9 C. 167 P. C.

1652. Analogous Law.—All acquisitions made by the holder of an impartible estate do not necessarily become a part of his impartible estate. *Prima facie* they are his self-acquisitions and as such follow the rule applicable to self-acquired property. (1) In order to constitute accessions to the impartible estate, they must be intentionally incorporated with it. Such intention might be ascribed to one who left the acquisition undisposed of in his life-time. (2) As the holder may incorporate his acquisitions with the parent estate at any time at his discretion, it follows that while he is alive, he is entitled to treat them as one or the other. But there is a presumption that he intends to keep his acquisitions separate. And the mere fact that he managed them through his Raj servants or had the account papers of the one maintained with the other does not shew his intention to incorporate when they become accretions to the Raj and acquire all its incidents.

1653. Where however they remain unincorporated they will descend to the heirs of the holders in accordance with the normal personal law to which he is subject. (3)

Property is presumably partible.

157. (1) All property is presumably partible and alienable.

(2) Impartibility and inalienability are the incidents of an estate which must be pleaded and proved in each case.

Synopsis.

- (1) *Presumption of partibility and alienability of property* (1654). *lity to be pleaded and proved* (1655).
 (2) *Impartibility or inalienability*

1654. Analogous Law.—When we see the vast body of property around us which is both partible and alienable, law naturally presumes in favour of the general partibility and alienability of all property. Impartibility and inalienability being exceptional and confined only to a few estates, must be proved whenever it is challenged in each case. So it is now enacted in S. 6 of the Transfer of Property Act as follows: "Property of any kind may be transferred except as otherwise provided by this Act or by any other law for the time being in force."

1655. The impartible and inalienable estates owe their existence to the feudal tenures created by the sovereign power for past and future services. But of recent years law has declared several estates to be impartible and inalienable, while in other cases, the same incidents have become attached to certain estates by custom.

(1) *Parbati v. Jagadis*, 29 O. 488 (455).
 P. O.; *Secretary of State v. Kamachee*, 7 M. I.
 A. 476 (587).

(2) *Rajeswara v. Virapratapali*, 5 M. H.

C. R. 91; *Kotta v. Bangari*, 3 M. 145; *Sarabjit v. Indarjit*, 27 A. 209.

(3) *Secretary of State v. Kamachee*, 7 M. I.
 A. 476 (587).

1656. An estate may be impartible though not inalienable and it may be inalienable though not impartible. The question of inalienability again depends upon the nature of the tenure, law or custom, (1) since a custom may be general, local, or one confined only to the estate in question. (2)

1657. These incidents cannot be engrafted upon an estate by contract or compromise which is void as being opposed to public policy. (3) The fact that parties have treated the estate as impartible and as such have not partitioned it for six or seven generations does not deprive the members of the family of their rights of partition. (4)

The question whether an estate is impartible is a mixed question of law and fact (5) (§ 387).

(1) *Sartaj Kuari v Deoraj*, 10 A. 272 (288) P. C.; *Venkata v. Court of Wards*, 22 M. 383 P. C.

(2) *Basvant Rao v. Mantappa*, 1 B. H. C. R. (App) 42 (47).

(3) *Vinayak v. Gopal*, 27 B. 353 P. C. *Piroj Shah v. Manibhai*, 26 B. 53 (56); *Sri*

Laja Viravara v. Sri Raja Virvara, 20 M. 256 P. C.

(4) *Durriao v. Dari*, 13 B. L. R. 165 P. C.; *Mulhu v. Dorasingha*, 3 M. 290.

(5) *Rupasing v. Rani Baisa*, 7 A. 1 (19) P. C.

CHAPTER XIII.

SUCCESSION TO IMPARTIBLE ESTATE.

158. In the absence of any law or custom to the contrary, succession to an impartible estate is subject to the personal law of the holder adapted to the nature of the tenure to the following extent:—

(1) Succession is subject to the rule of primogeniture.

(2) Where the holder is subject to the Mitakshara law, the heir is the eldest male issue of the deceased or failing him the eldest co-parcener.

(3) Where it passes by survivorship from one line of descent to another, it devolves not on the co-parcener nearest in blood but on the nearest co-parcener of the senior line.

(4) Females are presumably excluded from succession in favour of co-parceners if the estate is ancestral, but if it is a separate acquisition of the holder they are entitled to succeed.

(5) In a case subject to the Dayabhag school the heir is the eldest member of the class of persons who are the next heirs of the deceased.

Explanation.—In the absence of custom determining seniority according to the seniority of the mother, seniority in age amongst brothers alone determines the seniority, irrespective of the seniority of the mother.

Illustrations.

(NOTE.—In the following illustrations *A* must be understood to be the owner of an impartible estate).

(a) *A* dies leaving his son *B* aged 10 and a brother *C* aged 80. *B* succeeds in preference to *C*.

(b) *A* dies leaving his widow and a brother. The widow would succeed if the zamindari is in Bengal, otherwise it will go to the brother.

(c) *A* dies leaving him surviving *B* an elder brother of the half-blood, and *C* a younger brother of the whole blood. *B* succeeds in preference to *C* in the Mitakshara country (1) while *C* will succeed in Bengal. (2)

(d) *A* dies leaving two sons *B* aged 19 by his junior wife and *C* aged 10 by his senior wife. *B* succeeds.

(e) *A* died leaving a grandson *B* aged 10 and a brother's son *C* aged 20. *B* succeeds.

(1) *Subramanya v. Siva*, 17 M. 316.

(2) *Neel Kisto v. Beerchunder*, 12 M. L. A. 523.

Synopsis.

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| (1) <i>Succession to impartible estate</i> (1658—1660). | (7) <i>Order of succession under Mitakshara Law</i> (1665—1666). |
| (2) <i>Primogeniture</i> (1659) | (8) <i>Right of illegitimate sons of sudras</i> (1666). |
| (3) <i>General and lineal primogeniture</i> (1660). | (9) <i>Interest of junior members, merely a spes successions</i> (1667). |
| (4) <i>Succession under Mitakshara Law</i> (1660—1661). | (10) <i>Position of females</i> (1668). |
| (5) <i>Dayabhag Law</i> (1662). | (11) <i>Dayabhag succession</i> (1669). |
| (6) <i>Tests of preference among rival heirs</i> (1663). | (12) <i>Meaning of primogeniture</i> (1670) |

1658. Analogous Law.—In describing the incidents of an impartible estate it has been stated that succession thereto is subject to the personal law of the holder adapted to the tenure. The one incident of impartibility carries with it another necessary incident as to its succession being subject to the rule of primogeniture. To this extent the personal law must necessarily stand modified. Partibility being the general rule, the succession of one heir is therefore an exception. (1) This section lays down the salient principles as regards succession. All the clauses are drawn from the decided cases. (2)

1659. The explanation is moreover supported by the following text :—

Manu :—105. As between sons born of wives equal in their class and without any other distinction, there can be no seniority in right of the mother but the seniority ordained by law is according to the birth. (3)

1660. Succession to impartible estate.—Succession to an impartible estate in the Mitakshara country is not by inheritance but by survivorship. (4) "When an estate is impartible it is enjoyed in a different mode from that prescribed by the ordinary Hindu Law, but the inheritance is to be traced by the same mode unless some further family custom exists beyond the custom of impartibility." (5) As observed in the Shivgunga case, "In the absence of proof of a special custom of descent, the succession to a zamindari impartible and capable of enjoyment by one member only of the family at a time, is governed by the general Hindu Law prevalent in that part of India with such qualifications only as flow from the impartible character of the subject." (6) The question then is, who is the heir ?

(1) *E. I. Co. v. Kamachee*, 4 W. R. 42 P. C. S. C.; *Sub nom-Secretary of State v Kamachee*, 7 M. I. A. 476.

(2) Cl. (1) *Ishri Singh v. Baldeo Singh*, 10 C. 792 (805) P. C.; *Bhawani v. Deo Raj* 5 A. 542; *Dinkarasami v. Bhaskarasami*, 24 M. 618.

(Cl.) (2) *Parbati v. Chandrapal*, 31 A. 457 P. C.; *Subramania v. Siva*, 17 M. 316 (325); *Raja of Kalahasti v. Achigadu*, 30 M. 454.

Cl. (3) *Naraganti v. Venkatachalapati* 4 M. 260; *Kochi v. Kochi*, 24 M. 562 affirmed O. A. 28 M. 508 P. C.; *Reveneshwar v. Chandri Prasad*, 38 C. 721.

Cl. (4) *Tara Kumari v. Chaturbhuj* 42 C. 1179 P. C.; *Lekhiraj v. Harpal*, 80 A. 406 affirmed O. A. 84 A. 65 P. C.; *Bup Singh v.*

Baisni 7 A. 1 P. C.; *Heranath v. Ram Narain* 17 W. R. 316.

Cl. (5) *Mayne's H. L.* (8th Ed.) p. 767 expl.; *Jagdish v. Sheo Partap*, 28 A. 869 (882) P. C.; *Ramalakshmi v. Sivanatha* 14 M. 1 A. 570; *Pedda v. Bangari*, 2 M. 286 P. C.

(3) *Manu IX—125.*

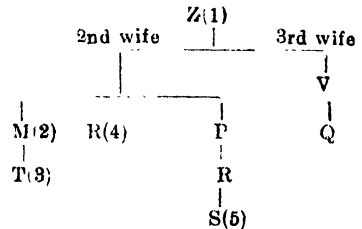
(4) *Nachiappa v. Sivasubramania*, 29 M. 453.

(5) *Muttuvaduganadha v. Periasami*, 16 M. 11 affirmed O. A. 19 M. 451 (457) P. C.; *Jogendro v. Nityanand*, 18 C. 151 P. C.

(6) *Kalama Nachiar v. Raja of Shivgunga*, 9 M. 1 A. 593. The rest of the judgment admitting co-parcenary rights in an impartible zamindari is no longer sound in view of their Lordships' considered view in *Rama Rao v. Raja of Pittapur*, 41 M. 778 P. C.

Where there is a single heir alive at the death of the last owner, he will succeed to the estate; but where there are several heirs equally related to him, they cannot all succeed, since if they did the estate could not continue impartible, since partibility is a necessary incident of joint ownership. An impartible estate can therefore be held only by one person at a time and he must be selected out of the body of heirs who would take a share if the estate were partible. Such selection is ordinarily based on the rule of primogeniture, that is the eldest male relation of the deceased becomes entitled to inherit the estate. But primogeniture may be general or lineal. Now since impartibility is the creature of law or usage, it must equally determine the rule of succession and whether it is one or the other, cannot be the subject of any *a priori* reasoning. It must depend upon the nature of the grant and the law or custom which regulates its succession, in the absence of which the general law must apply. As this law does not exclude women from succession, there is no inconsistency between a custom of impartibility and the right of females to inherit and the general law will prevail unless it is proved that they are excluded by custom. (1) That custom may shew what is the rule of succession, if it is by primogeniture, general or lineal, the one favours succession by proximity of degree (2) while the other limits succession to the eldest member of the senior line. In the one case nearness of blood and in the other nearness in line, is the ground of preference—that is to say while in the one case one nearer in blood though belonging to the junior line is preferred, while in the other, succession goes to the eldest in the senior line without reference to the nearest in blood. It is settled in accordance with the rulings of the Privy Council that when impartible property passes by survivorship from one line to another it devolves not on the co-parcener nearest in blood but on the nearest co-parcener of the senior line. (3) The question whether an estate is subject to the ordinary law of succession or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it. (4)

1661. In the Udayarpalayam zamindari case the plaintiff sued for recovery of the zamindari on the ground of his nearness in blood. The zamindari belonged to one Z who had three wives. By the first wife he had no issue. By the second he had three sons M, R and P and by the third one son V. On the death of Z the estate passed first to M then to M's son and then to M's brother R. On the latter's death possession was taken by S the grandson of his brother P. Q. contested S's right on the ground that he was nearer in blood to R, but the Privy Council threw out his suit holding that S being a nearer co-parcener of the senior line was preferably entitled. (5) In other words, the estate was subject to lineal primogeniture. "The principle of representation places the first defendant (S) and the plaintiff (Q) in the position respectively of their grandfather (P) and father (V) and therefore equally near to the deceased zamindar (Z) (apart from any question of half-blood) and that being so, the first defendant (S)



(1) *Ram Nundun v. Janki Koor*, 29 C. 828 (853) P. C.

(2) *Muhammad v. Husain*, 26 C. 81 (90) P. C.

(3) *Naraganti v. Venkatachalapati*, 4 M. 250 (267) P. C.; *Kachi v. Kachi*, 24 M. 552 (609) affirmed O. A. 28 M. 508 (512) P. C.

(4) *Varlagadda v. Varlagadda*, 18 M. 406 P. C.

(5) *Kachi v. Kachi* 24 M. 552 (609) following *Naraganti v. Venkatachalapati* 4 M. 250 (267) P. C. affirmed O. A. *Kachi v. Kachi*, 28 M. 508 (512) P. C.

being senior in age to the plaintiff would take the impartible property in preference to the plaintiff (Q)." (1)

1662. The case would have been differently decided if it were subject to the Dayabhog which does not recognize survivorship as determining the devolution of property. (2) The same view was taken by the Privy Council in a competition between a junior uncle of the last zamindar and a grandson of a senior uncle who was held to have a superior right. (3) Similarly in another case, the custom of succession by lineal primogeniture was pleaded and proved. There the contest lay between the eldest male descendant of the second son of the original owner and the descendant of his fourth son nearer by one degree to the *propositus*. It was not disputed that a grandson whose father was dead succeeded to the grandfather's estate in preference to a surviving uncle. But it was contended that this did not prove that the rule of lineal primogeniture applied in cases of collateral relationship. But the Privy Council held it established from a family tradition, though unsupported by any actual instance in which the rule had neither been followed or departed from proving the custom and the title of dignity bestowed on the heir apparent. (4) The rule of succession by lineal primogeniture is then an exception to the general rule that a nearer heir excludes a more remote one. But though from the reported cases it would appear that this mode of succession is common to impartible estates, it cannot be so presumed. And he who relies upon it must prove it. (5) Again, the fact that the estate is held by a single heir does not necessarily imply that it is subject to the rule of primogeniture (6) and to any particular kind of primogeniture.

1663. In determining the right of succession to an impartible estate the class of kindred from whom a single heir is to be selected, should be first ascertained. Next it should be seen whether family custom or kulachar disclosed a special rule of selection, and in default of such custom, seniority of age constitutes a title by descent to the impartible estate, by analogy to the general Hindu Law. Nearness of blood is no ground of preference under the Mitakshara Law in case of disputed succession to co-parcenary property which is partible and it is likewise no ground of preference when such property is impartible. When therefore, the family property belongs to a co-parcenary family consisting of all the brothers of the deceased *propositus*, whether of the whole or half-blood, in the absence of a specification to the contrary, the brother that is entitled to succeed to the property is the eldest in years. (7)

1664. The parties to a suit, first cousins once removed, contested the right to inherit an impartible zamindari, which had been acquired by their common ancestor, who had left two daughters by two different's wives. The plaintiff was the son of the younger daughter, the defendant's father was the son of the elder. The younger half-sister survived the elder, and in 1863 was judicially declared to have inherited alone the impartible zamindari. On her

(1) *Kachi v. Kachi* 24 M. 562 (609, 610).

(2) *Neelkisto v. Beerchunder*, 12 M. I. A. 528 explained in *Naraganti v. Venkatachalapati* 4 M. 250 P. C. and in *Subramanya v. Siva* 17 M. 816 (825-830); *Kachi v. Kachi*, 24 M. 562 (609, 609) affirmed O. A. 28 M. 508 (512) P. C.

(3) *Naraganti v. Venkatachalapati*, 4 M. 250 (267) P. C.

(4) *Mohesh v. Satrugnan*, 29 C. 848 P. C.

(5) *Achal Ram v. Unai Pertab*, 10 C. 511 (518, 519) P. C.

(6) *Bhai Narindar v. Achal Ram*, 20 C. 649 (652) P. C.; *Muhammad v. Husain*, 26 C. 81 (90) P. C.; *Jeethath v. Lokanath*, 19 W. R. 289; *Ramchandra v. Venkatrao*, 6 B. 598 (612); contra *Bhuvani v. Deo Rajkuari*, 5 A. 542; *Muthuvaduganada v. Periasami*, 19 M. 451 P. C.

(7) *Subramanya v. Siva*, 17 M. 816 (827).

death, the elder daughter's son, in litigation ending in 1881 made good his title to the estate being descendant in the elder line. It was held that this last male owner became the stock from which descent had now to be traced and that the successor was no longer that stock, and that the son of this last male owner had a title to the zamindari on his father's death in consequence of the full and complete ownership of the latter who had himself become a fresh root of title.⁽¹⁾

1665. In a zamindari subject to the Mitakshara a half-brother senior in age would have preference over a younger brother of full blood ⁽²⁾ but the very reverse is the case in a Dayabhag succession in which the doctrine of survivorship has no application either as a general part of inheritance or as an exception to it. ⁽³⁾ In the case of competition between two half-brothers in the absence of custom seniority in years is alone the criterion. The seniority of the mother does not count. ⁽⁴⁾ But custom may decree otherwise. It may, for instance, confer priority by reason of the seniority of the mother and not by reason of the seniority in age. Such a custom was pleaded and affirmed by the Privy Council. ⁽⁵⁾ Such was also the custom proved in a case that sons by wife of the caste of the Raja take in preference to a son by a wife of a lower caste. ⁽⁶⁾

1666. A half-brother succeeds in preference to the widow of the last owner.⁽⁷⁾ So where the zamindar was a Shudra amongst whom the illegitimate son succeeds to his father, it was held that as between the son by a wedded wife and illegitimate son, the ordinary rule of survivorship incidental to a family coparcenary applied and the illegitimate son having survived the legitimate upon his death without male issue, he was held entitled by survivorship to succeed to the partible Raj. ⁽⁸⁾ So if the owner die leaving no male issue, but two co-widows, they would jointly inherit if the estate is partible. But if the estate be impartible the senior will take the estate and the junior only receive maintenance. In other words the rule of descent is the personal law of the parties. That determines the heir or heirs. If the estate is partible they all participate. If it is impartible the eldest of them takes and the rest are excluded by reason of the impartible character of the estate. And since the heir is determined by the general law it follows that if females are competent to inherit to an impartible estate the fact that it is impartible is no reason for their exclusion though here as elsewhere custom may have ordained their exclusion; but in that case such custom must be strictly proved ⁽⁹⁾ in the absence of which, in the absence of male issue the widow of the late zamindar will succeed ⁽¹⁰⁾ and possess the absolute rights of the owner but may relinquish any of her rights in a

(1) *Muthuvadugunadha v. Periasami* 19 M. 451.

(2) *Subramania v. Siva*, 17 M. 816 (880); *Ramasami v. Sundaralingasami*, 17 M. 422.

(3) *Shao Soondary v. Pirthee Singh*, L. R. 4 I. A. 147 O.A. from Raj *Kishore v. Gobind*, 1 C. 27 F. B.

(4) *Ramalakshmi v. Sivanatha*, 14 M. I A. 570; *Pedda v. Banjari*, 2 M. 286 P.C.; *Ramasami v. Sundaralingasami*, 17 M. 422 (488).

(5) *Sundaralingasami v. Ramasami*, 22 M. 515 P. O.

(6) *Bistooprea v. Basoodab* 2 W. R. 232.

(7) *Parbati v. Jagodis*, 29 C. 488 P. C.

(8) *Jogendra v. Nityanand*, 18 C. 151, (155) P.C. approving *Sadu v. Baiza*, 4 B. 87. Visva-

natha v. Kamulu, 24 M.L.J. 271. 21 L.C. 724; contra in *Pervathi v. Thirumalai*, 10 M. 384 (846) dissenting from *Sadu v. Baiza*, 4 B. 87 can no longer be maintained since the approval of the Bombay case by the Privy Council. The view taken in that case that there is coparcenary in an impartible estate is equally erroneous. *Rama Rao v. Raja of Pittapur*, 39 M. 396 affirmed O. A. 41 M. 778 P. C.

(9) *Ramvundun v. Janki*, 29 C. 828 P. C.; *Tarakumari v. Narayan*, 42 C. 1179 P. C.; O.A. from *Narain v. Tarakumari*, 5 I. C. 198.

(10) *Periasami v. Periasami*, 1 M. 812 P.C. followed in *Doorga v. Doorga*, 4 C. 190 (202, 208) P. C.

compromise with her reversioner. (1) So it was proved that there was a custom applicable to the *babuana* and *Sohag* grants from the Darbhanga Raj which excluded widows, daughters and descendants of the daughters from succession. These grunts descend in the family of the Darbhanga Raj not to one male heir only, but to all the existing male heirs in the male line of the grantee as co-parceners. (2)

1667. Though the heir is traced in conformity with the general law, the interest of the other members of a Mitaks'hara family is, as regards an impartible estate, a mere *spes successionis*. (3) It is not a vested interest as in the case of partible property.

1668. Position of females.—The right of a female heir to inherit an impartible zamindari depends upon the law to which it is subject. In a zamindari subject to no special law or custom the ordinary rule must prevail, *viz.*, a female cannot inherit an impartible ancestral estate, belonging to a joint family under the Mitaks'hara, when there are male members of the family who are qualified to succeed as heirs; a rule of law not dependent on custom, and a custom modifying the law in this respect must be a custom to admit females, not a custom to exclude them. (4) This view would be intelligible if we remember that the rights which women possess as regards an ordinary partible property cannot be enlarged by the mere fact that the property to be dealt with is impartible. They succeed or are excluded irrespective of the nature of the property in accordance with their personal law. Such law entitles them to succeed to their husband's separate property (5) from which they cannot be excluded by reason of their sex unless they are excluded by custom. (6)

1669. Dayabhag succession.—The same rule holds good in the case of a Dayabhag family, that is to say, the heir is selected by the personal law and if there are more than one equally eligible, the eldest succeeds by his right of seniority.

1670. Meaning of primogeniture.—The term primogeniture means "first-born" and the heir most senior in age whatever his relationship to the last owner, will succeed under the rule in preference to other heirs of equal degree. So where the deceased has left several sons the eldest succeeds and the fact that he was born of a junior wife is immaterial. As the Privy Council observed: "It is by the birth of his first-born son that a Hindu discharges the duty which he owes to his ancestors and obtains spiritual benefits for himself and therefore it is to that son that the pre-eminence should be given." (7)

(1) *Horpai v. Lekraj*, 30 A. 406 affirmed. O. A. *Lekraj v. Horpal*, 34 A. 65 P. C. *Indar Sen v. Harpal*, 34 A. 79.

(2) *Ekradeshwar v. Janeswari*, 42 C. 592 P. C.

(3) *Laliteshwar v. Rameshwar*, 35 C. 481.

(4) *Hiranath v. Ram Narayan*, 9 B. L. R. 274 approved in *Chintaman v. Noylukho* L.R. 2 I.A. 268; *Rupasingh v. Baisni*, 7 A. 1 (10.11)

P. C.

(5) *Ram Nundun v. Janki*, 29 C. 828 (851) P.C. following *Beer Pertab v. Rajendar*, 12 M.

I. A. 1.

(6) *Ram Nundun v. Janki*, 29 C. 828 (852)

P. C.

(7) *Jagdish v. Sheo Partab*, 28 A. 269 (832)

P. C.

CHAPTER XIV.

TRANSFER OF PROPERTY.

1671. Topical Introduction.—Hindu Law of property has been greatly modified by the encroachment of the statute law, which has however, sedulously saved it on certain points upon which it is still extant. Thus the Transfer of Property Act while it separates the Hindu Law on the subject of forms and incidents of transfer by way of sale, exchange, mortgage, lease and actionable claims expressly saves the rule of Hindu Law on the subject dealt with in Chapters II and VII relating to gifts, except 123 which prescribes the form of gifts.

It will be seen that Chapter II deals with the general principles of transfer and their construction. As most of the sections in this chapter are drawn from the Succession Act, these sections are more in request in construing gifts, grants and wills than transfers for value which are the subject of other chapters in that Act.

1672. Now it may be observed that in ascertaining meaning of any transfer regard must be had to the following four essential facts:—

(1) The nature of the property; (2) the right possessed by the transferor; (3) its purpose; and (4) the mode of alienation. Suppose for example that the property is co-parcenary interest. Here the right possessed by the transferor depends upon the personal and in fact, the local law, to which he is subject. If he is subject to the Dayabhag law then he is free to dispose of it by sale or gift at his own discretion. But if he is subject to the Mitakshara, then his right of alienation must depend upon the local view of that law, that is to say, if he is subject to the Bombay and Madras view he may transfer it for value. But if he is subject to the courts in Behar, United Provinces, Oudh and the Punjab he cannot transfer it at all; but if he contravenes the law and transfer it, the purchaser acquires an equity to his purchase which may be translated into such relief as the court deems fit. But in the last case if the transfer is involuntary, *e g.*, if it is in execution of a decree against the co-parcener then, he is entitled to the interest to the same extent as a purchaser by treaty in Bombay and Madras.

1673. The Hindu Law of property is so far unaffected by the Transfer of Property Act. This is even less affected when it is a gift or a devise. It will be presently seen that the *quintum* of interest which a gift conveys to the donee depends not only upon the text of the deed but also the sex of the donee. Again both on the subject of the construction of gifts and wills, Hindu Law follows rules which are not all in consonance with the English canons of construction. The Hindu Law of transfer is thus of sufficient importance to deserve a separate chapter in the Hindu Code.

1674. The ensuing sections must, however, be necessarily regarded as merely dealing with points upon which Hindu Law remains unaffected by the statute. For a general commentary on the subject, reference is invited to the

author's Law of Transfer where the rules of Hindu Law modifying or bearing on the different sections will be found set out and discussed.

Definition of property.

159. (1) Property is anything which may be the subject of ownership.

(2) It may be moveable or immoveable.

Synopsis.

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| (1) <i>Definition of property</i> (1675). | <i>able property under Hindu</i> |
| (2) <i>Idol, both a person and property under Hindu Law</i> (1676). | <i>Law</i> (1679-1681). |
| (3) <i>Categories of property</i> (1677). | (5) <i>Malikana and nankar</i> (1682). |
| (4) <i>Nibandh or corrody, immove-</i> | (6) <i>Emoluments of office</i> (1682). |
| | (7) <i>Claim for maintenance</i> (1682). |

1675. Analogous Law.—The general notion of property will be found discussed in the author's work on the Law of Transfer. (1) It is proposed here to set out its meaning under Hindu Law, which however, contains no disquisition on the meaning of the term. "Property" is a creature of law. It includes only those things which law recognizes as capable of ownership. As such the term is necessarily elastic, comprising as it does such objects as law from time to time throws into that category.

Besides the ordinary objects and things which are classed as property by the general law, Hindu Law treats the following as property :—

1676. Idols.—An idol is treated by Hindu Law both as a juridical person and property. As property, idols may be the subject of partition. So where the plaintiff and defendant were jointly entitled by rotation to the profits from an idol in the defendant's temple, and the defendant having obstructed the plaintiff's use and worship of the idol in his temple the plaintiff was declared entitled to remove the idol to her own house during the period that she was entitled to the profits from it. (2) So in another case it was laid down that in the eye of the law, the idols are property, and the right to deal with such property must, in the event of disputes arising, be determined by a Civil Court. (3) The idol is again a juridical person, in perpetual minority and capable of holding property through its manager. (4) As such, the individuality of one idol cannot, it is said, be validly transferred to its substitute. (5) Nor is it clothed with any existence till it is consecrated, and has so become spiritualized or rather individualized. (6) But it is submitted and is now held, that neither of these conditions is essential, since an idol is a person in an ideal sense and its personality is not destroyed by the substitution of one image for another. In fact the wooden image of the God Juggunnath has to be so renewed from time to time. A permanent image does not therefore, seem to be indispensable for dedication to a deity of which the image is merely the visible expression. (7) Such are other ideal persons such as muths (8) and colleges which

(1) Gour's Law of Transfer (4th Ed.) St §§ 174, 175.

(2) *Dwarkanath v. Jannabee*, 4 W. R. 79.

(3) *Subharaya v. Chellappa*, 4 M. 315

(816); *Damodar Das v. Uttam Ram*, 17 B. 271.

(4) *Narayan v. Koodur Narain*, 2 Hay.

150; *Bispro v. Kewat Dayee*, 3 W. R. 165; 5 W. R. 82; *Bhuggabutt v. Goro Prosonno*, 25 C. 112; *Mandhar v. Lakshmi Ram*, 12 B. 247.

(5) *Doorga Pershad v. Shoo Prasad*, 7 C. L. R. 278.

(6) *Upendra v. Hem Chunder*, 25 C. 405; *Rojemoyee v. Troylulcho*, 29 C. 260 (274).

(7) *Asita v. Nibode*, 20 C. W. N. 901; 85 I. C. 127.

(8) *Jagadindra v. Hemanta*, 32 C. 129 P. C.

lead the dual existence of being both persons and properties, since they are both owners and the things owned.

The subject will have to be further examined in the sequel in connection with the law relating to religious endowments.

1677. Sub-division of property.—Though the General Clauses Act (1) as well as the Transfer of Property Act (2) contain definitions of "immoveable property" they do not dispense with a reference to Hindu Law. The definition of that term in the Transfer of Property Act is negative and incomplete (3) and that adopted in the General Clauses Act describes it as including "land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth." This definition only provides a working definition of that term as used in the Imperial Acts. (4) Even as such it does not define what is a "benefit to arise out of land." Moreover, as S. 2 of the Transfer of Property Act expressly saves the rule of Hindu Law against anything enacted in Chapter II it becomes necessary to enquire what is the actual import of the term in Hindu Law. This is all the more necessary as Hindu Law prescribes special rules for the alienation of immoveable property by the manager, the Hindu widow and other qualified owners of family property.

1678. Property may be variously subdivided according to the standpoint from which it is viewed. Hindu Law divides it into land and goods, or immoveable and moveable property. So far Hindu Law does not differ from the general law. It, however, regards certain incorporeal rights as immoveable property. The leading text on the subject is as follows:—

Yajñavalkya:—Let a king having given land or assigned a corrody cause his gifts to be written for the information of good princes who will succeed him (5)

To this Jagannath adds the following explanatory note: In the *Dipkalika* a corrody is thus explained: the gift of a future thing by a previous agreement in this form, "I will give a hundred *Suvernās* (6) every month of *Kartik* or out of this mine, or this village, I will annually give a hundred *Suvernās*, or I will monthly give one *Suverna*." (7)

1679. Nibandh.—What is then a *Nibandh*, translated as corrody? It is thus explained in the *Ratnakar*. "That which is fixed or made fast (*nibandhayte*) is a *Nibandh* (or corrody), fixed pension receivable out of mines or the like."

The correlation of *Nibandh* with land shows that the two were regarded as closely allied. The question then arises what they comprise and whether they are similar in their nature and quality. There can be no doubt that there are several incorporeal rights which Hindu Law classes as immoveable property. Such is a hereditary office which it treats as immoveable property. (8) So is also a right to officiate as priest at funeral ceremonies, (9) a right to worship an idol (10) and such is a *Nibandh* or corrody (11) which is an allowance whether secured

(1) Act X of 1897 S. 3 (25).

(2) Act IV of 1882.

(3) S. 8. See 1 Gour's Law of Transfer (4th Ed.) §§ 61-69.

(4) General Clauses Act. (X of 1897) S. 3.

(5) 2 Dig. pp. 162, 163 "Corrody—the gift of a thing assigned on a fund." Colebrooke's note The Sanskrit word is *Nibandh* cited in Mayukh. 11-1-6 (Maudlik) 19.

(6) "Gold pieces".

(7) 2 Dig. p. 163. To the same effect Mayukh 11-1-6.

(8) *Sinde v. Sinde*, 4 B. H. C. R. 51; *Balvantrav v. Purshotam*, 9 B. H. C. R. 99 ap-

proved in *Futtesangji v. Desai*, 13 B. L. R. 254 (263, 264) P. C.; *Beema v. Jamasjee*, 2 M. I. A. 29.

(9) *Futtesangji v. Desai*, 13 B. L. R. 254 P. C.; *Krishnabhai v. Kapalibat*, 6 B. H. C. R. 197; *Balvantrav v. Purshotam*, 9 B. H. C. R. 99; *Collector v. Krishnanath*, 5 B. 322; *Appana v. Nagid*, C. B. 544; *Raghoo v. Kassy*, 10 C. 78; *Sukh Lal v. Bishambhar*, 39 A 196.

(10) *Eshan v. Monmohim*, 4 C. 688 followed in *Jatihar v. Mukunda*, 39 C. 227 (280).

(11) *Government v. Kahanrai*, 14 M. I. A. 551; *Government v. Goswami*, 3 B. H. C. R. 222 (226); *Krishnaji v. Gajanan*, 88 B. 878.

on land or not.⁽¹⁾ The question was considered by a Full Bench of the Bombay High Court in connection with the question of limitation. The government of the Peishwa had by a sanad dated 1790-1791 A. D. granted an allowance for the performance of worship in a temple at Mahim which was annually payable and paid till 1859 when the Collector of Thana discontinued it. The plaintiff sued for its recovery and the question referred to the Full Bench was whether it was immoveable property within the meaning of the Limitation Act of 1859.⁽²⁾ On the construction of the sanad the grant was found to be permanent, irresumable and substantially alienable. It was contended for the appellant that the question whether the subject matter of the suit was or was not immoveable property ought not to be determined by a reference to Hindu Law. But the court held that as the term "immoveable property" had not been defined in the Act and even if it had been, so as to connote an interest in immoveable property, its nature and quality could only be determined by Hindu Law and usage according to which a *Nibandh*⁽³⁾ or corrody⁽⁴⁾ signifies anything which has been promised deliverable annually or monthly or at any other fixed period. Continuing the court said: "The Hindu authorities, which we have quoted, seem to show that a pension or other periodical payment or allowance granted in permanence is *Nibandh* whether secured on land or not. Some of them favour the supposition that a private individual as well as a royal personage may create a *Nibandh*. Whether that view is sustainable is a question on which we do not intend to give any opinion, such being unnecessary, inasmuch as the present grant is from the Peishwa Government which it is admitted had full power to make it. We are unanimous in holding that the grant made by the sanad here is *Nibandh* and that for the reasons already given, we are bound to regard it as immoveable property or an interest in immoveable property within the scope of Act XIV of 1859, S. 1, clause 12." ⁽⁵⁾

1680. This view was supported by a decision of the Privy Council in which the same view was taken of a *Toda Gira*, *hag* which is a customary due owing its origin to the annual payment exacted by the Girasias from the village communities in certain territories in the West of India by violence and wrong in the nature of blackmail but which on the assumption of Government by the British, acquired by long usage a quasi-legal character as customary annual payments. But inasmuch as the payments were made to Girasias who might be Mahomedans, the question of the character of *hak* could not be considered with reference to Hindu Law. They then added: "Whatever may have been the origin of the *hak*, it must be assumed to be now a right to receive an annual payment which has a legal foundation and of which the enjoyment is hereditary; and that the liability to make the payment is not personal to the respondent but one which attaches to the Inamdar *virtute tenure*. This being so, their Lordships have come to the conclusion that the interest of the *hakdar* does possess the qualities both of immobility and of indefinite duration in a degree which, if the question depended on English law, would entitle it to the

(1) *Kristothone v. Nandarani*, 85 C. 889 (894).

(2) S. 1 (12) Act XIV of 1859.

(3) The word *Nibandh* originally signified any piece of composition. It was then applied to a piece of composition issuing from a king. Thence by the transference of idea the word came to signify any hereditary office conveyed by a royal charter.

(4) "Corrody" is a word of medieval origin, properly signifying a peculiar right,

viz., the grant by the royal or other founder of an abbey of certain allowances out of the revenues of the abbey in favour of a dependant or servant" *Paiesangji v. Kalyanrayaji*, 10 B. H. C. R. 281 (283, 289) P. C.

(5) *Collector v. Hari*, 6 B. 546 (559) F. B. overruling *O. A. Collector v. Krishna Nath*, 5 B. 329 in which the allowance was not treated as immoveable because it was not charged on land.

character of a freehold interest in or issuing out of a real property ; (1) that upon the general principles of construction applicable to an Indian statute, it must be held to be "an interest in immoveable property within the meaning of Act XIV of 1859." (2)

1681. This case is then an authority for the proposition that a fixed perpetual payment assured by the ruling power must be regarded as immoveable property even though it is not charged on land. As compared to this *Varshasans* (8) are unquestionably immoveable property since they are annuities charged on land. (4)

1682. Such is also a *Malikana* (5) and a *Nankar* allowance receivable out of the profits of a particular village (6) and such is the right to manage a *Saranjam*. (7)

But the emolument of an office due by custom is not immoveable property, (1) nor is a claim for maintenance unless it is charged on land. (9)

160. Property of any kind may be transferred except as otherwise provided by any law for the time being in force and by the following clauses —

Inalienable
property.

- (a) The chance of obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature.
- (b) *Res extra commercium*.
- (c) Co-parcenary interest except to the extent hereinbefore allowed.
- (d) Maintenance grant.
- (e) Personal grant.

Synopsis.

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| (1) <i>Inalienable property</i> (1683). | <i>alienable</i> (1686). |
| (2) <i>Spes successionis</i> (1684). | (5) <i>Maintenance grant</i> (1687). |
| (3) <i>Res extra commercium</i> (1685). | (6) <i>Personal grant</i> (1688). |
| (4) <i>Co-Parcenary interest</i> how far | |

1683. Analogous Law.—This section is adapted from S. 6 of the Transfer of Property Act which leaves the rule of Hindu Law intact. But as there is no rule of Hindu Law to the contrary it follows that that section equally applies to Hindus. This rule renders the properties specified in its seven clauses generally untransferable. It does not imply that other property is transferable ; for all that it means is that Hindu Law interdicts the transfer of these seven species of property. For the rest it leaves the general law to take its course.

- (1) See 1 Cruise's Digest p. 47 plac. 10.
- (5) *Fatesanaji v. Kalianrayaji*, 10 B. H. C. R. 281 (291) P. C.
- (8) "Annual allowances."
- (4) *Keshav v. Vinayak*, 22 B. 22.
- (5) *Heeranund v. Oseerun*, 9 W. R. 102 ; *Bhoolal Singh v. Neemo*, 12 W. R. 498 ; *Gobind v. Ramchunder*, 19 W. R. 84.
- (6) *Deputy Commissioner v. Jagiwan*, 88

- I. C. (O) 461.
- (7) *Norajan v. Vasudeo*, 15 B. 247.
- (8) *Rathna v. Tiruvenkata*, 22 M. 851 ; *Raoji v. Bala*, 15 B. 185 ; contra dissenting from contra in *Ohagan Lal v. Bapubhai*, 5 B. 68.
- (9) *Beer Chunder v. Raj Coomar*, 9 C. 585 (555)

1684. Spes successionis.—A mere *spes successionis* cannot be transferred. Such is the chance of an expectant reversionary heir

Cl. (a) to an estate in possession of a female heiress. Even under the English law a mere chance of succeeding to an estate was a bare possibility incapable of assignment ⁽¹⁾ though equity would enforce a contract to convey the estate when it fell in. ⁽²⁾ But the Privy Council have held "that the principle of English law which allows a subsequently acquired interest to feed, as it is said, the estoppel does not apply to Hindu conveyances."⁽³⁾ It is equally clear that the same rule would hold good in cases governed by S. 6 (a) of the Transfer of Property Act, since that clause prohibits the sale of a chance directly, it equally prohibits its sale circuitously and moreover such a contract, if permitted, would defeat the law namely S. 6 (a) and would therefore be illegal within the meaning of S. 23 of the Contract Act. The result then is that such expectancies can neither be sold ⁽⁴⁾ nor their sale contracted for ⁽⁵⁾ For a fuller discussion on clause (a) See the author's Law of Transfer, 4th Ed. (§§ 200, 205).

1685. Res extra commercium.—This clause corresponds to S. 6 (d) of the Transfer of Property Act where its effect will be

Cl. (b). found set out in detail. See Law of Transfer, 4th Ed. (§§ 219, 220).

1686. Co-parcenary interest.—The nature of co-parcenary interest and the extent to which it may be transferred has already

Cl. (c). been the subject of a previous discussion (§ 1251).

1687. Maintenance grant.—It has already been seen that a maintenance grant is a personal right, and unless charged on land it creates no right *in rem* capable of transfer. ⁽⁶⁾

Cl. (d). **1688. Personal grant.**—This corresponds to S. 6 (d) of the Transfer of Property Act and will be found discussed under that

Cl. (e). clause in Gour's Law of Transfer, 4th Ed. (§ 218)

161. Where an absolute estate is given by a transfer or devise with a condition superadded which restricts the grantee's legal power of transfer or mode of enjoyment, the condition is void.

Repugnant condition

(2) Such are the conditions against alienation and partition of the property or that the alienee should accumulate its income or submit to the control of certain trustees.

(3) But there is nothing illegal in the grantor stipulating that the grantee shall live in his house.

(1) *Jones v. Roe*, 3 T R 88 (98); 100 E.R. 470; *In re Parsons Stockby v. Parsons*, 45 Ch D. 51.

(2) *Wiseman v. Roper*, 1 Ch. R. 158; *Wethered v. Wethered*, 2 Sim. 188; 57 E. R. 767; *Lyde v. Mynn*, 1 Myl. & K. 688, 39 E. R. 889 contra Per Lord Eldon *Carleton v. Leighton*, 8 Mer. 667; 86 E. R. 255; *Harwood v. Tooke*, 2 Sim. 192; 57 E. R. 761.

(3) *Doolichund v. Brojo Bhookun*, 6 C. L. R. 528 (532, 533) P. C. S C. 10 C L R. 61 P.C. cited and followed in *Ram Nirunjun v. Praijag*, 8 C. 188 (144).

(4) *Dhoorjeet v. Dhoorjeet*, 30 M. 201.

(5) *Sham Sundar v. Achhan Kunwar*, 21A. 71 (79, 80) P. C. *Sumsuddin v. Abdul*, 31 B. 165; *Dhoorjeet v. Dhoorjeet*, 30 M. 201; *Kakavalapudi v. Kannukuri*, 28 M L J 660; 39 I. C. 241 contra *Gitabai v. Balaji*, 17 B 282 (decided before the Transfer of Property was extended to Bombay); *Nasirul Haq v. Fiazul Rahman*, 33 A 457; *Ram Nirunjun v. Prayag*, 8 C. 188.

(6) See the subject discussed in 1 Gour's Law of Transfer 4th Ed., §§ 228, 224.

Illustrations.

(a) A devises his estate to B on condition that he does not alienate it. The devise is good but the condition against alienation is invalid and void. (1)

(b) A devises his estate to B and C on condition that it shall not be partitioned between them. (2) The devise will take effect without the condition which is void. (3)

(c) A devises his estate to an idol on condition that after defraying the cost of its worship the surplus should maintain the family but that it shall not be liable for any debts. The devise operates as an onerous bequest in favour of the family but the condition as to its non-liability for debts is void. (4)

(d) A bequeaths his estate to B but at the same time provides that C will manage it for B. B takes the estate without being obliged to have it managed by C. (5)

Synopsis.

- (1) *Restraint on alienation in- (3) Conditions void for remoteness valid* (1689). (1691).
 (2) *Provision for enjoyment of (4) Valid conditions* (1692).
Profits only (1690).

1689. Analogous Law.—This is the third rule formulated in the Tagore case (6) and corresponds with S. 11 of the Transfer of Property Act and S. 125 of the Succession Act. The rule was thus stated: "If the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected as being repugnant or rather as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize". (7) This rule is a necessary corollary of the general rule that no man can be permitted to create an estate unknown to the law. If a grant or devise were permitted with conditions superadded as to the mode of its enjoyment, it would subject ownership to varying incidents destroying its certainty and meaning and no one would deal with property of which the incidents may be varied and not easily ascertainable.

The Privy Council have in a series of cases held that the rule here stated is applicable to Hindus. (8)

1690. So where the testatrix bequeathed her estate to her family deity for its worship and the surplus for the support of her family adding that her property will not be transferable or liable for any person's debts but nevertheless one of her son's creditors attached it in execution of his money decree, it was held that the estate was charged with the daily worship and that the clause against transfer was invalid, the estate being liable for seizure in execution by the

(1) *Tagore v. Tagore*, 9 B. L. R. 377 (895)
 P. C.; *Ashutosh v. Doorgachurn*, 5 C. 438 P. C.;
Sookhmoy v. Monohurri, 11 C. 409 P. C.;
Raikishori v. Debendranath, 15 C. 409;
Chundi Churn v. Sideshwari, 16 C. 71 P. C.;
Lalit Mohan v. Chukkumlal, 24 C. 884 P. C.

(2) *Mokondo v. Ganesh*, 1 C. 104; *Raishari v. Debendranath*, 15 C. 409 P. C.;
Narayan v. Kanman, 7 M. 815.

(3) *Raishori v. Debendranath*, 15 C. 409 P. C.

(4) *Ashutosh v. Doorga*, 5 C. 438.

(5) *Bhagbutti v. Bholanath*, 1 C. 104.

(6) *Tagore v. Tagore*, 9 B. L. R. 377 (895) P. C.

(7) *Ib.*

(8) *Tagore v. Tagore*, 9 B. L. R. 377 (895) P. C.; *Ashutosh v. Doorga*, 5 C. 438 P. C.; *Shookmoy v. Monohurri*, 11 C. 684 P. C.; *Raishori v. Debendranath*, 15 C. 409 P. C.; *Chandi Charan v. v. Sideshwari*, 16 C. 71 P. C.; *Lalit Mohan v. Chukkun Lal*, 24 C. 884 P. C.

creditor of the testatrix's son. ⁽¹⁾ In another case it was laid down that Hindu Law did not allow such a disposition of property as would have been made by a testator whose intention was to give to his descendants the profits only of his estate for their benefit, for the maintenance of religious services, but not to dispose of the estate itself. ⁽²⁾

1691. Void restrictions may be ignored if they are separable. But if they are not, then the whole deed would fail. The testator executed three deeds in 1856, 1862 and 1870. In the first he prescribed the shares which his adopted son and natural sons would receive in his estate. The second apportioned his debts and the family dwelling house. The third provided that until the youngest should attain majority the names of his adult sons should not be registered nor should they be able to interfere with the property. He then added that even on attaining majority his estates shall be managed by his *Amlas* who will defray the expense of the worship and pay the balance to his sons. A gift over was, that on the death of a son, the surviving sons should take his share proportionately to their own, and that if any of the sons so taking should die leaving sons, such sons should receive their proportionate parts of the deceased son's share. The court held that the will contained clauses which were invalid but severable from the rest and as such it upheld the will, ignoring its subsequent provisions creating a perpetuity and the special rule of succession as regards the share of a son after he had succeeded to another deceased son. ⁽³⁾

1692. Valid conditions.—The difference between valid and invalid conditions is one of degree. But they are nevertheless distinguishable. So in the second case arising out of the Tagore will, the question was whether the devisee *J* had not forfeited his life to estate devised to him on condition that he lived in his *baithak khana*. It was held that the devisee had substantially complied with the condition by keeping it open and occupying it occasionally. ⁽⁴⁾

Rule against per- **162.** A perpetuity cannot be created by
petuity. transfer or devise, except for religious and
charitable purposes.

Synopsis.

- (1) *Rule against perpetuity in Hindu Law* (1693-1695). (3) *Religious and charitable gifts excepted* (1697).
(2) *Gift to unborn persons* (1696).

1693. Analogous Law.—The rule against perpetuity is enacted in S. 14 of the Transfer of Property Act and S. 101 of the Succession Act. As these sections save any rule of Hindu Law to the contrary, it is sufficient to state that the Hindu Law equally abhors a perpetuity. It was so held by the Privy Council.

1694. The partial working of this rule will be illustrated in the following case in which the testator had provided that while his estates should remain intact, its income should be applied to the worship of the deity upon which Privy Council observed: "His object appears to have been to create a perpetuity as regards the estate, and to limit, for an indefinite period, the

(1) *Ashutosh v. Doorga*, 5 C. 498 (444) P. C.
P. C.; *Sonatun v. Juggut Soondaree*, 8 M. I. (8) *Raikishori v. Debendra Nath*, 15 C. A. 66. 409 (421) P. C.
(2) *Shookmoy v. Monohurri*, 11 C. 684 (692) (4) *Tagore v. Tagore*, 14 B. L. R. 80 P. C.

enjoyment of the profits of it which would not be allowed by Hindu Law." (1) The will being thus set aside as void, there was an intestacy and the natural heirs were allowed to succeed. The case would have however, been different, if the testator had first given the estate and then restrained the alienee to use only its profits in which case the gift would have taken effect without the subsequent clause creating a perpetuity. It was so held in another case also decided by the Privy Council. (2)

1695. The limitations and provisions of Ss. 14, 15, and 20 of the Transfer of Property Act have since been directly made a part of Hindu Law by the statutory enactment known as the Hindu Disposition of Property Act. (3)

1696. On the same principle Hindu Law does not favour the conditional grant of property to persons yet unborn, who may happen to be the living descendants of the grantees named, at some future and indefinite period, upon the occurrence of an event, which may possibly never occur. (4) Such was the deed executed by one Rai Bind Narain in 1778 A. D. in favour of the plaintiff's ancestors in which he assigned seven villages "in the nature of a fixed remuneration. However as you are now being supported by the profits derived from three villages and by other means, for this reason four villages have not been made over to you . . . If ever in the time of my descendants you are not provided with the means of maintenance (by them) then let the descendants of yours who may be living at that time produce this deed, and taking possession of the three abovementioned villages and also of the four villages (now held) khas (by me) enjoy possession of them rent free from generation to generation . . . These seven villages will in no way appertain to my kingdom." The Privy Council held that that the condition "if you are not supported" was not shown to have been fulfilled, and if it was, that (ii) the grant was void for remoteness and uncertainty, or that (iii) it was a grant in favour of unborn and therefore equally ineffectual. "It is immaterial in what way an interest such as the appellants claim is created. If it prevents the owner from alienating his estate discharged of such future interest, before the emergence of the condition, and that event may possibly never occur, it imposes a restraint upon alienation which is contrary to the principles of Hindu Law". (5)

1697. Religion and charity excepted.—The rules against perpetuity and remoteness yield to religion and charity both under the statutory (6) as well as under the Hindu common law (7)

163. A direction to accumulate income is valid if limited to the period during which the testator is entitled to direct and control the course of devolution of property.

Synopsis.

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|---|--|
| (1) <i>Scope of the rule against accumulations</i> (1698). | (3) <i>Limits to the period for which accumulation can be directed</i> (1698). |
| (2) <i>Rule applicable only to self-acquired property</i> (1698). | |

(1) *Shookmoy v. Monohurri*, 11 C. 684 (89) P. C.

(2) *Raikishori v. Debendra Nath*, 15 C. 409 (421) P. C.

(3) Act XV of 1916.

(4) *Chandichurn v. Sidheswari*, 16 C. 71 (79) P. C.

(5) *Chandichurn v. Sidheswari*, 16 C. 71 (80) P. C.

(6) S. 17, Transfer of Property Act, S. 105, Succession Act.

(7) *Lalu Mohun v. Chukkun Lal*, 24 C. 884 P. C. reversing O. A. *Chukkun Lal v. Lalit Mohun*, 20 C. 906.

1698. Analogous Law.—The rule against accumulations is enacted in S. 104 of the Succession Act and S. 18 of the Transfer of Property Act. The Hindu rule is more elastic and permits of accumulations if limited to the period during which the testator is entitled to control the course of devolution of property. The history of the rule will be found set out in extension the present writer's work on the Law of Transfer ⁽¹⁾ to which reference is invited for a fuller discussion of the Hindu rule on the subject.

The rule has no application to ancestral or joint property since such property follows a special line of devolution uncontrolled by the owner. It can apply only as regards self-acquired property. Since the testator's powers have now been enlarged by the enactment known as the Hindu Disposition of Property Act his power to accumulate has been correspondingly enlarged.

The rule stated in the section is drawn from the statement of law by Jenkins, J. (now Sir Lawrence Jenkins) ⁽²⁾ who said: "Now it appears to me, on principle, that if accumulations are permitted then in the absence of special provision, the limit must be that which determines the period during which the course of devolution of property can be directed or controlled by a testator." ⁽³⁾ In this case the testator had directed his trustees to accumulate the income until the testator's widow should adopt a son and the son should attain the sixteenth year, which was upheld as infringing no rule of law. A direction to accumulate for all time or until the accumulations aggregate three lacs or any certain amount would then be repugnant and void. ⁽⁴⁾ If a direction to accumulate up to three lacs were good, there is no reason why a similar direction to accumulate up to twenty crores before division should not also be good. But in such cases the devise fails not because the direction is *per se* invalid, but because it is arbitrary and repugnant to the nature of the interest created or because it created a perpetuity, or because if the direction were held valid, it might lead to divisions being made amongst persons unborn at the time of the testator's death, or because of uncertainty, it being impossible to ascertain at the testator's death who would be entitled to participate in the several divisions of accumulations directed to be made since it cannot be ascertained as to when the accumulations directed to be made, would attain the requisite amount to become divisible. It may then be impossible to say within what degree of relationship the descendants of any deceased person would be when the time for division might arise. A direction for accumulation would thus by indefinitely postponing the rights of expectant heirs, create confusion. As Norman, J. observed in a case "a testator cannot in giving his property by will impose conditions in contravention of the objects for which property exists, or contrary to the policy of the law. For instance, suppose an estate were given to a man on condition that it should be allowed to relapse into a jungle or never be cultivated, no one could doubt that such a condition would be void." ⁽⁵⁾ Consequently it has been held that a provision in a will postponing the enjoyment of the property by the son beyond the period of minority is invalid ⁽⁶⁾ and a trust to accumulate for 99 years, without any

(1) 1 *Gour's Law of Transfer* (4th Ed.) S 488, pp. 819, 820.

(2) *Amrito v. Surnemoje*, 24 C. 589 O. A. (reversed on another point) 25 C. 662 O. A. to P. C. 27 C. 996 P. C.

(3) *Amrito v. Surnemoje*, 24 C 589 (615).

(4) *Per Peacock, C. J. in Krishnamani v. Ananda*, 4 B. L. R. 281 (277).

(5) *Kumara v. Kumara*, 2 B. L. R. (O.C.) 11 (25).

(6) *Bramamayi v. Jages Chandra*, 8 B. L. R. 400; *Mokoondo v. Gonash*, 1 C. 104; *Cally Nath v. Chunder Nath*, 9 C. 878.

direction as to its disposition after the limitation, was similarly held void. So in another case the testator directed that his estate should remain intact, providing for religious services to be kept up by his family from the profits of the estate, his will being that "his heirs, sons, son's son's great grandsons and so on in succession should be entitled to enjoy such profits." There were clauses for the accumulations of the profits of a certain portion of the estate and forbidding alienation. It was held that the will was invalid since the testator did not intend to convey the corpus but merely its income. "His object appears to have been to create a perpetuity as regards the estate and to limit for an indefinite period the enjoyment of the profits of it, which would not be allowed by Hindu Law. It is true if the bequest had been of rents and profits and it appeared that it was the intention of the testator to pass the estate, those words would be sufficient to do it; but what their Lordships have to do is to find the intention, looking at the words of the provisions of the will; and they gather from those words that it was not his intention to pass the estate." (1)

164. The principle of election enacted in Chapter XXVII of the Succession Act, and S. 35 of the Transfer of Property Act applies to the transfers and bequest of Hindus.

Synopsis.

- (1) *Principle of election applicable to Hindu Law* (1699). (2) *Rule of equity and justice* (1699).

1699. Analogous Law.—Though the statutory rules of election do not of their own force apply to Hindus still being rules founded upon the highest principles of equity they have been held to be equally applicable to them. (2) So where a Hindu widow devised the estate which she had inherited from her husband to *A* and a legacy to *B* both being the heirs of her husband, *B* sued for the legacy under the will and for half the immoveable property as her husband's heir, it was held that he should be put to his election whether to take the legacy under the will or half the property as heir of the testator's husband. (3) A person who by his act or conduct elects to take under a will is precluded from maintaining a suit on the basis of a claim in opposition to the will. So where the testator bequeathed an estate as his self-acquired property the legatee obtained probate of the will and possession of the property devised to him. He then sued for recovery of the estate on the ground the property was ancestral but the court threw out his suit on the ground that having by his conduct elected to take under the will the plaintiff could not turn round and set up a claim in opposition to the will. (4) The legatee electing to accept a sum of money bequeathed to him in repayment of a debt, cannot claim the same amount once again as a legacy. (5) Having however failed to obtain it as a debt, he is not precluded from afterwards claiming it as a legacy. (6)

(1) Per Peacock, C. J. in *Kumara v. Kumara*, 2 B. L. R. (O. C.) 11 (36).

(2) *Shookmoy v. Monohurri*, 11 C. 684 (692, 698) P. C. affirming O. A. 7 C. 269.

(3) *Mangal Das v. Ranchoddas*, 14 B. 488; *Kamubai v. Dossa*, 15 B. 443; *Tribhovandas v. Smith*, 20 B. 316 O. A. (reversed on a diffe-

rent point) 21 B. 349; *Rajamannar v. Venkatakrishna*, 25 M. 861 (864, 866).

(4) *Mangal Das v. Ranchoddas*, 14 B. 488.

(5) *Tribhovandas v. Purshottam Das*, 20 B. 316 (335) reversed O. A. (on a different point) 21 B. 349.

(6) *Rajamannar v. Venkatakrishna*, 25 M. 861 (864, 865).

**Transfer or devise
of self-acquired
property.**

165. A person may transfer or devise his self-acquired property.

1700. Analogous Law.—The rule here stated now appears to be a truism; and so it is. But it has emerged out of Hindu Law after a prolonged struggle, in which the texts tied the acquirer down to the rule that whatever he acquired was the property of the family to which he belonged. But natural justice has at last triumphed over the written text and it is now established that a Hindu is free to transfer or devise his self-acquired property, whether moveable or immoveable.

Power of the manager, trustee guardian shebait, female heir to transfer.

166. (1) The manager, trustee, guardian, and the shebait are all entitled to transfer the property entrusted to their management for the sake of necessity or benefit of the estate or of the family members or the ward or the trust as the case may be.

(2) The father of a joint family may transfer its property for the same purpose or for the satisfaction of his own antecedent debts.

(3) The widow, and other female heirs possess similar powers of alienation for legal necessity or benefit of the estate.

Synopsis.

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|---|---|
| (1) <i>Legal necessity</i> (1701). | (4) <i>Powers of father of a joint Hindu family</i> (1701). |
| (2) <i>Benefit</i> (1701). | |
| (3) <i>Powers of manager, trustee, guardian, etc., to alienate property</i> (1701). | (5) <i>Alienation by female limited owner</i> (1701). |

1701. Analogous Law.—That the manager, the trustee, the guardian of a minor and the head of a religious endowment all possess similar powers of alienation is now settled by the Privy Council. (1) The father wields these powers in his capacity of manager, in addition to which by reason of his relationship and apart from his position as manager, he possesses the textual right of alienating the joint property of himself and of his sons in satisfaction of his own antecedent debts. This is explained by the Privy Council who said: "The law of the Mitakshara has, however given to the father in his capacity of manager and head of the family, certain powers with reference to the joint family property. The general principle in regard to that matter is that he is at liberty to effect or to dispose of the joint property in respect of purposes denominated necessary purposes. The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or *muth* or of the guardian of an infant family. In all of the cases where it can be established that the estate itself that is under administration demanded or the family interests justified the expenditure, then those entitled to the estate are bound by

(1) *Sahu Ram v. Bhup Singh*, 39 A. 487 (448).

transaction. It is not accurate to describe this as either inconsistent with or an exception to the fundamental rule of Mitakshara. For where estate or family necessity exists, that necessity rests upon the co-parceners as a whole and it is proper to imply a consent of all of them to that act of the one which such necessity has demanded." (1)

Their Lordships went on to add that in addition to these powers the father possessed the exceptional power of alienating the family property for his own antecedent debts not shown to be illegal or immoral. (2)

Their Lordships were dealing with the case of the father and not of the widow who however possesses no greater power than the guardian or manager added to which she is under a further legal obligation to discharge her husband's debts for which she is entitled to alienate her inherited estate. (3)

(1) *Sahu Ram v. Bhup Singh*, 89 A. 487
(448) P. C

(2) *Ib.*, pp. 446, 447.

(3) *Bhawani v. Himmat Bahadur*, 88 A.
312 P. C

CHAPTER XV.

TRUSTS AND BENAMI TRANSACTIONS.

Form of trust.

167. (1) No form is necessary to create a trust for religious or charitable purposes.

(2) But a secular trust cannot be created otherwise than as provided in Ss. 5 and 6 of the Trusts Act.

Synopsis.

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|---|---|
| (1) <i>Public trust, how created</i>
(1702). | (3) <i>private trust</i> (1702).
<i>Imperfect gifts not to be converted into a trust</i> (1703). |
| (2) <i>Formalities for creation of a</i> | |

1702. Analogous Law.—Even under English law “technical language is not necessary to create a trust. It is enough that the intention is apparent. Thus it has been long settled that words of recommendation, request, entreaty, wish, or expectation, addressed to a devisee or legatee, will make him trustee for the person or persons in whose favour such expressions are used, provided the testator has pointed out, with sufficient clearness and certainty, both the subject matter and the object or objects of the intended trust.” (1) Where therefore the testator by his will left to his wife the whole of his property in the confidence that she would act justly to their children in dividing the same when no longer required by her, the wife by her will left to their children certain portions of such property leaving off, amongst other things, certain banking shares. These were seized by her creditors but the court released them holding that the wife took under her husband’s will a life-interest only in his property with a power of appointment in favour of the children and that the shares belonged to the child and could not be sold in execution of the decree as part of the estate of the wife. (2)

A trust is created when the author of the trust indicates with reasonable certainty by any words or acts, (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, (d) the trust property, and (e) the transfer of such property to the trustee, unless the trust is declared by will or the author of the trust is himself to be the trustee.

Reading Ss. 5 and 6 of the Trusts Act together it would seem that a specific oral declaration of trust on points (a) to (d) would be enough to create a trust without transfer where the author was himself the trustee. (8)

1703. Imperfect gift.—Where there has been a clear intention to make a gift but on account of some omission on the donor’s part, that intention has failed, the courts will not erect a trust on the imperfect gift. When the intention is to make a gift, and the intention has failed for want of transfer or any other

(1) *Jarman on Wills* (8rd Ed.) S 856 cited in *Raynor v. Mussourie Bank*, 2 A. 55 (58).

(2) *Raynor v. Mussourie Bank*, 2 A. 55.

(8) *Manchersham v. Ardesbir*, 10 Bom. L. R. 1209.

cause, the court will not convert what was meant to be an out and out gift into a trust. (1) No trust is created by words in the will to the effect that "the executors should give my brothers, their wives and children according to their (executors') wishes." (2) A person cannot do by intervention of a trustee what he cannot do directly by a gift. (3)

Trusts valid and
void.

168. A trust may be created for any lawful purpose, whether secular or religious.

Synopsis.

- (1) *Trust valid only if object lawful* (1704). (2) *Applicability of English law* (1705).

1704. Analogous Law.—Secular trusts are now subject to the Trusts Act (4) which however, exempts religious trusts from its operation. (5) Such trusts will be governed by Hindu Law which recognizes the creation of trusts as was stated in the Tagore case: "Property whether moveable or immovable must for many purposes be vested more or less absolutely in some person or persons for the benefit of other persons, and trusts of various kinds have been recognized and acted on in India in many cases. Implied trusts were recognized and established here in the case of *benami* purchases (6). . . and in cases of a provision for charity or for other beneficial objects, such as the professorship (7) provided for by the will under consideration, where no estate is conferred on the beneficiaries and their interest is in the proceeds of the property (to which no objection has been raised), the creation of a trust is practically necessary." (8)

1705. Quoting this, West, J., added in a case: "But while the substantive Hindu Law insists as strongly as any on the suppression of fraud and the fulfilment of promises, it fails to furnish the detailed rules by which effect is given to its principles in cases of trust. It contemplates no such power and flexibility in the legal machinery as are an integral element of the English equity system. If the court is called on to give effect to a trust in any given case, it looks indeed to the Hindu Law of property to determine the estate of the trustee; but in many of the duties it annexes to the estate, the rights it recognizes as arising from the position of beneficiaries, the means by which those rights are made effectual, it is governed by the rules of English equity. There are no others that it can apply. It has to take care, in applying them, not to violate the "laws, manners and customs and usages" of the native community as these may subsist. It must not allow a trust to be made a means of conferring a gift either *inter vivos* or by testamentary disposition upon a person not in existence at the moment when the donation is declared. It must not allow it to effect a course of devolution opposed to the Hindu

(1) *Milroy v Lord*, 4 De G. F. and J. 271 followed in *Manchershaw v. Ardehbir*, 10 Bom. L. R. 1409 (1. 16).

(2) *Kumaranami v. Sabharaya*, 9 M. 875; *Quere in Venkatachella v. Thathammal*, 4 M. L. C. R. 460.

(3) *Rajomoyee v. Troylukho*, 29 C. 260.

(4) II of 1882.

(5) *Ib.*, 8 1.

(6) Citing *Gopeekrist v. Gunga Persaud*, 6 M. I. A. 58.

(7) The Tagore Law Professorship provided for in the will construed in *Tagore v. Tagore*, 9 B. L. R. 377 P. C.

(8) *Tagore v. Tagore*, 9 B. L. R. 877 (401, 402) P. C.

Law of property and succession. Thus the operation of the native laws is preserved as to the estates that may be taken in property and the purposes to which they may be applied, while it gains a flexible adaptation to new circumstances from the English system. In meeting an exigency or taking cognizance of a form of right not provided for in the shastras the court, in exercising its jurisdiction under S. 41 of the charter, may certainly apply the Hindu Law. It must be careful not to overlook it, but taking the Hindu law as one of its data, it applies 'English law' also in the form of equity to all or nearly all the questions that arise." (1) These observations were made in a case in which the petitioner had in 1863 dedicated certain lands and a large sum of money to be applied to religious and charitable uses, vesting the same in trustees, one of whom had since died. The petitioner applied to fill his place, and the defence was that the surviving trustee was competent to administer the trust; but the court held that as the trust deed provided for the appointment of two trustees, they should be appointed. (2)

1706. The enactment of the Trusts Act, has placed all secular trusts under statutory control leaving only "public, private, religious or charitable endowments" as still amenable to the personal law of the parties.

1707. It is clear that since Hindu Law permits the dedication of property to religious and charitable uses it must necessarily permit the vesting of it in trustees but for whose intervention the purpose of the founder would be impossible of achievement. But the trusts can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognizes, and that, for the determination of those interests the beneficial interest in the residue of the property remains in the person, who, but for the will, would lawfully be entitled thereto. (3)

1708. The subject of religious and charitable endowments occupies an important place in Hindu Law and will be the subject of another chapter.

Benami transfer.

169. (1) A person does not acquire any interest in property by merely lending his name to another.

(2) Where one person holds property for another, he will be deemed to hold it in trust for another.

Synopsis.

(1) *Benami transfers common in India* (1709). (2) *Nature of benami transactions* (1710).

1709 Analogous Law.—The habit of acquiring and holding property *benami* so inveterate in India, is not merely confined to the Hindus; (4) nor indeed, is the habit confined to India, since the purchase of property by one in the name of another is not unknown in England, (5) though such instances are comparatively rare. But in India it is a habit which, though now on the decline, is yet maintaining a firm hold on the people.

(1) *Kehandas (In re)* 5 B. 154 (174).

(2) *Kehandas (In re)*, 5 B. 154 (175).

(3) *Tagore v. Tagore*, 9 B. L. R. 377 (402) P. C.

(4) *Gopee Krist v. Ganga Prashad*, 6 M. I. A. 53; *Monevie Sayyad v. Bebee Ultaf*,

13 M. I. A. 232; *Amrervoossia v. Ashrufoossia*, 14 M. I. A. 433

(5) *Pelham v. Gregory*, 1 Eden 516 followed in *De Silva v. De Silva*, 5 Bom. L. R. 784

1710. The case for *benami* may arise (i) where the father or manager acquires property in the name of the junior member for the benefit of the family; (ii) where the husband acquires property in the name of the wife; (iii) where similar acquisitions are made by strangers. Not only may property be acquired *benami* but it may be transferred and held *benami*. But the principle applicable to all cases is the same. As the Privy Council observed, '*benami* transactions are common amongst Hindus; but I am not aware that there is any authority for applying to them the doctrine of resulting trust as a presumption of law. On the other hand the presumption of advancement does not necessarily arise upon a purchase by a father in the name of his son. There seems then to be nothing in the Hindu Law which is contrary to either the plaintiff's or the defendant's view of this case. And the court must determine the case upon its own conviction deduced from the evidence of what the intention of Rajaram Gosai in this particular transaction was. We ought not however, in dealing with this question entirely to leave out of consideration the decisions of the English courts, because, although the presumptions which I have mentioned are not to be applied as legal presumptions, the process of reasoning on which they are founded so far as it rests on experience or observation of the ordinary principle of human action, and is not repugnant to any of the peculiarities of Hindu faith or custom may most legitimately and usefully be applied to the construction of ambiguous acts, and to the deduction of a particular intention from them; and further, because in determining what is and what is not admissible to prove intention, we must in this, as in every other case, follow the English law of evidence.' (1)

Proof of *benami*.

170. (1) There is no presumption in favour of *benami* and he who alleges that the apparent title is not the real title must allege and prove it.

(2) There is no presumption that a purchase made in the name of the child, wife or mistress is *benami* or by way of advancement, the question being one of intention which must be proved by the party asserting it.

Synopsis.

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| (1) <i>Evidence and proof of benami</i> (1711). | (5) <i>Badges of benami</i> (1714). |
| (2) <i>Tests for ascertaining benami character</i> (1711). | (6) <i>Oral evidence admissible to prove benami character</i> (1715). |
| (3) <i>Purchase in the name of relations</i> (1711, 1716). | (7) <i>Father and son, acquisitions by one in the name of the other</i> (1717). |
| (4) <i>No presumption in favour of</i> | |

1711. Analogous Law.—The first clause is in accordance with the general law but the second clause states a rule at variance with the English law, under which a purchase made in favour of the wife or child is treated as made by way of advancement in their favour though the relationship is a circumstance which should be taken into consideration. (2) In one case it was contended that where a property is purchased apparently by a wife and where neither party has given evidence to show who paid the purchase money, there

(1) *Gopee Krist v. Gunga Pershad*, 6 M. I. A. 68 (68).

(2) *Gopee Krist v. Gunga Pershad*, 6 M. I.

A. 68 explained in *Bilas Kunwar v. Deoraj*, 87 A. 557 (565) P. C.; *Abdul Rahman v. Maky*, 8 Bur. L. T. 87; 26 I. C. 102.

was a presumption that the purchase was made by the husband in the name of the wife. But the court held that there was no room for any presumption. (1) The case of a joint family is, however, different, since the presumption of jointness raises a presumption that the son has no funds of his own and any purchase made by the father is consequently presumed to be *benami*; (2) but otherwise there is no presumption in favour of *benami*. (3) A presumption in favour of *benami* may however, be raised by very little evidence. The points upon which a question of *benami* turns are:—

(1)—Who advanced the consideration (4); (2)—who had possession of the property; and (3)—of the document of title; (4)—was there any motive for the *benami*; and (5)—was the alleged *benamidar* so connected, as he is likely to have acted as a *benamidar*. (6) For example if the apparent purchase was by the wife but the husband continued to be in possession of the property there would be a presumption that the sale by the husband to the wife was merely *benami*. (6) So the presumption in favour of *benami* would be strengthened by proof of the payment of consideration. (7) In fact this is the real (8) though not the sole test. (9) There is no presumption that a purchase made by a person in the name of his mistress is made for her benefit; (10) though where such property was registered in the name of the woman who was therefore, the only person legally entitled to collect the rents, the facts that the person advancing the money possessed a number of other properties none of which was put in the name of the woman, that the value of the property in the woman's name was very small, and that the woman's right to the property was not disputed until some six years after the man's death, were held to be circumstances sufficient to show that the title passed to the woman. (11) So where a person brought a daughter of his wife's relative as his own child, treated her with affection and married her to his cousin at considerable expense, kept her husband as his *Khana-Dumad* (son-in-law to reside in the house) and purchased a valuable garden and a house in her name with his own money and treated that property as belonging to her up to the time of her death, it was held that the purchase was really for the benefit of the adopted daughter and not merely *benami*, and that the transaction was in effect a marriage settlement by way of gift of the money for which the property was purchased. (12)

1712. Benami not presumed.—There is no presumption in favour of *benami*. The presumption is rather the other way although the habit of *benami* is prevalent in India. (13)

(1) *Durga Prasad v. Prankrishna*, 3 Pat. L. W. 841; 39 I. C. 530.

(2) *Parbati v. Baikuntha*, 18 C. W. N. 428 P. C.; 24 I. C. 306 (814). *Nga Tin Gyi v. Nga Tze Aung*, 9 Bur. L. T. 35; 26 I. C. 12.

(3) *Durga Charan v. Khorda*, 20 C. W. N. 251; 29 I. C. 596 *Rider v. Kidder*, 10 Ves. 869 (purchase in name of mistress insufficient to convey title).

(4) *Pulyampatti v. Kuppier*, 9 C. W. N. 89 P. C.; *Chundermath v. Ramoy* 15 W. R. 7 P. C.

(5) *Kalishahu v. Kedarmal*, 38 I. C. 551.

(6) *Moolivahoo v. Iurushothom*, 29 B. 806 (813).

(7) *Sitara v. Mhd. Ishaq*, 92 I. C. 865.

(8) *Nrutyamoni v. Lakhanchunder*, 48 C.

660 F. C.; *Habibullah v. Nayac* (1914) P. L. R. 74; 24 I. C. 636; *Abid Ali v. Asgar Ali*, 7 N. L. R. 169; 12 I. C. 721; *Thillamuthu v. Nathudaya*, 17 I. C. (M) 740.

(9) *Ram Narain v. Mhd. Hadi*, 26 C. 227 P. C.

(10) *Bilas Kumwar v. Dasraj*, 37 A. 557 P. C.

(11) *Sitan v. Manbarta*, 5 I. C. 85.

(12) *Incemullah v. Aisha Bi*, (1918) P. L. R. 41; 18 I. C. 105.

(13) *Bustoor v. Shumsocnissa*, 11 M. I. A. 551, *Ramcbai v. Ramchandra*, 7 Bom. L. R. 298, *Shamial v. Joharsial* (1903) P. R. 27; 1 I. C. 732; *Uman Parshad v. Gandharp*, 15 C. 90 P. C.

1713. The courts even look with jealousy on *benami* transactions, requiring from one claiming under such title, a strict proof, ⁽¹⁾ though in view of its prevalence, even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose. ⁽²⁾ But though slight, it must be evidence and not mere suspicion. As Lord Westbury said: "Undoubtedly there are in the evidence circumstances which may create suspicion and doubt may be entertained with regard to the truth of the case made by the appellant, but in matters of this description it is essential to, take care that decision of the court rests not upon suspicion, but upon legal testimony." ⁽³⁾ Quoting this dictum in a later case Lord Shaw said: "In regard to *benami* transactions courts of law should not approach them with that scrupulous rigour which in other systems of jurisprudence may demand the existence of the clearest positive evidence that the *ex facie* owner of a property is a transferee for or holds the same for the interest of another. *Benami* transactions are very familiar in Indian practice, and as Lord Hobhouse said in *Uman Parshad v Gandharp Singh*, ⁽⁴⁾ even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose." The learned Judge however, added: "Still, such a transfer cannot be considered as nothing. The person who impugns its apparent character must show something or other to establish that it is a *benami* or sham transaction. This brings the legal situation into line with the general doctrine already cited from Lord Westbury." ⁽⁵⁾ The case in which these observations occur was decided upon the following facts: One Wilayat had mortgaged some of his villages to one Durga Prasad who brought them to sale in execution. They were purchased by Wilayat's wife for Rs. 10,000 who entered upon possession retaining it for 10 years after which she devised them to one M with the consent of her husband and her nephews. The mortgagee having in the meantime obtained a supplementary decree under S. 90 of the Transfer of Property Act attached the self same villages as belonging to his mortgagor Wilayat for whom he alleged his wife had purchased them *benami*. The Privy Council held that though a little evidence was sufficient to prove a *benami* that little must be evidence and not mere suspicion and that there was nothing in the case before them to take the case out of the rule that an apparent title was *prima facie* the real title unless the contrary was established.

This may be established by showing that the person purchasing the property had no means of his own, and that the consideration was advanced by the beneficiary who had possession and control over the property. ⁽⁶⁾

1714. Badges of benami.—The first and most material criterion of beneficial ownership is the source from which the purchase money is derived. ⁽⁷⁾ This does not mean the apparent passing of consideration—money from hand to hand which is not sufficient to establish the *bona fide* character of a sale. It is necessary to see that it is actually the money of the alleged vendee that is really paid to the vendor. ⁽⁸⁾

1715. Evidence of benami.—Oral evidence is admissible to prove that a transaction was *benami* ⁽⁹⁾ except in cases where the transaction was entered

(1) *Asimul v. Hurdarree*, 18 M. I. A. 895

(2) *Uman Parshad v. Gandharp*, 15 C. 20

(3) *Sreeman Chunder v. Gopal Chunder*, 11 M. I. A. 23 (48). To the same effect *Faer*

Baz v. Fakiruddin, 14 M. I. A. 234.

(4) 15 C. 20 P. C.

(5) *Mahlab Ali v. Bharat*, 28 C. W. N. 821 (324) P. C.

(6) *Haymobutty v. Sreekishan*, 14 W. R. 59.

(7) *Akbar Ali v. Fais Bukshi* 15 W. R. 12

(8) *Luchmee Kocar v. Fattahsingh* 24 W. R. 400.

(9) *Shamlal v. Amarendro*, 28 C. 460.

into with intent to defraud a third party in which case if the fraudulent purpose was accomplished, then the court applies the maxim *in pari delicto potior est conditio possidentis*. (1) Another exception favours the certified auction purchaser whose purchase cannot be shown to be *benami*. (2) But these are all exceptional cases and where there is no legal impediment to the proof of *benami* it may be proved by oral evidence. And where the oral evidence is inconclusive it is necessary to rely largely upon the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their action, and their subsequent conduct. (3)

1716. As *benami* implies repose of confidence between the benamidar and the beneficiary, the existence of relationship between

(2) **Relationship** the two is a circumstance which has a material bearing on the case. Such is a purchase made in the name of the wife or the daughter (4) or other near relations. (5)

1717. Father and son.—It has however, been laid down in several cases that a purchase of property by the father in the name of the son is presumed to be *benami* and on the father's death becomes the property of the family. (6) Such presumption would be strengthened if the son was a minor.

As between the vendor and vendee, where the latter produces the deed and the former proves his possession, the burden is still on him to show that the sale-deed was only executed *benami* and that he had not received the consideration though he acknowledged it in his sale-deed. (7)

(1) *Petheermal v. Muniandy*, 35 C 551 P. C. *Giberdhan v. Ritu Roy*, 23 C. 462, *Kilicharan v. Bank Lal*, 28 C. 962 N; *Banka Behari v. Raj Kumar*, 27 C 281.

(2) S. 60, (1) Civil Pro Code, 1908: S. 817, G. P. C., 1882.

(3) *Dalip Singh v. Nawal Kunwar*, 80 A.

258 P. C.

(4) *Kodeerun v. Lallan*, 14 W. R. 866.

(5) *Roop Dharee v. Noroin*, 1 W. R. 217.

(6) *Bhagbut v. Huro Gobind*, 20 W. R. 239

(7) *Durga Charan v. Khorda & Co.*, 29 I. C. (C) 696.

CHAPTER XVI.

GIFTS AND GRANTS.

1718. Topical Introduction.—The Hindu Law of gifts has been modified by S. 123 of the Transfer of Property Act, Chapter VII (Ss. 122-129) of which generally relates to gifts of both moveable and immoveable property. S. 129 however, saves gifts of moveable property made in contemplation of death, and the chapter generally saves any rule of Hindu Law except as provided by S. 123, the effect of which is that whatever may be the rule of Hindu Law, a gift must be made as therein provided. As this section prescribes the form in which a gift must be completed, the only points upon which the rule of Hindu Law is saved are those which affect the personal law of the donor and the donee, its construction and necessary incidents. These have all been described with some particularity in the author's Law of Transfer to which reference is invited for a fuller discussion on the topics here summarized.

Who may make a gift.

171. Any adult may make a gift of his property or any interest therein over which he possesses the power of disposal.

Illustration.

A agreed by deed to pay to his sister and on her death to her daughter Rs. 10 per annum from his self acquired estate. The deed creates a corrodio or charge on the profits of his estate which binds it in the hands of *A*'s widow. (1)

Synopsis.

- (1) *Power to make gifts* (1719). (3) *History of the law* (1719-1723).
(2) *Texts on the subject* (1719-1723). (4) *Father's power of gift* (1725).

1719. Analogous Law.—The sacerdotal law gives naturally commend-
Historical retro- ed the making of gifts to the Brahmins as the high road
spect. to heaven. But as a curb upon his cupidity, Manu declared that "though permitted to receive presents, let him avoid a habit of taking them, since by taking many gifts his divine light soon fades." (2) But all the same the donor was encouraged to make continual gifts.

Manu :—223. Let each wealthy man continually and sedulously perform sacred rites, and consecrate pools of gardens with faith : since those two acts, accomplished with faith and with riches honestly gained, procure an imperishable reward.

227. If he meet with fit objects of benevolence let him constantly bestow gifts on them both at sacrifices and consecrations to the best of his power and with a cheerful heart.

228. Such a gift how small so ever bestowed on request without grudging passes to a worldly object which will secure the giver from all evil.

234. And for whatever purpose a man bestows any gift, for a similar purpose he shall receive with due honour a similar reward.

(1) *Chalamanna v. Sudhamma*, 7 M. 28.

(2) *Manu* IV-186.

285. But he who respectfully bestows a present and he who respectfully accepts it, shall go to a seat of bliss, but if they act otherwise, to a region of horror. (1)

1720. Yajnavalkya's dissertation on gifts is contained in the Achar Kand and proceeds on the lines of Manu.² It has no legal value. The Mitakshara⁽³⁾ and other texts follow the same line. All regard gift as a pious act and therefore relegate it to the Achar Kand of their works.

1721. Hindu Law divides gifts into four classes: (1) *Deya* or that which should be given; (2) *Adeyam* or that which should not be given; (3) *Dattam* or valid gifts; and (4) *Adattam* or invalid gifts. As to the *quantum* of interest, Hindu Law divides gifts as stated by Wilson, J. "Gifts are of three kinds—those which convey a present title and interest and a present right of enjoyment; those which are vested, that is present in interest, but in which the enjoyment is deferred; and those which are contingent, that is to say, in which neither title nor right of enjoyment is given at present; both depend upon future uncertain events. All these kinds of gifts are admissible among Hindus. All are recognized by the Succession Act, the Hindu Wills Act and the Transfer of Property Act." (4)

1722. As to *Deya* or what may be given, *Narad* allows that "what is left of the property after the expense of maintaining the family has been defrayed, may be given. But by giving away anything besides, a householder will incur censure." (5) He then describes the valid and invalid gifts as follows: "The price paid for merchandise, wages, (a present offered) for an amusement, (a gift made) from affection, or from gratitude or for sexual intercourse with a woman, and a respectful gift are the seven kinds of valid gifts." "Invalid gifts are the following: (1) what has been given by a man under the influence of fear, or (2) anger, hatred or (3) sorrow or (4) pain, or (5) as a bribe, or (6) in jest, or fraudulently (7) under false pretences (8) or by a child; or (9) by a fool, (10) by a person not his own master; or (11) by one distressed; or (12) by one intoxicated or (13) by one insane; or (14) in consideration of a reward thinking this man will show me some service, and so on, is invalid; (15) what was given from ignorance to unworthy man thought to be worthy or (16) for a purpose thought to be virtuous through ignorance. (6) The result of making and taking invalid gifts is penal: "Both the donee who covets invalid gifts and accepts them through avarice, and the donor of what ought not to be given who yet gives it away, deserve punishment." (7)

1723. This classification of void gifts differs from that of Manu who regards only the following gift as void: "Should money or goods be given or promised as a gift by one man to another, who asks it for some religious act, the gift shall be void, if that act be not afterwards performed" (6)

It is clear that neither this conception nor this classification of gifts is in accordance with the modern notions of jurisprudence, and though the rules of Hindu Law on gifts remains directly unaffected by the Transfer of Property Act, their interpretation in the light of modern notions of equity and justice has altered the original rules beyond all recognition.

(1) Manu IV—226, 228. Then follow (229—238) other verses promising various rewards to the giver of various things.

(2) Yaj. (Mandlik) pp. 186, 187.

(3) Mit II-V-VI.

(4) *Ramial v. Kanai Lal*, 12 O. 668 (1868).

(5) *Narad* IV—6, 83 S. B. E. 128, 129 To the same effect, Manu XI—7; Yaj. I 124; Vashisth VIII 10; Vishnu LIX.8.

(6) *Narad* IV—8 11; 83 S. B. E. 129, 130.

(7) *Ib.* IV—12; 83 S. B. E. 130.

(8) Manu VIII—212.

1724. The authority to make a gift depends upon the donor's power of disposal over the subject matter of gift. If it is his self-acquired property he is entitled to dispose it of by gift or devise at his discretion. But if it is his joint property, then his power of disposal is necessarily limited by the rights of his coparceners.

Again, his power of disposal may depend upon the nature of the property. If it is impartible, he cannot alienate it in parts; if inalienable, he cannot alien it at all. Then again the *quantum* of interest taken by the donee may depend upon the terms of the gift and the sex of the donee. These will be the subject of a future discussion.

The subject of gift of co-parcenary interest has already been the subject of discussion in the foregoing pages (Ss. 107, 109).

The subject of individual property and the extent to which it may be disposed of by gift will now be considered.

1725. Father's power of gift.—As regards the father's power of gift it is settled that under the Dayabhaga law, the father being the sole and undivided owner of all property whether moveable or immoveable, ancestral or self-acquired, he can make a valid gift or devise of any such property. (1)

But the powers of the Mitakshara father are limited, for the Mitakshara declares that the father has independent power in the disposal of effects other than immoveable for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth, but he is subject to the control of his sons and the rest in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor. (2) But as pointed out by the Privy Council, this text can no longer be literally enforced. (3) The question then arises, what are the limits within which the father is entitled to make a gift of his joint or separate property. It cannot be denied that the true measure of his power is to be found in the cases and not in the texts. His present power has been the result of gradual growth. At first the text was literally construed so far as to protect the sons. And the Privy Council accordingly laid down that if the father had no male issue, he was free to dispose of all his self-acquired property whether moveable or immoveable. (4) But later on it was discovered that the Mitakshara texts were themselves contradictory: for while in one place the father's wealth is declared to be "subject to the control of the sons" (5) in another place, it is said that the "sons must acquiesce in the father's disposal of his own self-acquired property." (6)

1726. These conflicting texts supported the conflicting decisions (7) till the law was finally settled by the Privy Council who upheld the father's unqualified power to dispose of his self-acquired property whether moveable or immove-

(1) Mit. 1-1-27 cited in *Suraj Bansi v. Sheo Pershad*, 5 C. 148 (164) P. C.

(2) *Mit. 1-1-27.

(3) *Suraj Bansi v. Sheo Pershad*, 5 C. 148 (164, 165) P. C.

(4) *Beer Perlab v. Rajender*, 12 M. I. A. 88.

(5) Mit. 1-1-27.

(6) Mit. 1-V-10.

(7) That he had full power of disposal was held in the following cases *Sudanund v. Bonomalles*, 2 Hay 205; *Mudhu Gopal v. Rani Buksh*, 6 W. R. 71; *Ojoodhya v. Ram-*

sarun, 6 W. R. 77; *Rajaram v. Tewary* 8 W. R. 15; *Bishen Pershad v. Bawa*, 10 W. R. 287; *Sudanund v. Soorjo*, 11 W. R. 426; *Bishen Pershad v. Bawa*, 20 W. R. 187 P. C; *Sipal v. Madho*, 1. A. 394; *Gangabai v. Vamanaji*, 2 B. B. C. R. 318; *Jugmohun Das v. Manguldas*, 10 B. 528; contra 1 Str. H. L. 261; 2 Str. H. L. 496 441, 450; *Maenatchee v. Chelumbra*, (1858) Mad. D. 61; *Muttumaran v. Lakshmi*, (1860) Mad. D. 227; *Nallatambi v. Mukunda*, 8 M. H. C. R. 455; *Ponnappa v. Pappurayyan-gar*, 4 M. 47; *Madhasookh v. Budree*, 1 N. W. P. H. C. R. 158.

able.⁽¹⁾ In so holding, their Lordships said: "It appears to them that the subject is one of those in which from the earliest times there have been two conflicting principles of law, one favouring the paternal integrity and the fixed succession of family property, and the other the free use of such property for the circumstances of the day. The controversies and conflicting decisions on the father's powers of mortgage and sale, for the payment of his debts out of the inheritance, and on the testamentary power, will occur to everybody who is familiar with Indian litigations of the past half century or so. On each of those subjects there has been a growing tendency, coincident with the growth of commerce, to give more effect to the latter of the two principles, viz., the use of property by the living generation, or its living heads."⁽²⁾ They then held that the father had full power of disposal of all his self-acquired property whether by sale, mortgage, gift or devise and that the presence of the sons was no curb on his power.

Gift how made.

172. A gift may be made in the form prescribed by S. 123 of the Transfer of Property Act.

Synopsis.

- (1) *Formalities of a gift* (1727). *essential* (1729).
 (2) *Statutory requirements* (1728). (4) *Gift to a class* (1730-1731).
 (3) *Delivery of possession not*

1727. Analogous Law.—The Hindu Law of gifts is unaffected by the provisions of Chapter VII relating to gifts in the Transfer of Property Act, S. 129 of which enacts as follows:—

Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Mahomedan law, or save as provided by S. 123, a rule of Hindu or Buddhist law.

1728. The effect of this clause on Hindu Law is that if there be any rule of Hindu Law inconsistent with the statutory rules enacted in Chapter VII then latter the would give way to the former. But there must be such a rule. If there is none the statutory rules will apply. But so far as regards S. 123, it applies overruling Hindu Law under which the one thing necessary was delivery of possession to the donee,⁽³⁾ writing being unnecessary and optional.⁽⁴⁾ Now that the rule of Hindu Law has been abrogated by S. 123 of the Transfer of Property Act a question has been raised whether the abrogation is both as regards writing and possession, or only as regards writing the necessity of which is insisted on in the statute, or to put it differently, if a gift complies with

(1) *Balwant Singh v. Rani Kishore*, 20 A. 267 (288) P. C.

(2) *Balwant Singh v. Ram Kishori*, 20 A. 267 (288) P. C.

(3) *Venkatachalla v. Thathammal*, 4 M. H. C. R. 460; *Harjivan v. Naras*, 4 B. H. C. R. (A. C.) 81; *Bank of Hindustan v. Premchand*, 5 B. H. C. R. (A. C.) 89; *Vasudev v. Narayan*, 7 B. 131; *Bhaskar v. Saraswathibai*, 17 B. 486; *Abaji v. Mukta*, 18 B. 688; *Gordhan Das v. Ramcoover*, 26 B. 449; *Moosabhai v. Yakubhai*, 7 Bom. L. R.

45 (49), *Krishnaji v. Varamasi*. (1880), C.P.S. C. Pt VIII No 24; *Dhuria v. Kadhi*, 1 C. P. L. R. 41; *Soni v. Panram*, 5 C. P. L. R. 68; *Kishan Rao v. Rukhma*, 11 C. P. L. R. 2; *Dagai v. Mothura*, 9 C. 864; *Tara v. Ghasiram*, 3 C. L. R. 247; *Dagain v. Mothura*, 12 C. L. R. 590.

(4) *Doe v. E. I. Co.*, 6 M. I. A. 267; *Hurrischunder v. Rajendur*, 18 W. R. 298; *Anonymus I-J* (O. S.) 195; *Balaram v. Appa*, 9 B. H. C. R. 121.

the requirements of S. 123, is it a good gift though there has been no delivery of possession in accordance with the requirements of Hindu Law.

1729. All the High Courts have now settled down to this view ⁽¹⁾ though the necessity of possession is yet at times insisted on. ⁽²⁾ It should however be noted that the rule as to writing is a negative rule and deduced from the absence of any provision as to writing as being essential to complete a gift to be found in Hindu Law which merely insists upon the delivery of possession as the indispensable necessity to complete the gift. This is the sole and single rule which S. 123 has abrogated. Its effect is to reverse the law as it was understood prior to its enactment in 1882 when a registered deed could complete no gift unless it was accompanied by the transfer of possession. Under the present law transfer of possession cannot effectuate a gift unless it is evidenced by a registered deed.

1730. This section merely deals with the rule of interpretation of a gift or devise made in favour of a class. What is then a class? The term is thus explained by Jarman. "A number of persons are popularly said to form a class when they can be designated by some general name as 'children' 'grandchildren' 'nephews', but in legal language, the question whether a gift is one to a class depends not upon those considerations, but upon the mode of the gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time and who are all to take in equal or some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons." ⁽³⁾

1731. The term "class" as used in this section and in Hindu Law is not used in the technical sense ascribed to it in English law. It is used in the popular sense as designating a body of persons who can be generally described as possessing the same attribute—such as sons, brothers, nephews and the like. ⁽⁴⁾

173 Subject to the provisions of Ss. 13, 14 and 20 of the Transfer of Property Act, 1882, a settlement, gift, or devise may be made in favour of a person not in existence at the date of the gift.

Synopsis.

- (1) *Hindu Law as to transfers in favour of unborn person* (1732-1733). (2) *Statutory modifications of the rule* (1732-1733). (3) *The Tagore case* (1733).

1732. Analogous Law.—This section is adapted from the Hindu Disposition of Property Act, 1916, ⁽⁵⁾ which was enacted to abrogate the rule of

(1) *Ramohandra v. Ranjit Singh*, 27 C. 242 (249); *Alabai v. Mussa*, 24 M. 518; *Acharatti v. Mathammal*, (1908) 4 M. L. T. 827; *Ra'aram v. Ganesh*, 28 B. 181; *Cursandas v. Ramcooberbai*, 3 Bom. L. R. 557 O.A. *ib.*, p. 874; *Jotaram v. Ramkrishna*, 27 B. 81; *Madhavrao v. Kashi Bai*, 34 B. 287; *Phulchand v. Lalokhu*, 25 A. 358; *Pahlwan v. Ram Bharose*, 27 A. 169; *Ramcharan v.*

Bhagwati, (1908) P. R. 52.

(2) *Govinda v. Malhari*, 8 C. P. L. R. 87; *Sani v. Pantham*, 5 C. P. L. R. 63.

(3) Jarman on Wills (6th. Ed.) 386 quoted with approval in *Krishna v. Almaram*, 15 B. 543 (548).

(4) *Bishen Chand v. Asmaida*, 6 A. 560 (574) P. C.

(5) Act XV of 1916.

Hindu Law of devise which did not allow a gift or devise to be made in favour of a person ⁽¹⁾ real or juridical, *e.g.*, an idol ⁽²⁾ not in existence at the time it took effect. Now since under Hindu Law, an estate cannot remain in abeyance but must vest in some one at the time of the donor's or testator's death, it followed that where the donee or the devisee was not in existence at the time of the former's death his disposition failed altogether. ⁽³⁾ But English law permitted, however, the creation of such future estates, subject to the limitations contained in Ss. 13, 14 and 20. With the passing of the Hindu Disposition of Property Act, it is not possible to extend the same rule to Hindus.

Though the operation of this section will best be seen in the subsequent discussion on the effect of future devises, it is not to be understood as confined merely to gifts and devises but applies equally even to transfers for consideration. ⁽⁴⁾

1733. The net result of the Hindu Disposition of Property Act is to allow of the creation of future estates subject to the provisions of Ss. 13, 14 and 20 of the Transfer of Property Act.

This Act has overruled a series of cases decided by the Privy Council and the courts in India in which the orthodox Hindu rule was enunciated and applied. ⁽⁵⁾

The leading Privy Council case was decided upon the construction of the will of the late Prasanna Kumar Tagore who died on the 30th August 1868 leaving his only son, the plaintiff, and two widowed daughters with six of their children him surviving. On the 10th October 1862 the deceased had executed a will which cut out the plaintiff with a statement that he had been already provided for in the testator's life-time, the real cause being his conversion to Christianity in 1851. The will purported to give all the testator's properties to four trustees of whom one Jatindra Mohan Tagore (hereafter to be called, *J.*) was one, who were to convert all personalty into cash and to apply the profits of the realty in payment of debts, legacies and annuities and the founding of the Tagore law professorship after which the realty was to be held by the trustees for the use of the said *J.* for life, and on *J.*'s death to the eldest son of *J.* who should be born during the testator's life, for the life of such eldest son, "and after the determination of that estate to the use of the first and other sons successively of the eldest son of *J.* according to their respective seniorities and the heirs male of their respective bodies issuing successively; and upon the failure or determination of that estate, to the use of the second and other sons of *J.* who shall be born during the testator's life" successively; according to their respective seniorities for the life of each such son respectively; and upon the failure or determination of that estate to the use of the first and other sons successively of such second or other sons of *J.* and the heirs male of their respective bodies issuing, so that the eldest sons of

(1) See the subject discussed in 1 Gour's Law of Transfer (4th Ed.) Ss. 438-440, 497.

(2) *Bhagabati v. Kalicharan*, 88 C. 468 (472) P. C.; *Rai Upendra v. Hemchandra*, 25 C. 405 P. C.; *Motivahu v. Mamubai*, 21 B. 709 P. C.; *Rajamoyee v. Troplukho*, 6 C. W. N. 267.

(3) *Tagore v. Tagore* 9 B. L. R. 877 F. C.

(4) *Ramasamy v. Chinnan*, 24 M. 449 (469); *Chundichurn v. Sidheswari*, 16 C. 71 P. C.

(5) *Tagore v. Tagore*, 9 B. L. R. 877 (894) P. C.; *Soorjeemoney v. Denobundo*, 6 M. I. A. 555; *Motivahu v. Mamubai*, 21 B. 709 P. C.; *Kally Prosonna v. Gopee*, 7 C. L. B. 241; *Kristnaramani v. Ananda*, 4 B. L. B. (O. C.) 281; *Colgan v. Administrator General*, 15 M. 424; *Javerbai v. Kalli Bai*, 16 B. 492; *Kashinath v. Chinmaji*, 80 B. 477 (490); *Bhagabati v. Kalicharan*, 82 C. 992 (1009) O. A. 88 C. 468 P. C.

J. born in the testator's life-time and his first and other sons successively, and the heirs male of their respective bodies issuing, may be preferred to and take before the younger of the sons of the said J. born in the testator's life-time and his and their respective first and other sons successively, and the heirs male of their respective bodies issuing and after the failure or determination of the uses and estates herein before limited, to the use of each of the sons of the said J. who shall be born after the testator's death successively according to their respective seniorities, and the heirs male of their respective bodies issuing so that that the elder of such sons and the heirs take before the younger of such sons and the heirs male of their and his respective bodies issuing and after the failure or determination of the uses and estates herein-before limited, then to the use of S the second son of the testator's brother after the failure or determination of that estate, then to the sons of S and their sons and the heirs male of their body respectively; in like manner for J.'s and after the failure or determination of the said several estates and uses to the first and other sons and their sons and the heirs male of their bodies of L successively and respectively in like manner as in the case of the sons of J and S.

The will then contained a provision that adopted sons shall be deemed to be sons of the body within the will, and be postponed to the actual issue of the body.

It next provided that the estates of inheritance shall not be alienable.

The plaintiff sued for cancellation of his father's will as carving out estates inconsistent with Hindu Law.

Phear, J. dismissed the suit as disclosing no cause of action but the decree was reversed on appeal by Sir Barnes Peacock, C. J. and Norman, J. who held portions of the will void. Both sides appealed to the Privy Council whose judgment was delivered by Willes, J. who laid down the following rules:—

(1) A grant or bequest *prima facie* conveys the entire interest of the grantor unless it is limited by words clearly expressed or necessarily implied.

(2) All estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance are void, as such. (1)

(3) Where an absolute estate is given by the gift or will, a condition repugnant to the grant or restricting its mode of enjoyment, is void.

(4) A person capable of taking under a will must be such a person as could take a gift *inter vivos*; and therefore, must either in fact or contemplation of law, be in existence at the death of the testator. (-)

They then examined the will and while upholding the life-interest of J. as valid under Hindu Law, held the subsequent estates of inheritance created by the will as invalid. (3)

All these propositions will now be explained.

(1) *Tagore v. Tagore*, 9 B. L. R. 377 (396) P. O.

(3) *Ib.*, p. 400. This rule has since been abrogated by the Hindu Disposition of Pro-

perty Act (XV of 1916), S 8

(3) *Tagore v. Tagore*, 9 B. L. R. 377 (410) P. C.

174. (1) A settlement, gift or devise to an unborn person may be made as provided by the Hindu Disposition of Property Act; or in the Madras Presidency, as provided in the Madras Hindu Transfers and Bequests Act.

(2) Provided that no restriction contained in these Acts shall limit or affect a disposition of property for a religious or charitable endowment or for the benefit of the public, for the advancement of knowledge, commerce, health, safety or any other object beneficial to mankind.

Illustrations.

(a) *A* gifts his property to *B*, a living person, for his life, with remainder to *C* on his attaining his 18th year. The gift is valid.

(b) In the last case a son *D* is born to *C* before *C*'s estate is reduced to possession. *D* takes a vested interest in *C*'s estate on his birth. (1)

(c) *A* creates a trust for the benefit of his daughters *B*, *C* and *D* with a direction that if any of them marry under age, her share shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. *B*, *C*, and *D* must be in existence at *A*'s decease and any portion of the estate which may eventually be settled as directed must vest not later than 18 years from the death of the daughter whose share it was. All these provisions are valid. (2)

(d) *A* gifts his property to *B*, a living person, for his life, with remainder to *C* on his attaining his 19th year. The validity of the gift depends upon whether the gift will or will not vest in *C* within *A*'s own lifetime. If it does not, it is void being opposed to S. 14 of the Transfer of Property Act and S. 101 of the Succession Act.

Synopsis.

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| (1) <i>Gift or devise to unborn person</i> (1736). | (5) <i>Exception in favour religious and charitable endowments</i> (1734-1735). |
| (2) <i>Historical retrospect</i> (1736). | (6) <i>Texts of Hindu Law</i> (1735). |
| (3) <i>Modification of Hindu Law by legislation</i> (1736-1737). | |
| (4) <i>The Hindu Disposition of Pro-</i> | |

1734. Analogous Law.—Clause 2 of this section is drawn from S. 17 of the Transfer of Property Act for which there is no analogous provision in the Succession Act, the corresponding S. 105 of which is restrictive and drawn on the lines of the English Mortmain Acts.

The Hindu rule and that followed by the Transfer of Property Act allows a gift or bequest in favour of religion and charity without any of the restrictions contained in Ss. 14-16. In other words, the law enacted in the Transfer of Property Act and favoured by Hindu Law is on the lines of English law as it existed before the passing of statute of Mortmain. (8)

1735. Religious and charitable endowments excepted.—There is abundant authority in favour of religious and charitable gifts.

Texts.

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| (1) S. 20, Transfer of Property Act. | 24th June 1786 in part modified by 51 and |
| (2) S. 101, ill (d) Succession Act. | 52 Vict C. 42, Mortmain and Charitable |
| (8) 9 Geo II C. 86 brought into force from | Uses Act, 1888. |

Manu :—The wicked man who misappropriates the property of God and Brahmins lives in the next three worlds by the excreta of vultures. ⁽¹⁾

Katyayan :—If a gift be promised by a person whether in sickness or for a religious purpose and he dies without making it, his son should be compelled to make it: of this there is no doubt. ⁽²⁾

Mitakshara :—Whatever has been promised to anybody for religious purposes should be given to him without fail. ⁽³⁾

Mahanirvan Tantra :—Property thus given by a man or appropriated (by him) to religious uses cannot be set aside by his son and the rest. The giver is competent to take care of the wealth or property endowed for religious purposes. He can no longer resume it, because *Dharm* is then master or owner of such property. Let the owner himself as its representative, O Goddess, appropriate to pious purposes the corpus of a property or its income according as it may have been resolved. ⁽⁴⁾

1736. The law on the subject of settlement, gift or devise is now subject to the Hindu Disposition of Property Act, 1916, ⁽⁵⁾

Historical retrospect. altering the pre-existing law which stood as follows:

Under Hindu Law as interpreted till then, the view was that no gift or devise could be made to a non-existent person, that is to say a gift made to a person who was not alive either in fact or in the womb, was void; so was a devise made to one who was not similarly in existence at the death of the testator. So it is said in the *Dayabhag* "that in the case of donation, the donee's right to the thing arises from the act of the giver, namely from his relinquishment in favour of the donee who is a sentient person." ⁽⁶⁾ Referring to this text the Privy Council said that "by a rule now generally adopted in jurisprudence, this class would include children in embryo who afterwards come into separate existence. ⁽⁷⁾ As to the case of adopted children (so much relied upon during the argument) it is distinguishable, because of the peculiar law applicable to that relation. The Hindu Law recognizes an adopted child, whether adopted by the father himself in his life-time, or by the person to whom he has given the power of adoption after his death, from amongst those of his class, of one to stand in the place of a child actually begotten by the father who adopts him, or for or on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him. Apart from this exceptional case, which serves to prove the rule, the law is plain that the donee must be a person in existence capable of taking at the time when the gift takes effect" ⁽⁸⁾.

1737. This settled the law as regards gifts and it equally settled it as regards wills which follow the analogy of gifts. After pointing this out, their Lordships concluded, "that a person capable of taking under a will must be such a person as could take a gift *inter vivos* and therefore must either in fact or in contemplation of law, be in existence at the death of the testator". ⁽⁹⁾ These principles were of course applied in several cases by the Indian courts. ⁽¹⁰⁾ But meanwhile

(1) Manu, XI. 26.

(2) Mandlik's Tr. P. 124

(3) Mit. Pt. III-Ch IV-14 (Vyavhar Part.)

(4) Mahanirvan Tantra Sect. 12 vv. 92-94
See all texts collected in *Bhupati v. Bamlal*,
37 C. 123 (145-155) F. B.

(5) XV of 1916.

(6) *Dayabhag* 1-1-21

(7) Followed in *Pudmanund v. Hoyes*, 28
C. 720 (788) P. C.

(8) *Tagore v. Tagore*, 9 B. L. R. 377 (397)

P. C. explaining *Soorjeemoney v. Deenubundoo*, 9 M. I. A. 123.

(9) *Ib.* p. 400.

(10) *Soudamoney v. Jogesh Chunder*, 2 C. 262; *Kherodemoney v. Doorgamoney*, 4 C. 455; *Rajendar v. Shamchand*, 6 C. 106 (116); *Ramlal v. Secretary of State*, 7 C. 804 P. C.; *Tarakeswar v. Shikareswar*, 9 C. 92; *Kristomoney v. Narendro*, 16 C. 383; *Bhagabati v. Kali Charan*, 38 C. 468 P. C.; *Bilaso v. Munnital*, 33 A. 558.

in 1882 the Transfer of Property Act was enacted and it saved these rules by a saving clause inserted in S. 2. The Act however enacted the English law which permitted of dispositions to unborn persons within the limits prescribed in Ss. 13, 14 and 20. The undue restrictions of the Hindu rule were first broken in upon by the enactment of the Hindu Transfers and Bequests Act, 1914, ⁽¹⁾ which applies to such dispositions whenever made as are intended to come into operation after the commencement of the Act. ⁽²⁾ It legalizes bequests to unborn persons subject to the restriction contained in S. 14 of the Transfer of Property Act and S. 101 of the Succession Act which is S. 3 of the Madras Act. Two years later, the Imperial Council was moved to enlarge the scope of this Act by enacting the Hindu Disposition of Property Act which in the first instance extends to whole of British India except the province of Madras "provided that the Governor General may by notification in the *Gazette of India* extend this Act to the Province of Madras." ⁽³⁾ This important Act unlike the Madras Act not only deals with devises but also with all dispositions by way of transfers, settlements and gifts, but the object of the two is identical.

1738. The provisions of this Act run as follows :—

THE HINDU DISPOSITION OF PROPERTY ACT.

ACT NO. XV OF 1916.

Received the assent of the Governor General on the 28th September 1916, An Act to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition.

WHEREAS, it is expedient to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition.

It is hereby enacted as follows :—

Short title and extent. 1. (1) This Act may be called the Hindu Disposition of Property Act, 1916.

(2) It extends, in the first instance, to the whole of British India, except the province of Madras: Provided that the Governor-General in Council may by notification in the *Gazette of India*, extend this Act to the Province of Madras.

2. Subject to the limitations and provisions specified in this Act no **Dispositions for the benefit of persons not in existence** disposition of property by a Hindu whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition.

3. The limitations and provisions referred to in S. 2 shall not be the **Limitations and conditions.** following, namely: (a) in respect of dispositions by transfer *inter vivos*, those contained in Ss. 13, 14 and 20 of the Transfer of Property Act, 1882, and

(1) *Kudapa v. Kakarla*, 81 M L J. 88; force on 24th March 1914.
85 I. C. 150.

(3) S. 1 (2) Act XV of 1916.

(2) Mad. Act 1 of 1914 which came into

(b) in respect of dispositions by will, those contained in Ss. 100 and 101 of the Indian Succession Act, 1862.

4. Where a disposition of property fails by reason of any of the limitations referred to in S. 3, any disposition intended to take effect after or upon failure of such prior disposition also fails.

5. Where the Governor-General in Council is of opinion that the Khoja community in British India or any part thereof desire that the provisions of this Act should be extended to such community, he may by notification in the *Gazette of India* declare that the provisions of this Act with the substitution of the word "Kojas" or "Khoja" as the case may be, for the word "Hindus" or "Hindu" wherever those words occur, shall apply to that community in such area as may be specified in the notification, and this Act shall thereupon have effect accordingly.

1739. Its scope.—As Ss. 13, 14 and 20 of the Transfer of Property Act correspond with Ss. 100 and 101 of the Succession Act, the above Act has the effect of legalizing the disposition of property whether by transfer, settlement, gift or will for the benefit of a person not in existence to the extent permitted by those sections, that is to say, to the following extent:—

A person may dispose of his property to any person but he is not permitted to transfer any but an absolute estate, *i.e.*, his whole and entire estate in favour of an unborn person when the transfer in favour of him is to take effect after the determination of the prior interest created by the same transfer and the disposition itself, whether of the whole or of limited interest, cannot be created so as to last for one or more existing lives, *plus* 18 years (and the period of gestation in case of a possible issue).

In other words, his disposition must be *absolute* after a period and it must not offend against the rule as to perpetuity.⁽¹⁾

Such transfers cannot, of course, be made without the intervention of a trustee.⁽²⁾

The provisions of S. 101 of the Succession Act are not only enacted as S. 14 of the Transfer of Property Act but have been adopted as S. 2 of the Hindu Wills Act⁽³⁾ and of the Oudh Estates Act.⁽⁴⁾

1740. Religious endowment.—Gifts and bequests being everywhere commended by the religious law it follows that no legal restriction as is involved in the rule against perpetuity and remoteness can apply to such a gift.⁽⁵⁾

(1) See the subject discussed in the author's *Law of Transfer* (4th Ed.) §§ 431-440.

(2) Per Peacock, J. in *Kumara v. Kumara*, 2 B. L. R. (O. O.) 11 (36).

(3) XXI of 1870.

(4) I of 1869.

(5) *Jeewan Dass v. Kabeerodeen*, 2 M. I. A. 390; *Kally Prosono v. Gopee Nath*, 7 C. L. R.

241; *Sookhmoy v. Munohuri*, 11 C. 684 P. C.; *Rai Kishore v. Debendra Nath*, 15 C. 409 P. C.; *Bikani v. Shuklal* 20 C. 116 F. B.; *Fatma v. Advocate General*, 6 B. 43; *Limji v. Bapuji* 11 B. 411; *Sitaramji v. Jadunath*, 10 O. L. J. 204; 24 I. C. 72; *Gobind Prasad v. Gamji*, 30 A. 288; *Palaniappa v. Pandarasannadhi*, 40 M. 709 P. C.

But the gift must be in reality for the object, and not a mask for circumventing the rule against perpetuities. (1)

1741. An idol is a juridical person capable of taking and holding property, and although the idol holds property in an ideal sense through its manager or *shebait*, the nature of the title is in no way different from that of a living individual. **Gift to idol.** There is no distinction in this respect between a family idol and an idol installed in a temple for public worship. Hindu Law recognizes a gift made in favour of such an idol to the same extent as a gift in favour of a deity in the abstract and will give effect to it even if a portion of the income of the gifted property is set apart for the maintenance of certain members of the family or of the manager and administrator of the trust. (2) The question in such case is whether the disposition was a real or a fictitious endowment.

Such an endowment may be made whether for the benefit of an existent or non-existent idol of a named deity (3) in whose favour the endowment is constituted. An endowment for the benefit of an unnamed deity such as "the Thakurji in his Thakurdevara" without mentioning the "Thakurji" was held to be too vague to be valid. (4) But in this and similar cases the rule to apply is *certum est quia certum reddi potest*. (5) The testator had in the last case devised his eight shops in favour of "Shri Thakurji of the Thakurdevara situated in Kasha Pusanpur" which description was apparently insufficient to identify any deity. Such were devises to "Dharm" which failed for vagueness. (6)

1742. Charities.—A gift or devise may be made regardless of the rule against perpetuities in favour of any charitable object, such as a *Sadavart* (or delivery of food to all comers) (7) an *avala* (i.e., a water trough for animals to drink from) (8) the maintenance of *choultries* (or shelter for travellers), (9) hospitals, (10) a university, (11) a lecturership, (12) or in fact any object of public utility or benevolence.

1743. But a gift to Brahmins is a personal gift, though inspired with a religious motive. It does not therefore fall within the exception applicable to religious or charitable endowments. (13)

(1) *Promotho v. Radhika*, 14 B. L. R. 175 (179).

(2) *Rajender v. Shamchand*, 6 C. 106.

(3) *Bhupati v. Ramulal*, 37 C. 128 (141).
F. B. overruling contra Upendralal v. Hemchandra, 25 C. 405; *Rojomoyee v. Troylukto*, 29 C. 267; *Nogendra Nandini v. Benoy Krishna*, 30 C. 521. To the same effect *Ramtonoo v. Ram Gopaul* 1 Knapp 245; *Gokool Nath v. Issur Lochun*, 14 C. 22; *Praculla v. Jagendral*, 9 C. W. N. 528; *Ashutosh v. Doorgachurn*, 5 C. 788 P. C.; *Bruggobuttu v. Goroo Prasanna*, 25 C. 112; *Porbali v. Ram Barun*, 31 C. 895; *Asita v. Niroda Mahan*, 20 C. W. N. 901; *Jairam v. Kumbhari*, 9 B. 491; *Manohur v. Keshavram*, 12 B. 267 N. *Mohar Singh v. Het Singh* 32 A. 337; *Chatarbhuiji v. Chaterjit* 33 A. 258.

(4) *Phundan Lal v. Arya Prithi Nidhi*, 33 A. 793.

(5) "It is certain which is ascertainable."

(6) *Motivahoo v. Mamooabai*, 21 B. 709 P. C.; *Upendra Lal v. Hemchandra*, 25 C. 405; *Parthasarathi v. Thiruvengada*, 30 M. 804; *Gurdi Singh v. Sher Singh*, 14 I. C. 247; See other cases collected in 8 Gour's Law of Transfer (4th Ed., §§ 2834, 2886).

(7) *Jamnabai v. Khimji* 14 B. 1 (14).

(8) *Ib.*

(9) *Hossain v. Ali Ajain*, 4 M. H. C. R. 44.

(10) *Broughton v. Mercier*, 14 B. L. R. 112; *Finandra v. Administrator General*, 6 C. W. N. 321.

(11) *Manorama v. Kalicharan*, 31 C. 166.

(12) *Tagore v. Tagore*, 9 B. L. R. 877 P. C.

(13) *Anantha v. Nagamuthu*, 4 M. 200.

Conditional gift or
devise.

175. (1) A gift or devise may be absolute or conditional.

(2) A conditional gift or devise takes effect upon the fulfilment of the condition, except in the following cases:—

(a) Where the condition is a condition subsequent,

(b) where it is illegal or immoral,

(c) or is repugnant to the nature of the grant.

(3) A substantial fulfilment of the condition may be sufficient if its literal fulfilment is impossible or impracticable.

(4) A gift once completed cannot be revoked except on the ground which would suffice to cancel a contract.

Synopsis.

- (1) *Conditional gift* (1744). *made* (1745).
(2) *Gift irrevocable when once*

1744. Analogous Law.—Conditional transfers are subject to the provisions of Ss. 25-27 of the Transfer of Property Act and conditional bequests subject to those of Ss. 113-117 of the Succession Act. And as there is nothing in Hindu Law to the contrary ⁽¹⁾ their principles are equally applicable to Hindus. The Privy Council have upheld the validity of conditional gifts holding it competent to the donor to create an absolute estate defeasible on the failure of issue. ⁽²⁾ So where the donor gave a taluq to his sister for her support and "for the generation born of your womb successively and no other heirs of yours shall have a right or interest" it was held that the grant was absolute and defeasible on the failure of issue living at the death of the donee. ⁽³⁾

The subject will be further examined in the chapter on wills.

1745. Gift is irrevocable.—The following texts bear on the subject of Cl. (4). this clause:—

Bṛhaspati:—Things once delivered on the following eight accounts cannot be resumed: for the pleasure of hearing poets, musicians or the like, as the price of goods sold, as a nuptial gift to a bride or her family, as an acknowledgment to a benefactor, as a present to a worthy man from natural affection or from friendship.

What is given by a person in wrath or excessive joy, or through inadvertance or during disease, minority or madness or under the influence of terror or by one intoxicated or extremely old or by an outcaste or idiot or by a man afflicted with grief or with pain or what is given in sport all this is declared ungiven or void. If anything be given for a

(1) *Soorjeemoney v. Denchundhoo*, 9 M. I. A. 128 (135); *Tarokessur v. Soshi*, 9 C. 952 P. C.

(2) *Bhoobun Mohini v. Hurrish Chunder*, 4 C. 28; *Sham Shivendra v. Janbi Kuar*, 36

C. 311 P. C.

(3) *Bhoobun v. Hurrish Chunder*, 4 C. 28 P. C. explained in *Tarokessur v. Soshi*, 9 C. 952 (959) P. C. To the same effect *Sham Shivendra v. Janbi Kuar*, 36 C. 311 P. C.

consideration unperformed or to a bad man mistaken for a good one, or for any illegal act, the owner may take it back. (1)

Yajnavalkya :—Let the acceptance be public especially of immoveable property and delivering what may be given and has been promised, let not a wise man resume a donation(2).

Dayabhag :—Accordingly Harit says "A father during his life distributing his property may retire to the forest or enter into the order suitable to an aged man ; or he may remain at home having distributed small allotments and keeping a greater portion ; should he become indigent he may take back from them." (3)

A gift once completed cannot be revoked (4) except upon grounds which suffice to cancel a contract. (5) Such grounds are fraud, misrepresentation undue influence and the like. In this respect Hindu Law agrees with the statutory provisions contained in S. 126 of the Transfer of Property Act.

With the solitary exception of the Dayabhag text all texts declare a gift irrevocable, Katyayan even going so far as to make the offer of a gift for a religious purpose specifically enforceable. But though this part of the law contravenes the express provisions of the statute law and is therefore obsolete, the fact remains that Hindu Law does not countenance the resumption of a gift.

(1) 2 Dig. 174, 197.

(2) Cited in *Kalidas v. Kanhaya Lal*, 11 C. 121 (182) P. C.

(3) Dayabhag Ch. II-57.

(4) *Bishenchand v. Asmaida*, 6 A. 560 (575) P. C ; *Rajaram v. Ganesh*, 28 B. 181.

(5) *Nasir Hussain v. Mata Prasad*, 2 A. 891 (895); *Bishenchand v. Asmaida*, 6 A. 560

(575) P. C ; *Ganga Baksh v. Jagat Bahadur*, 28 C. 15 ; *Rajaram v. Ganesh*, 28 B. 181 ; *Sita Ram v. Harihar*, 85 B. 16 ; (Alludes to text stating that a gift cannot be resumed if it is to "a benefactor" or to a father but it does not imply that a gift to any other person is resumable).

CHAPTER XVII.

WILLS.

1746. Topical Introduction.—Hindu Law as such contains no provision for wills which have come into vogue in the following manner described by the Privy Council: "As to gifts by way of will, whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice in itself enough, if necessary, to establish an approved usage and legal series of judicial decisions both here and in India proceeding upon the assumption that gifts by will are legally binding, and recognizing the validity of that form of the gift as part and parcel of the general law. The introduction of gifts by will into general use has followed in India as it has done in other countries, the conveyance of properties *inter vivos*. The same may be said of the Roman law. Such a disposition of property to take effect upon the death of the donor, though revocable in his life time is, until revocation, a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries. They take upon the death of the testator as they would if he had given the property to them in his life-time. There is no law expressly and in terms applicable to persons who can so take. The law of wills has however grown up, so to speak, naturally from a law which furnishes no analogy but that of gifts and it is the duty of a tribunal dealing with a case new in the instance, to be governed by the established principles and the analogies which have hitherto prevailed in like cases." (1)

1747. In the presidency of Bengal and the towns of Madras and Bombay the law of wills is now subject to the Hindu Wills Act⁽²⁾ which extends certain sections of the Succession Act to Hindu wills. It has been held in Madras that the provisions of this Act may be referred to in the construction of even *mofussil* wills, embodying as it does, principles in consonance with equity, justice and good conscience. (3)

Thus the testamentary power though a graft upon the archaic law has now become well established.

The ensuing sections present the leading principles thus evolved out of the analogies from gifts.

176. (1) Will is the expression of a person's wish with reference to his property which he desires to be carried into effect after his death.
 "Will" and "codicil" defined.

(2) Where the will is in writing, it may be modified by an instrument, made in relation thereto and explaining, altering or

(1) *Tagore v. Tagore*, 9 B. L. R. 377

(887, 888) P. C.

(2) XXI of 1870.

(3) *Katna v. Narayanaswami*, 26 M. L. J. 616; 24 I. C. 796.

adding to its dispositions. This instrument is called a codicil. It is considered as forming an additional part of the will.

Synopsis.

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| (1) <i>Definition of 'will' and 'codicil'</i> (1748-1749). | (4) <i>Will distinguished from gift</i> (1753). |
| (2) <i>Pre-requisites of a will</i> (1750). | (5) <i>Construction of will</i> (1754). |
| (3) <i>Legal declaration relating to property</i> (1751-1752). | (6) <i>English rules of construction, inapplicable</i> (1754). |

1748. Analogous Law.—The definition of “will” and “codicil” here given is adapted from the following definitions of these terms to be found in the Succession Act (1) and reproduced in the Probate and Administration Act (2):—

(3) “Will” is the legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death.

“Codicil” means an instrument made in relation to a will and explaining altering or adding to its dispositions. It is considered as forming an additional part of the will.

1749. These definitions cannot bodily be incorporated into the Hindu Code because the Hindu notion of a will is much wider than that contemplated in these acts. Taking the “will” first, the statute requires that it should be in the form of a “declaration” which should be “legal” that is, as to its form and substance, in conformity with law. But Hindu Law considers an informal and even a casual statement as sufficient. Under the Succession Act a declaration must be in writing signed by the testator in the presence of two witnesses.

But neither writing nor execution, nor its attestation by two witnesses is required to complete a Hindu will.

Again the statutory definition is inaptly worded, since it defines a will with reference to the “testator” who is the author of a will—a definition *obscurum ab obscurius*.

As regards the definition of “codicil” the statutory definition postulates the existence of a written will and a “codicil” is therefore naturally defined as an instrument explaining or modifying its terms.

There can be no oral codicil, though an oral will may be explained, altered added to or cancelled by another will and this may go on till the last will remains which alone is operative.

1750. Pre-requisites of a will.—It will be seen from the wording of the rule here formulated that a will is a declaration—but a declaration which must possess the following five essential elements:—

- (1) It must be legal.
- (2) It must relate to a disposition of property.

(1) S. 8, Act X of 1865.

(2) S. 8, Act V of 1931.

(3) It must relate to the testator's property, or property over which he has disposing power. (1)

(4) It must dispose it of as to take effect from the testator's death.

(5) It must be revocable at the testator's pleasure.

1751. Legal declaration.—The first essential of a will is that it must be a declaration and the declaration must be legal. A declaration implies a formal statement intended to be acted upon, not necessarily surrounded by any solemn form but nevertheless made with a degree of seriousness so as to impress on it the stamp of deliberation. Both under the Succession Act and the Hindu Wills Act as under the Oudh Estates Act, such declaration must be in writing signed by the testator in the presence of two witnesses. Any declaration otherwise made is not legal. But under Hindu Law such declaration may be made in any form oral or in writing in a formal instrument or in an informal conversation, provided it expresses the testator's intention.

1752. Strictly speaking a Hindu non-statutory will cannot be designated a declaration at all; since law allows the utmost latitude in its construction considering only the intention and ignoring the mode of expression except only so far as it throws any light on the intention. As such the definition is somewhat too narrow, taken as it is from the statute applicable to a more developed condition of society.

Ignoring for the present the statutory definition and taking the term "declaration" as synonymous with an expression of intention, a will may be constituted in any form of expression, a petition, or a letter or in fact—any document the context of which may bear no relation to the statement which constitutes the will.

1753. Will distinguished from gift.—Although the notion of wills is evolved out of gifts, the two classes of disposition are distinguishable and must be distinguished. A gift confers a present interest, relates to existing property and takes effect immediately; while a will confers a deferred interest, may comprise future property and does not take effect until the death of the testator. (2) A gift once completed cannot be revoked; but a will may be revoked at any time and is by its nature ambulatory and revocable by the testator and again and again by him. (3)

Then again a person may give what he cannot devise. In this respect the power of gift and devise are not identical. (4)

1754. Construction of will.—The rule of construction in a Hindu as (1) English rules in- in an English will, is to try and find out the meaning of applicable. the testator, taking the whole of the document together, and to give effect to its meaning. In applying the above principle courts of justice in this country ought not to judge the language used by a Hindu, according to the artificial rules which have been applied to the language of people, who live under a different system of law, and in a different state of society. (5) Before considering the rule how a will should be construed it is therefore, essential to state how it should not be construed. In the first place it should

(1) *Bijrai v. Purv Sundari*, 42 C 56 P. C.

(2) *Bishenchand v. Asmaida*, 6 A. 560 (572) P. C.

(3) *Sagal v. Dwarka* 14 C. W. N. 174 : B. I. C. 380; *Sita v. Doonath*, 8 C. W. N. 514 : *Rammonir v. Ram Gopal* 12 C. W. N. 942.

(4) In *Lakshmi Bai v. Ganpat*, 4 M. H. C. R. 150 (158) this question was held unsettled by judicial decisions; *Mulchand v. Mancha*, 7 B. 491 (493); *Lakshman v. Ramchandra*, 5 B. 48 (61) P. C.

(5) *Din Tarini v. Krishna*, 36 C. 149 (156).

be construed in the light of Hindu Law alone, without any mixture of laws or ideas derived from any foreign source. Technical rules of English law which owe their origin and existence to an entirely different system of personal and property law are altogether foreign to Hindu Law and ideas and ought not to be applied in the construction of Hindu gifts and wills. (1) For instance, the distribution adopted by the law of England in the course of inheritance between inheritable freehold and personalty is not known in Hindu law. (2) So the principle of joint tenancy is unknown to Hindu Law, except in the case of co-parcenary between the members of an undivided family. So where a testator bequeathed a four-annas share of a zamindari to his youngest widow and her son "for your maintenance" with power of alienation, the donees would take as joint tenants, under English law, but by Hindu Law they take as tenants in common, though under both laws the conveyance of her interest by the widow would have the effect of severing the joint interest. (3)

Who may make a will.

177. (1) Any adult person may bequeath his estate by will.

(2) His power to bequeath an estate by will is co-extensive with his power over the estate in his life-time.

Synopsis.

(1) *Who can make a will* (1755)

(3) *What property can be bequeathed* (1757-1759).

(2) *Power of bequest* (1756).

1755. Analogous Law.—The Indian Majority Act excepts only Hindus as regards, marriage, dower, divorce and adoption but not as to the power to make a will, which is subject to it. (4) Consequently, a person, though major under the Hindu personal law but not so under the statute, is not competent to make a bequest. (5) Where, therefore, a guardian is appointed or declared under the Guardian and Wards Act, the minority of the ward does not cease till he attains the age of 21 years and he is incompetent to make a will, it being immaterial whether the guardian dies, is removed, or otherwise ceases to act. (6)

1756. Power of bequest.—The testator's competency to make a will is distinct from its validity. The former depends upon his age, the latter upon his disposing power. (7) A person cannot make a bequest of property which he could not have conveyed by a transfer *inter vivos*. The rule on the subject was thus stated by Willes, J : "The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can be transferred." (8) "The power of a Hindu to make a will is not of modern introduction nor is it of local origin. Wills were known to and in use amongst Hindus not in the presidency towns only, but from one end of the peninsula to the other. The right to make a will is part of Hindu Law itself.

(1) *Tagore v. Tagore*, 9 B. L. R. 377 P.C.; *Ram Singh v. Ugar Singh*, 13 M. L. A. 373 (390); *Jogeshwar v. Ramchandra*, 28 C. 670 (679) P.C.; *Dinesh Chandra v. Biraj Kamini*, 15 C. W. N. 945; 14 C. L. J. 20.

(2) *Tagore v. Tagore*, 9 B. L. R. 377 P. C.

(3) *Jogeshwar v. Ramchandra*, 28 C. 670 (678, 679). P. C.; overruling *Vijaynada v. Nagammal*, 11 M. 258.

(4) S. 2 (9) Act IX of 1875.

(5) *Gulab v. Thakorelal*, 86 B. 622; *Haraduari v. Gomi*, 8 A. L. J. 885; *Dipa v. Lakshmi*, 6 I. C. (C) 6.

(6) *Joyram v. Mohadeb*, 86 C. 768; *Dipa v. Lakshmi*, 6 I. C. (C) 6; *Deheram v. Soman Ali*, (1911) 2 M. W. N. 883; 12 I. C. 551.

(7) *Pitum v. Joykishan*, 6 W. R. 101 (109); *Court of Wards v. Venkata*, 20 M. 167; *Vallinayagam v. Pachche*, 1 M. H. C. R. 826.

(8) *Tagore v. Tagore*, 9 B. L. R. 377 P. C.

The extent and nature of the disposition which a Hindu testator is capable of making is not a question of public expediency or of custom or usage, but must be regulated by the rules to be found in or directly deduced from Hindu Law. ⁽¹⁾

1757. Now since a Hindu co-parcener is only permitted to alien his undivided interest *inter vivos* for value, it follows that he has neither the power to alien it by gift or bequest. ⁽²⁾ And as in Upper India he does not possess even that power, it is clear that a co-parcener can nowhere alien his interest by will, except in Bengal where the co-parcener being competent to make a gift of his interest, he is held equally competent to devise it by will so as to deprive the widow of her share on partition. ⁽³⁾

1758. And since a widow is incompetent to transfer by gift her limited estate, it follows that she has no power to bequeath it even with the consent of the next reversioner. ⁽⁴⁾ But she is not incapacitated by her sex from bequeathing property to which she is absolutely entitled. ⁽⁵⁾

So a person may make a bequest of his self-acquired property ⁽⁶⁾ or even his ancestral property if he had no co-parceners at the time ⁽⁷⁾ since the right of alienation in such cases is subject to the right of co-parceners. Hence the son may challenge the father's bequest even if made before he was born. ⁽⁸⁾

1759. Since the will takes effect from the death of the testator and co-parcenary interest vests from the moment of conception, ⁽⁹⁾ at the moment of the father's death the right of survivorship is in conflict with the right by devise, and the right by survivorship being the prior title takes precedence to the exclusion of that by devise. ⁽¹⁰⁾

It being now settled that the holder of an impartible estate has no co-parceners, it follows that he is competent to will away his estate. ⁽¹¹⁾

178. Except as otherwise provided by the Hindu Wills Act or any other law for the time being in force, a will may be oral or in writing, and if in writing, it need not be registered.

Form of will.

Synopsis.

- (1) *Form of will* (1760-1761). *clear* (1762-1765).
 (2) *Form immaterial, if intention* (3) *Nuncupative will* (1766).

1760. Analogous Law.—The Hindu Wills Act extends certain sections of the Succession Act to wills of Hindus made anywhere within the Presidency of Bengal and in the towns of Madras and Bombay or relating to immoveable

(1) Per Norman, J. in *Tagore v. Tagore*, 4 B. L. R. (O. C.) 108.

(2) *Lakshman v. Ramchandra* 5 B. 48 P. C.; *Bhuianga Rao v. Maloji Rao*, 5 B. H. C. R. (Ac) 161.

(3) *Debendra v. Brojendra*, 17 C. 886.

(4) *Raghava v. Narayanasami*, 4 M. L. J. 89; *Goorooa v. Narainasawmy*, 8 M. H. C. R. 18.

(5) *Bankol v. Jeshankar*, (1881) B. P. J. 271.

(6) *Narainasami v. Arunachala*, 1 M. H. C. 487 N.; *Bawa v. Bishen*, 10 W. R. 287;

Nana v. Haree, 9 M. I. A. 96.

(7) *Nagalutchmee v. Gopoo*, 6 M. I. A. 809.

(8) *Vithabai v. Balwant Rao*, (1898) B. P. J. 72.

(9) *Sabapathi v. Somasundram*, 16 M. 76.

(10) *Villa v. Yamenamma*, 8 M. H. C. R. 6; *Goorooa v. Narainasawmy*, 8 M. H. C. R. 18 N.; *Lakshmi v. Subramanya*, 12 M. 490 (492).

(11) *Rama Rao v. Raja of Pittapur*, 41 M. 778 P. C.; *Mothurasawmy v. Bangarammal*, 8 I. C. (M) 332.

property situated therein. (1) As such it extends S. 50 of the Succession Act which prescribes the necessity of writing and attestation by two witnesses who should have witnessed the testator's execution of the will. (2)

1761. The Oudh Estates Act (3) also extends (*inter alia*) the same section to wills and codicils made by a Taluqdar or grantee or by his heir or legatee, under the provisions of that Act or any interest therein. And S. 20 of the same Act provides against any bequest to religious and charitable uses of any interest in the estate of more than Rs. 2,000 in value "except by a will executed not less than three months before his death and registered within one month from the date of its execution." (4)

Excepting these and other similar provisions, a will may be made orally or in writing and not necessarily in the form of a formal bequest, provided it conveys with sufficient clearness the intention of the maker as to the disposal of his property on his death.

1762. Form immaterial.—Such disposal may be made by a petition filed before a Revenue official (5) or a statement made to him (6) or a tabular statement of heirs filed before him, (7) statement made to a settlement officer, or found recorded in the *wajibularz* (8) the value of which must, of course, depend in each case on the circumstances in which it was originally made, and the corroboration it receives from extrinsic evidence. (9) So statements made in a deed of settlement at the time of adoption as to what should be done by the executant's adopted son and his wife after his life-time have the effect of a will. (10) So a will might be embodied in a *Sambandh Nirnay Patra*, a matrimonial arrangement deed executed in the form of a letter which the father wrote to the aunt of his future son-in-law stipulating that he should live in his house and take possession of the executant's estate on his demise. (11)

1763. In another case a Taluqdar subject to the Oudh Estates Act had executed a deed of assignment in favour of his brother intended to operate *inter vivos* but in which he provided that he (the executant) shall enjoy his estate during his life-time and on his death his brother will hold and enjoy it, but should a legitimate son be born to him, then the son and the brother will each get a moiety of his estate. It was contended that this agreement was intended to operate only *inter vivos* and that not being intended to be a will, it could not have that effect. But the Privy Council overruled this contention holding it to operate as a will. In so holding they said: "If they had been the words of an English conveyancer preparing an English instrument, they would have afforded a very strong argument; but the instrument was prepared by Lal Sunder, and we must not construe with too great nicety, or assign too much weight to the exact words that he uses for a transfer of property, as if he were accurately weighing the difference between a testamentary instrument and one operating

(1) S. 2 (b) Act XXI of 1870.

(2) *Ib.*, S. 50.

(3) S. 19, Act 1 of 1869.

(4) S. 20, Act 1 of 1869.

(5) *Mahomed v. Shewakram*, 22 W. R. 409 P. C.; *Kollany v. Luckmee Pershad*, 21 W. R. 395; *Kalian Singh v. Sanwal Singh*, 7 A. 168; *Haidar Ali v. Tassadduk*, 18 C. 1 P. C.; *Balbhadar v. Sheonarayan*, 26 I. A. 194, *Din Tarini v. Krishna*, 36 C. 149 (155, 156).

(6) *Kalian Singh v. Sanwal Singh*, 7 A.

163.

(7) *Hurpershad v. Sheo Dayal*, 26 W. R. 55 P. C.

(8) *Mathura v. Bikhari Mal*, 19 A. 16; *Lal v. Murlidhar*, 28 A. 488 (45) P. C.; *Sahodra v. Ganesh*, 10 C. W. N. 249.

(9) *Lali v. Murlidhar*, 28 A. 488 (494, 495) P. C.

(10) *Lakshmi v. Subramanya*, 12 M. 490.

(11) *Din Tarini v. Krishna*, 36 C. 149 (150).

inter vivos. We must remember that wills are comparatively new in any part of India, and are of more recent introduction in Oudh in respect of this class of property. So with respect to the reservation of a life-interest. The will being not a very familiar instrument to the people who prepare it or who sign it, the testator often does express a great anxiety that he shall not be considered to have parted with anything in his life-time, and their Lordships have seen here instruments which most unquestionably were wills, and intended to operate as such, in which nevertheless there have been expressions upon the face of them intimating that the testator intends to remain the owner of his property. Upon the whole, therefore, looking at what are the substantial characteristics of the document which has been referred to, setting aside mere matters of form and what may be considered as technical expressions, their Lordships think that reasons for holding it to be a will have a decided preponderance over those which have led them to hold it be a deed." (1)

1764. The same view was taken by the same Board in another case, in which the Taluqdar had executed what he called "by way of deed of adoption and codicil to a will." The deed was clearly testamentary in character; and it was held to be a will in spite of its misleading form and description. (2)

These were more or less formal documents. But a will had been discovered in a power of attorney, (3) in a draft (4) and an unsigned will (5) when the testator died before the draft could be fair copied or where he was too ill to append his signature but possessed sufficient consciousness to assent to it.

1765. From these and similar cases, it is clear that whatever may be the form of the instrument, whether it is formal or informal, a deed, jotting or a memorandum, the one thing essential is, has it the effect of a will? Now since the one characteristic distinguishing feature of a will is its revocability it follows that if the grant was revocable then it is a will; otherwise it is not. (6) The fact that the grant is stated to operate in *presenti* or that it is expressed to be operative in future is, though relevant, equally indecisive, since there is no magic in the future tense. (7) The fact that the document is called an agreement is no doubt a circumstance which cannot be ignored, but it should not be overrated. As stated in a case, "this *per se* is not much." (8) So conversely, the fact that document is called a will does not make it so unless it has that effect. Such was the document executed by the father who divided his estate amongst his sons and after setting out its details provided that "If I at any time come back from pilgrimages and find mismanagement or the character of an one bad, then I shall have power to cancel this will which shall be enforced from the date of its execution." And it concluded thus, "All the three sons were put in separate possession of the estate in the beginning of the year 1303 Fasli. I have no other heir having a right besides those mentioned in this will. I have therefore executed this will in order that it may serve as evidence". On the father's death two of his sons sued for partition on the strength of this "will". The defence was that the deed was a partition deed, and was miscalled a will. The Privy Council held it to be a family arrangement (9) by which all the sons were bound.

(1) *Ishri Singh v. Baldeo Singh*, 10 C. 792 (801, 802) P. C.

(2) *Udai Raj v. Bhagwan*, 32 A. : 27 (240) P. C.

(3) *Kollany v. Luchmee*, 2 Hay 370 (in which the terms of the power of attorney are set out) 24 W. R. 895.

(4) *Janki v. Kallu*, 31 A. 286.

(5) *Terrachand v. Nibinchunder*, 8 W. R. 138.

(6) *Rajammal v. Authiammal*, 38 M. 304.

(7) *Per Kekewich, J. in Johnston v. Mapson*, 64 L. T. R. 49 (51).

(8) *Rambhat v. Lakshman*, 5 B. 630 (686).

(9) *Bry Raj Singh v. Sheodan Singh*, 35 A. 337 (352) P. C.

It is said that an instrument which confers or reserves a life estate to the maker is not a will. ⁽¹⁾ But it is submitted that this statement is too wide, since there is nothing to prevent the testator from executing a composite deed reserving a life-interest for himself. ⁽²⁾

1766. Nuncupative will.—A Hindu is entitled to dispose of his property whether moveable or immoveable by an oral will ⁽³⁾ which may or may not be reduced to writing after the testator's death. ⁽⁴⁾ But since it is easy to set up a false oral will and difficult to disprove it, law requires the very strictest proof of such oral disposition. As the Privy Council said: "But if any party is bound to strictness of pleading, it is he who sets up a nuncupative will. He who rests his case on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege as well as to prove with the utmost precision, the words on which he relies, with every circumstance of time and place." ⁽⁵⁾ A verbal disposition of property though permissive must be supported by the very best evidence. It must be not only proved that the will was verbal, but also why it was not reduced to writing. And in judging of its factum the court will pay special regard to whether it is a natural or an officious will.

Power defined. **179.** (1) "Power" is a right which a person acquires over another, or over things not his own.

(2) The person who confers the power may be called the donor of the power, and the person upon whom it is conferred, the donee of the power.

(3) The exercise of power is discretionary with the donee.

Synopsis.

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|---|--|
| (1) <i>Definition of 'power'</i> (1767). | (4) <i>Divisions of powers, general and special</i> (1769-1771). |
| (2) <i>Recognition of "powers" in Hindu Law</i> (1767). | (5) <i>Creation and exercise of powers</i> (1772-1776). |
| (3) <i>English Law on "powers"</i> (1768). | |

1767. Analogous Law.—The term "power" is a technical term and is distinct from the dominion which a man has over his own property. ⁽⁶⁾ It is used to denote the use of delegated authority of which a power of attorney is an example.

Hindu Law recognizes powers of which the power of adoption conferred by the husband upon his wife, the power of appointment, the power to appoint an heir ⁽⁷⁾ or an executor ⁽⁸⁾ are examples. But the exercise of

(1) *Persab v Gurappa*, 88 B 227 (235, 236)

(2) *Reference* 20 B. 210 (214) F.B.; followed *Rajammal v. Anthiammal*, 38 M 304 (307).

(3) *Srinivasammal v. Vijayammal*, 2 M. H. C. R. 87; *Subhaya v. Surayya*, 10 M. 251; *Bhagvan v. Kala Shankar*, 1 B. 641; *Janaki v. Kallu*, 81 A. 285.

(4) *Hari v. Micro*, 11 B. 89.

(5) *Beer Partab v. Rajender*, 12 M. I. A.

1 (28); *Sukh Des v. Kedar Nath*, 8 Bom. L.R. 704

(6) *Re Armstrong*, 17 Q.B.D. 521; *Commissioner of Stamps v. Stephen* (1904) A.C. 131; *Goatley v. Jones*, (1909) 1 Ch 557.

(7) *Brj Lal v. Sura*, 84 A. 405 I.C.

(8) *Lallubhai v. Mankuverbai*, 2 B. 888 (406); *Dosssee v. Tarachurn*, *Bourke* (Pt. VII) 50.

power by a Hindu is necessarily subject to and circumscribed by the requirements of his personal law and while the English law on powers furnishes analogies, it is not to be applied generally to Hindu wills. (1)

1768. In English law power is defined to be authority reserved by or of, either wholly or partially real or personal property, either for his own benefit or that of others. (2) Power may be at common law, equitable or that operating under the statute of uses. (3) A common law power is an authority given by one person to another to do an act for him which his recognised and operative at common law. A power of attorney is an instance of such power which is equally available to a Hindu.

1769. An equitable power is a power which affects the equitable and not the legal estate or interest. Sugden distinguishes the two powers as follows: "Powers are either common law authorities or declarations or directions operating only on the conscience of the person in whom the legal estate is vested; or declarations or directions deriving their effect from the statute of uses. . . . A power to dispose of an estate, or a sum of money where the legal interest is vested in another, is a power of the second sort. The legal interest is not divested by the exercise of the power, but equity will compel the person seized of it to clothe the estate created with the legal right." (4)

1770. A power is distinguished from a trust in that in the one the estate vests in the donee by whom the exercise of power conferred on him is purely discretionary, while in the other the estate does not vest in the trustee except for a specific purpose and he has no discretion, being merely the instrument of the author for execution of the purpose for which the trust is created. (5) A power left unexecuted lapses, since its execution is personal to the donee but powers, in the nature of trusts, that is, when they amount to trusts in the garb of powers, the failure of the donee to exercise them will not prejudice the intended objects, since the court will in, such cases, execute them. (6) Whether particular words constitute a trust or power is a question of intention and not of grammatical import. (7) Powers over real estates are either (1) powers of ownership (2) powers collateral or (3) powers relating to the estate of the donee of the power in the land, and these are sub-divided into powers appendant and in gross. The first is a power which gives the donee complete dominion though no ownership in the estate; the second is a bare power conferred upon a person who is given no interest in the land, such as a mere power of sale; while the third is a power coupled with the transfer of ownership. It is appendant where the estate created by its exercise affects the interest of the donee of the power; it is gross where it does not affect his interest.

1771. A power may be general or special. It is general where the donee is at liberty to exercise it in favour of any person he chooses. It is special where it can only be exercised in favour of certain specified persons. To borrow an example from Hindu Law where the testator empowers his widow to make an adoption, she possesses a general power of adoption; but where he empowers her to adopt a *persona designata* such as the person named A she has a

(1) *Motivahu v. Mamubai*, 21 B. 709 (722) P. C.

(2) 28 Hals. Laws p. 8.

(3) 27 Hen VIII. C. 10.

(4) Sugden (Lord St. Leonards) on Powers (8th Ed.), pp. 45, 46 cited per Kay, J. in

Dixon v. Broun, 32 Ch. D. 597 (601).

(5) *Cloutte v. Storey*, (1911) 1 Ch. 18 (80).

(6) *Igod 34 Beav. 242*; *Brown v. Higs* 8 Ves. 570.

(7) *Burroughs v. Philcox*, 5 My. and Cr. 72; *Re Weeks* (1897) 1 Ch. 289.

special power. Powers may be given to a person for the purpose of managing either his own or another person's property, or they may be to appoint to various offices, such as the power of appointing new trustees, which loom large in English law and are of the most general importance.

1772. Creation and exercise of powers.—Under English law powers relate to property, but under Hindu Law they may relate both to persons and property. This is due to the parental authority which still survives the *patria potestas*. The power of adoption has been already been the subject of a previous discussion (§§ 27-29). It is stated there that the father possessed the power to authorize his widow to make an adoption.⁽¹⁾ He is also conceded the power of appointing a guardian of his minor children (§ 59). He is equally entitled to confer upon a person the power of appointing an heir. Such a case arose upon the following facts: A testator had devised his immoveable property upon trust for the income to be appropriated to the maintenance of his widow and of his daughter Mamu and the children that might be born of her, the property to be divided among the heirs of such children. If there should not be any children born of the daughter the property under the will should devolve upon them "to whom she might direct it to be delivered by making her will." The daughter having had no children and questions having arisen between the daughter and the widow as to the administration of the estate according to the will it was held that there was no absolute gift to the daughter, and that the persons to whom the property was given, though to be designated by her, did not take the gift from her, but from the testator. In so holding the Privy Council said: "The remaining question is whether his substituting Mamu, and giving her power, to designate the person by her will is contrary to any principle of Hindu Law. There is no analogy to it in the law of adoption. A man may, by will, authorize his widow to adopt a son to him, to do what he had power to do himself, and although there is a strong religious obligation, their Lordships think that the law as to adoption shows that such a power as that now in question is not contrary to any principle of Hindu Law. Further, they think that the reasons which have led to a testamentary power becoming part of the Hindu Law are applicable to this power, and that it is their duty to hold it to be valid. But whilst saying this, they think they ought also to say that, in their opinion, the English law of powers is not fit to be applied generally to Hindu wills."⁽²⁾ Similar construction was placed by the same high tribunal on a will in which the testator had bequeathed his estate to his wife and on her death to her daughter-in-law and thereafter "she shall have power to nominate any one whom she may think fit as, "heir" so that the name of the family may continue as formerly with honour."⁽³⁾

1773. It was at one time held that in order to be operative the donee of the power must have been in existence at the death of the testator.⁽⁴⁾ But since the passing of the Hindu Disposition of Property Act this is by no means now necessary, and the Hindu Law of appointment and power is now subject only to the provisions of that Act and Ss. 13, 14 and 20 of the Transfer of Property Act.

1774. In one case the testator made a bequest to such person "and in such manner as his brother Jamnadas should by deed or deeds, writing or writings

(1) *Indar v Jaipal*, 15 C. 725 P. C.

(2) *Motivahu v. Mamubai*, 21 B. 708 (722) P. C.

(3) *Brijlal v. Suraj*, 34 A. 405 (411) P.C.

(4) *Tagore v. Tagore*, 9 B. L. R. 377 P.C;

Motivahu v. Mamubai, 21 B 709 P. C.;

Yethurajulu v. Mukunthu, 28 M. 862 (875);

Upender v Hem Chundra, 25 C. 405 P.C;

Narayan v. Lal Ramesh, 11 O.C. 271.

appoint, with or without power of revocation or new appointment." It was held that there was no principle of Hindu Law which forbade such a bequest being construed and given effect to according to its plain and literal terms ; always however, subject to the same restrictions as the Hindu testamentary law imposes on the testator himself, *viz.*, that the appointment should be made so that the appointee might be ascertained when the event arose on which he was to take. In this case the testator had by his will after appointing his brother *J.* to be his executor bequeathed all his estate to *J.* (i) upon trust to pay his debts and the residue in trust for the testator's wife and the wife of the executor *J.* during the life of both, or the survivor of them for their or her sole use ; (ii) and from and after the decease of the survivor of them in trust for the male issue of *J.* if any there were ; and (iii) in default of such male issue in trust for any person or persons in any shares or share, and in such manner as his brother *J.* should, by any deed or deeds, or writing or writings, appoint, with or without power of revocation or new appointment". The court upheld the last as a valid power of appointment which was not opposed to any principle of Hindu Law. (1)

1775. The conferral of power must of course be legal. For instance, the husband possesses the power to authorize only his wife to make an adoption. If, therefore, he authorizes his widow who was also the executrix of his will conjointly with two other executors, the power is void. (2)

1776. But there is nothing illegal in a testator conferring two or more separate powers upon separate individuals. So where the testator empowered his two wives to make *patni* settlement of his immoveable property and empowered three other persons to arrange for the performance of the family rites and ceremonies and the debts and dues, the court upheld them as in no way clashing with one another. (3) Where a testator leaves a *kam* out of a certain land to a certain person, the whole land measuring more, the legatee has the right of selection and is entitled to one *Ram* out of a specified portion of the estate. (4)

180. (1) A will made in accordance with the Hindu Wills Act must be proved as therein required.

(2) A will otherwise executed must be proved so as to show that it is a complete instrument and expresses the deliberate intentions of the testator.

(3) The words of an oral will must be proved with the utmost precision, with every circumstance of time and place.

Synopsis.

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| (1) <i>Proof of will</i> (1777-1778). | (3) <i>Character of the dispositions</i> |
| (2) <i>Nuncupative will to be strictly proved</i> (1779-1780). | (1780). |
| | (4) <i>Loss of will</i> (1781). |

1777. Analogous Law.—In the territories to which the Hindu Wills Act applies a will must be made as therein provided ; but elsewhere it may be made orally or in writing. In the first case, it must be executed as provided in part VIII (Ss. 50, 51) of the Succession Act, that is to say, except in the

(1) *Jaserbai v. Kabli Bai*, 16 B. 498 (499, 500) reversing O. A. 15 B. 826; *Girdharji v. Madhoddas*, 17 B. 600 (617).
 (2) *Amrito Lal v. Surnemoni*, 25 C. 662 affirmed O. A. 27 C. 996 (1008) P. C.
 (3) *Promode v. Krishna*, 1 O. L. J. 301.
 (4) *Narayanamsami v. Perialthambi*, 18 M. 460.

case of a soldier employed in an expedition, or engaged in actual warfare, or a mariner at sea, every other person must execute his will which must be attested by two witnesses.

1778. Where the will is in writing but is not subject to the Hindu Wills Act, it need not be attested. It need not even conform to the provisions of a privileged will, ⁽¹⁾ in that it is subject to no formal rules and need not be even be signed by the testator, ⁽²⁾ all that is necessary being that it be a complete instrument, and express the deliberate intention of the testator. It need not be attested ⁽³⁾ and even if attested, it may be proved otherwise than by calling the attesting witnesses ⁽⁴⁾

1779. Nuncupative will.—A nuncupative will is valid. ⁽⁵⁾ "But if any party is bound, in strictness of pleading, it is he who sets up a nuncupative will. He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies with every circumstance of time and place". ⁽⁶⁾

1780. The question whether the will was an officious or an inofficious will is material as operating upon its probability or improbability. ⁽⁷⁾ The court will treat an officious will as *prima facie* improbable, being regardless of the ordinary preferences ⁽⁸⁾ of natural ties and affection. So where a person subject to the Mitakshara law made in a will favour of the first cousin who lived in joint estate with him to the disinherison of his widow except a small provision for her maintenance in the event of her leaving the family home, the will was held, in the circumstances, proved. ⁽⁹⁾ But this is a question of antecedent probability upon which the English Judges rely upon the opinion of Hindu Judges who are more conversant with the habits and trend of thought of their co-religionists. ⁽¹⁰⁾ So on the point of vernacular writing the opinion of a native Judge is to be preferred to that of a European. As their Lordships observed, "Now with great respect for the knowledge which the two learned Judges of the High Court possessed, as their Lordships doubt not, of the Bengali language, their Lordships cannot but think that upon such a point as that the native Judge, examining a letter in his own alphabet, is more likely to be a competent Judge than the two European judges." ⁽¹¹⁾ These remarks occur with reference to the construction of the letter which the moribund testator was stated to have mustered strength to write, for the word "Manzur," (or "Agreed") which the Sadar Amin had held to be in the testator's handwriting from whom the High Court had disagreed. After expressing their preference to the native Judge their Lordships proceeded: "But it is impossible from the mere inspection of the letter, as it appears to their Lordships, to be able to predicate with any degree of

(1) S 58, Succession Act.

(2) *Vinayak v. Govindrav*, 6 B.H.C.R. 77 (A.C.) 224.

(3) *Mancherji v. Narayan*, 1 B.H.C.R. 77; *Radhabai v. Ganesh*, 3 B.7 (8).

(4) S. 72, Evidence Act

(5) *Srenivasammal v. Vijayammal*, 2 M. H.C.R. 37; *Turachand v. Nobin Chander*, 3 W.R. 188; *Sudanand v. Soorjo*, 8 W.R. 455; *Vinayak v. Govindran*, 6 B.H.C.R. (A.C.) 224; *Bhagvan v. Kalashanker* 1 B. 641. (614).

(6) Per Sir James Colville in *Beer Partab v. Rajender*, 12 M.I.A. 1 (98); *Dhurilal v. Dhania*, 5 N.L.R. 85.

(7) *Sorendramath v. Heeramoni*, 12 M.I.A. 81 (97-98).

(8) *Sorendra nath v. Heeramoni*, 12 M.I.A. 81 (98).

(9) *Ib.*

(10) *Rajendra v. Jogendro*, 14 M.I.A. 67 (90).

(11) *Rajendro v. Jogendro*, 14 M.I.A. 67 (84).

certainty or accuracy, that he was too weak to make the impression with his pen which he is said to have made. It is impossible to say what he is said to have made. It is impossible to say what momentary rally of strength might take place to do an act of such brevity as that: and therefore, their Lordships are unable to give to that, which is after all merely the impression of these two Judges derived from actual inspection, the weight which has been given to it".⁽¹⁾

1781. A will is not invalidated merely because some person other than the devisee is competent to confer greater spiritual benefit on the testator: nor is it invalidated on the ground of there being no provision for the maintenance of the widow of the deceased brother of the testator.⁽²⁾ The will of a childless Hindu giving power to adopt a son, though opposed to the interests of the widow and the next heir in reversion, is not officious.⁽³⁾

Under English law a will traced to the testator's possession and not forthcoming at his death, is presumed to have been destroyed by him *animo revocandi*. But the same degree of presumption, if at all, does not arise under Hindu Law.⁽⁴⁾

181. (1) The maker of a will may revoke it at any time.

(2) Subject to any law for the time being in force, such revocation may be oral though the will itself be in writing.

(3) The subsequent marriage of the testator, or the birth or adoption of a son, has not the effect of revocation; nor has the subsequent execution of another will necessarily that effect except so far as it is inconsistent with its terms.

Explanation.—A written will may be revoked by parol though the will itself is not destroyed.

Illustrations

(a) A has made an unprivileged will. Afterwards A makes another unprivileged will which purports to revoke the first.

This is a revocation.

(b) A has made an unprivileged will. Afterwards A being minded to make a privileged will makes a privileged will which purports to revoke his unprivileged will.

This is a revocation

Synopsis.

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|---|---|
| (1) <i>Revocation of will</i> (1782). | (4) <i>Effect of marriage, and birth or adoption of a son</i> (1787). |
| (2) <i>Formalities if necessary</i> (1782-1785). | (5) <i>Presumption of revocation from loss of will</i> (1788-1789). |
| (3) <i>Intention to revoke, essential</i> (1784). | |

(1) *Rajender v. Jogendra*, 14 M. I. A. 67

(84).

(2) *Roonmonee v. Krishno*, 20 W. R. 147.

(3) *Sarado v. Tincourry*, 1 Hyde 228.

(4) *Shibi Sabitri v. Collector*, 19 A 82

(89)

1782. Analogous Law.—The revocation of a will made under the Hindu Wills Act is subject to the following provisions of the Succession Act. (1)

S. 57. No unprivileged or codicil nor any part thereof shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same. This is sanctioned by the Hindu usage under which, however, a will is revocable without any of the restrictions enacted in the Succession Act. All that is necessary is intention.⁽²⁾ This was the law of England before the Statute of Frauds was passed.⁽³⁾ It is not necessary that the will itself should be cancelled, torn up or destroyed. Nor indeed need the revocation be formal or in writing.⁽⁴⁾ But though this is the law, its dangers are obvious and as the Privy Council said: "Their Lordships are very sensible of the danger of acting upon such evidence as is ordinarily produced in the courts in India in order to establish such a revocation and they desire to say nothing which may induce those courts to apply the law in such cases otherwise than with extreme caution."⁽⁵⁾ This passage occurs in a judgment in which their Lordships had to consider the oral revocation of a written will which though ordered to be, was in fact, never destroyed. It was however supported by his subsequent conduct. The same view was taken in another case in which one Venkata Rao had during his illness made a will disposing of his property to his wife, his daughter, and her son in succession. On recovering from his illness he executed a power of attorney appointing a pleader to obtain the will out of the Registry and to restore it to him. Owing to some blunder this was not done for the testator had cancelled some grants recited in it. For 20 years after his death no one claimed under it, the effect of which all was held to justify the finding that the will had been revoked.⁽⁶⁾

1783. Revocation of will.—The power of revocation at will is a necessary incident of a will and inherent in the maker who may make and unmake it as he chooses till the hour of his death.⁽⁷⁾ Persons may agree to make mutual wills which remain revocable during their joint lives by either with notice to the other. But where the joint will is a disposition by each testator of his own property without any arrangement between the two, the will is revocable at the will of either and cannot be proved till the death of the survivor.⁽⁸⁾

1784. A will, whether single or joint, is revocable. No formal words are necessary to constitute revocation. As Lord Denman, C. J., said: "Some doubt has been entertained whether any declaration could be sufficient without the word 'revoke' but upon full consideration, we think it impossible so to limit the testator's power of revocation, and that any equivalent words or words and expressions would be sufficient for that purpose."

"But further, we are now required to consider whether without any language at all, a testator may revoke a will by the conduct he exhibits.

(1) *Subba v. Dcraisami*, 30 M 369.

(2) *Pertab Narain v. Subhao*, 8 C 626 (688) P. C.

(3) *Ib.*, p. 643

(4) *Venkayamma v. Venkata Ramanayamma*, 25 M. 678 (685) P.C.

(5) *Pertab Narain v. Subhao*, 8 C 626 (648)

P. C.

(6) *Venkayamma v. Venkata Ramanayamma*, 25 M. 678 (685) P. C.

(7) S 49 Succession Act; *Rambhajan v. Gircharan*, 27 A.14; *Basant v. Muna*, 20 C. 326.

(8) *Minakshi v. Viswanatha*, 20 M L J. 389; 5 I. C. 794.

And this appears to be tantamount to an enquiry whether conduct *can* give a positive declaration of intent. If it can, there can be no more necessity for words than for the use of a particular expression. Now, nothing is easier than to imagine such gestures and proceedings connected with the will, as must fully convince every rational mind that the testator intended to revoke his will, and thought he had done so by the means he took for that purpose. But if he who has power to revoke by declaring a present resolution then to do so, does in fact make that resolution manifest, it seems clear that the act of revocation is complete in every essential." ⁽¹⁾ It is thus clear that all that is necessary to effect revocation is the *animo revocandi* and that revocation may be express or implied by words, acts or conduct leading to an irresistible conclusion that the testator had cancelled his will.

1785. But though this is the rule its logical possibility must not be confused with its reasonable application. The court will, indeed, demand very clear, cogent and consistent proof of an oral revocation of a written will and such evidence must necessarily be most precise as to time and place.

1786. A will may contain its own terms of revocation. Such was the will of a testator who had stated in the preamble to it that it was executed for that year only. He died without doing anything afterwards to indicate his intention to keep it as a testamentary instrument and it was held that the will had no force whatever and that the testator must be presumed to have died intestate. ⁽²⁾

1787. Effect of marriage and birth or adoption of son.—Under S. 56 of the Succession Act marriage operates as revocation of the will. But this section has not been extended to Hindus under the Hindu Wills Act which leaves their common law on the subject intact which contains no provision on wills and consequently no such provision as is enacted in the Succession Act. Neither marriage nor the birth or adoption of a son ⁽³⁾ has the effect of revocation, though, as already remarked, the son may defeat a devise by his own claim by survivorship.

1788. In England a presumption of revocation arises from the non-discovery of the will last shown to be in possession of the testator. ⁽⁴⁾ But no such presumption arises in this country. ⁽⁵⁾ Even in England it raises only a presumption more or less varying in strength with the circumstances of each case. As Lord Campbell, C. J., said, "Certainly the fact of the will being last traced to the possession of the testator and not being found is not conclusive that he cancelled it. If, for instance, it could be shown that the heir at law had access to the place where the testator had deposited the will and grounds could be shown for a suspicion that he had destroyed it, it would be a case to

(1) *Reed v Harris*, 8 A and E. 11 cited and followed in *Chelikkini v. Appa*, 20 M. 297 (209, 210) affirmed O. A. *Venkayamma v. Venkata Ramanayyanamma*, 25 M. 678.

(2) *Gnanambal v. Ammalu*, 5 M. L. J. 94.

(3) *Subba Redi v. Doraisami*, 30 M. 369 (871); *Harendra Nath v. Shibo*, 3 I.C. (C) 876; *Venayak v. Govindran*, 6 B. H. C.R. (A.C) 224.

(4) *Finch v. Finch* 1 P. & D 87 (Per Sir J.P. Wilde "It is the non-existence of the paper

at the time of death which leads up to the legal presumption of revocation") *Welch v. Phillips* 1 Moo. P. C 239; *Brown v. Brown*, 8 E & B 876; *Sugden v. Lord St Leonards* L.R. 1 P. D. 164.

(5) *Chidambara v. Swaminathan*, 18 M. L. J. 185; *Hamwala v. Padam*, (1909) P. W. R. 160; *Shib Sabitri v. Collector*, 29 A. 82 (89); *Amwar Hossain v. Secretary of State*, 31 C. 885.

consider." (1) And there is no presumption at all, unless there is evidence to satisfy the court that the will was not in existence at the time of the testator's death. This presumption owes its existence to the habits of the people who preserve with care all their deeds and wills. But the same presumption cannot extend to people who are permitted to make an oral will, and whose muniments of title are not preserved with the same degree of care. As observed by the Privy Council in a case decided in 1838: "Now the rule of the law of evidence on this subject as established by a course of decisions in the ecclesiastical courts is this: that if a will, traced to the possession of the deceased and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself and that presumption must have effect, unless there is sufficient evidence to repel it. It is a presumption founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved by a person of ordinary caution in some place of safety and would not be either lost or stolen; and if on the death of the maker, it is not found in his usual repositories or elsewhere where he resides, it is in a high degree probable that the deceased himself had probably destroyed it. But this presumption, like all others, yields to circumstances which raise a higher degree of probability to the contrary. The onus of proof of such circumstances is undoubtedly on the party propounding the will." (2)

1789. The Calcutta court followed this rule in a case in which they held that the court may presume revocation of a will last traced to the testator and shown to be non-existent at his death. Such a presumption is however a presumption of fact which the court may make under S. 114 of the Evidence Act. But regard must be had to other circumstances. As the court remarked: "The presumption subject to these qualifications may no doubt be applied in this country with due regard to the special conditions prevalent here, where deeds are not kept and preserved with the same care and where their preservation is more difficult. And there is another presumption, which, having regard to the habits of the people of this country and especially to those of a wandering *Fakir* may well arise, namely that, when a document like this is not forthcoming, after the testator's death, it has been mislaid." (3)

182. (1) A will or any part thereof is void if it is brought about by coercion, fraud, undue influence, misrepresentation or by such importunity as deprives the maker of his free will.

(2) And if the maker of a will is induced by the same means to alter or revoke his will, or is prevented from altering it, it will have the same effect which the maker had intended.

Explanation.—The importunity, undue influence and misrepresentation under this section must be such as amounts to fraud or force destroying the free agency of the testator.

Illustrations.

(a) A threatens to shoot B, or to burn his house, or to cause him to be arrested on a false charge unless he makes a bequest in favour of C. B in consequence makes a bequest in favour of C. The bequest is void as induced by coercion.

(1) *Brown v. Brown*, 8 E. and B. 876.

(2) *Welch v. Phillips*, 1 Moo. P.C. 299.

(3) *Amwar Hossain v. Secretary of State*, 31 O. 885 (892).

(b) *A* falsely informs *B* that his son is dead and thereby induces *B* to bequeath his estate to *A*. The bequest is void.

(c) *A* being in so feeble a state of mind as to be unable to resist importunity is pressed by *B* to make a will of a certain property merely to purchase peace and in submission to *B*. The will is void.

(d) *A* wishes to revoke his will made in favour of *B*. *B* threatens to kill *A* if he revokes it. The will is void.

(e) *A* makes a will in favour of *B* on his death-bed. He is induced by importunities of *C* to alter it in favour of *C*. The alteration is void.

(f) *A* is induced by the adulation and flattery of *B* to make a bequest in his favour. The bequest is not rendered invalid by reason *B*'s adulation and flattery.

Synopsis.

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|---|---|
| (1) <i>Void wills</i> (1790). | (1791). |
| (2) <i>Invalidating circumstances</i> (1790). | (4) <i>Force or fraud renders will void</i> (1792). |
| (3) <i>Free will of testator essential</i> (1793-1796). | (5) <i>Undue influence</i> (1793-1796). |

1790. Analogous Law.—This section is adapted from S. 148 of the Succession Act which is extended by the Hindu Wills Act to Hindus subject to that Act. But even apart from that Act, the section enunciates a general principle which is equally applicable to cases not subject to that Act. (1)

1791. Free will.—To be operative the will must emanate from the free will of the maker. This does not mean that the making of a will must originate with the testator; (2) nor is it required that proof should be given of the commencement of such a transaction, provided it be proved that the testator completely understood, adopted and sanctioned the disposition proposed to him, and that the instrument, if made, itself embodied such disposition. (3) If a part of a will has been obtained by fraud or any of the other means above enumerated it is to that extent invalid unless it alters the sense of the remainder so that there is a question whether there is a valid will at all. (4)

1792. Force and fraud are sufficient to vitiate all transactions. As such, they vitiate a will. But apart from these, a will may be vitiated if it is caused by the exercise of undue influence. As Eyre, C. B., said: "There is another ground which though not so distinct as that of actual force, nor so easy to be proved, yet if it should be made out, would certainly destroy the will; that is, if a dominion was acquired by any person over a mind of sufficient sanity to *general purposes*, and of sufficient soundness and discretion to regulate his affairs *in general*; yet if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind." (5) To which Williams adds in his work on Executors: "But the influence to vitiate an Act must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was dictated by this coercion; by importunity which could not be resisted; that it

(1) *Bali v. Husani*, (1894) P. R. 55.
Kashahat v. Administrator General, 5 C.W.N. 506.

(2) *Constable v. Tufnell*, 8 Knapp 122.
 Hyde 250.

(3) *Constable v. Tufnell*, 8 Knapp 122.
 (4) *Rhodes v. Rhodes*, L. R. 7 App. Cas. 192.

(5) *Mountain v. Bennett*, 1 Cox. 355.

was done merely for the sake of peace ; so that the motive was tantamount to force and fear." (1)

1793. The same view was taken by Lord Cranworth in delivering the judgment of the House of Lords, in the course of which he said: "In a popular sense, we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if in these circumstances, the young man, influenced by his regard for the person who has thus led him astray were to make a will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man to dispose his property: provided only, that in making such a will, the young man was really carrying into effect his own intention, formed without either coercion or fraud. I must further remark that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion are greatly enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish."

"In order therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used, or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency; a will thus made may possibly be described as obtained by coercion. So as to fraud, if a wife by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed; such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive. It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that, allowing a fair latitude of construction, they must range themselves under one or other of these heads—coercion or fraud." (2)

(1) *Williams on Executors* (9th Ed.) 40 citing *Williams v. Gonde*, 1 Hagg 581; *Constable v. Tufnell*, 4 Hagg 455; *Sefton v. Hopwood*, 1 Fost and F. 578; 8 *Lovett v. Lovett*, 1 Fost and F. 481; *Hall v. Hall*, L. R. 1 F

and D 491; enacted as S. 48 Succession Act; and followed in *Tajmashwari v. Ugneshwari*, 11 C. W. N. 828

(2) *Boyse v. Rossborough*, 6 H. L. C. 1.

1794. The undue influence vitiating a will must be an influence exercised in relation to the will itself, not an influence in relation to other matters or transactions. But as pointed by Lord Cranworth in the case last cited, this principle must not be carried too far. "Where a jury sees that, at and near the time when the will sought to be impeached was executed, the alleged testator was, in other important transactions, so under the influence of the person benefited by the will, that as to them he was not a free agent, but was acting under a control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence, bearing direct on the execution of the will, that in regard to that also the same undue influence was exercised". (1) So in another case Sir J. Wilde (afterwards Lord Penzance) directed the jury in these words: "To make a good will a man must be a free agent. All influences are not unlawful. . . . But pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to empower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. The importunity or threats, such as the testator had assented and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven, and his will must be the offspring of his own volition and not the record of some one else." (2)

1795. It will be thus seen that the term "undue influence" as used in relation to wills has a more limited meaning than it bears as operating on contracts and gifts. They are set aside if it can be shown that by reason of a relationship one was in a position to dominate the will of the other. But in the case of a will, relation is no evidence of coercion or dominion exercised over the testator against his will or of coercion so strong that it could not be resisted. (3)

1796. The question of undue influence must not be mixed up with that of incapacity: since incapacity is one thing and undue influence another, (4) though the proof of one is not irrelevant to the proof of another, (5) since the exercise of undue influence is greatly facilitated by feeble health, produced by disease, distress or age. (6)

183. (1) The burden of proving a will
Burden of proof. lies upon the person who propounds it and not upon the person who impeaches it.

(2) Such proof must comprise not only proof of due execution, but also that the executant was of a sound disposing mind, though if nothing appears to the contrary, this may be presumed.

Explanation.—A person is said to possess a disposing mind if he possesses sufficient understanding and reason to be able

(1) *Boyse v Rossborough*, 6 H.L.C. 1 (6) followed in *Sayad Muhammad v. Fatteh Muhammad*, 22 C. 824 (336, 337) P. C.

(2) *Hall v Hall*, L.R. 1 P. and D. 481

(3) *Parfitt v. Lawless*, L. R. 2 P. and D 462.

(4) *Sayad Muhammad v. Fatteh Muhammad*, 22 C. 824 (336) P. C.

(5) *Levett v. Levett*, 1 F. and F. 581.

(6) *Woomesh Chunder v. Rashmohini*, 21 C. 279; *Bur Singh v. Uttam Singh*, 38 C. 355 P. C.

to form an intelligent judgment as to the disposal of his property.

Synopsis.

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| (1) <i>Burden of proving will on person propounding</i> (1797-1798). | (3) <i>Proof of sound disposing state of mind</i> (1802-1804). |
| (2) <i>Disposing state of mind of testator</i> (1799-1801). | (4) <i>Effect of pressure</i> (1805). |

1797. Analogous Law.—Both the clauses of this section are supported by the decisions of the Privy Council. (1) If a party writes or prepares a will under which he takes a benefit, or if any other circumstances exist which excite the suspicion of the Court, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the will, and it is only where this is done that the *onus* is thrown upon those who oppose the will to prove fraud, or undue influence, or whatever they rely on to displace the case for proving the will. (2)

1798. Ordinarily proof of due execution will be sufficient if only execution is proved; it being presumed that the testator was competent. But where his competency is challenged it must be proved as a part of "due execution" that is to say he who proves execution by a person must also affirmatively establish his competency to the extent that he possessed at the time a sound disposing mind. (3)

1799. Disposing mind.—The testator must be known to possess a disposing mind, that is to say, a mind sufficiently sound to understand the nature of the Act. (4) A man may be a monomaniac (5) but it does not incapacitate him from making a will. Even a lunatic may make a will in his lucid intervals, the only difference being that upon proof of general insanity it will be on those relying upon the will to prove its execution during a lucid interval. (6)

1800. The amount of intelligence which constitutes a disposing mind was thus defined by Warren, J: "A man is competent to make his will if he has sufficient memory and intelligence to be able to comprehend the nature of his property, to remember and understand the claims of relations and friends, and to have a judgment of his own in disposing of his property. . . . If a man possesses this amount of memory and intelligence, he is a competent testator; if he is not able to perform the mental acts mentioned, then he is not a competent testator." (7) "It is not sufficient in order to make a will that a man should be able to maintain an ordinary conversation and to answer familiar and easy questions. He must have more mind than suffices for that. He

(1) *Cl. (1) Sukh Dei v. Kedarnath*, 28 A. 405 P. C.

Cl. (2) Shunmugaraya v. Manikka, 82 M. 400 P. C.

(2) *Laahho v. Gopi*, 28 A. 472

(3) *Woomesh Chunder v. Rashmohini*, 21 C. 279; *Bur Singh v. Uttam Singh*, 83 C. 355 P. C.

(4) *Purandar v. Tulsa*, 9 C. P. L. R. 189; *Woomesh Chunder v. Rashmohini*, 21 C. 279;

Bur Singh v. Uttam Singh, 83 C. 355 P. C.

(5) *Vanks v. Goodfellow*, L. R. 5 Q. B. 549

(6) *Cartwright v. Cartwright*, 1 Phillim. 100.

(7) *Longford v. Purdon*, Ir. R. Ch. 75 (77).

must have what the old lawyers called 'a disposing mind'. He must be able to dispose of his property with understanding and reason. This does not mean that he should make what other people may think a sensible will or a reasonable will, or a kind will . . . But he must be able to understand his position, he must be able to appreciate his property, to form a judgment with respect to the parties whom he chose to benefit by it after death; and if he has capacity for that it suffices." (1)

1801. The term "disposing mind," was then defined by the Privy Council: "In order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but that he must also have capacity to comprehend the extent of his property and the nature of the claims of others whom by his will he is excluding from all participation in his property. . . . The question is not whether Mr. Baker knew when he was giving all his property to his wife and excluding all his other relations from any share in it but whether he was at the time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty and of deliberately forming an intelligent purpose of excluding them from any share of his property." (2)

1802. Proof of will.—Two things are essential to the proof of a will, (i)—that the executant had a disposing mind and, (ii)—that he had executed it. Mere proof of execution is not sufficient but if added to execution there is the proof the executant's disposing mind, then the requirements of law are satisfied. It is then on him who challenges its execution to prove it. The fact that the will is attested by his servants and dependents is of course, no ground for holding it invalid, though that fact becomes material when there is a reasonable suspicion that the will is not the voluntary act of the testator and has been procured by the undue influence of members of his household. (3) Their Lordships had to consider such a case decided upon the following facts. One Sir Tharia Topan was a native of Zanzibar and owner of a larger mercantile business carried on in that Island. He was a khoja, and as such observed Hindu customs as regards his property. He was the father of 8 living children, 3 of whom were born of a previous marriage and 5 were of his living wife Janbai. He died in 1891 after executing a will and five codicils of which his widow applied for probate. His eldest son Musa contested the application alleging that the third and fourth codicils were obtained by the undue influence or coercion of Janbai and that the fifth codicil, if signed at all, was signed when he was unconscious. The plea of undue influence was supported on the ground that in 1889, when they were executed the testator was very infirm in health and almost blind, dependent upon Janbai who was a woman of superior abilities and great force of character; that she had acquired constantly increasing dominion over the testator's mind, and that she used it to obtain from him a constantly increasing amount of benefit for herself, which it is extremely improbable that he would have given her of his own accord. The third codicil empowered his executors to leave out all property which Janbai called her own and the fourth codicil conferred increased benefit upon her. The former codicil was prepared by a solicitor of the first rank in Bombay. The evidence showed that the wife was importunate and

(1) Per Creswell, J. in *Sefton v. Hopwood*, (290).

1 F. and F. 579.

(2) *Chote Narain v. Ratan*, 22 C. 519

(3) *Harwood v. Baker*, 8 Moo. P. C. 292 (582) P. C.

the husband made the third and fourth codicils to satisfy her. But the court held these facts insufficient to establish undue influence amounting to coercion. But their Lordships condemned the fifth codicil holding the executant not sufficiently conscious to understand the effect of the valuable bequests he was making to Janbai and her minor son aged 6. (1)

1803. What is then the degree of consciousness and intelligence that is sufficient to uphold the will of a dying man? "To constitute a good testamentary disposition the testator must retain a degree of understanding to comprehend what he is doing, to have a volition or power of choice: so that what he does really must be his own doing and not the doing of anybody else."

"The faculties in those two great divisions of the understanding and the will must still exist. They may have declined from their former comprehensiveness and vigour, they may be, and often are, on such occasions weakened, actually on the point of being extinguished; still though they may be as it were flickering in the socket, yet if they suffice to show the genuine and last behests of a rational creature, and a free agent, that is a good will in point of law. Wills are too frequently made by the sick and dying; the degree of understanding therefore which the law requires is such as may reasonably be expected from persons in that condition. It is not enough that the testator is able to answer familiar and usual questions. That has always been laid down. He must be able to exercise a competent understanding as to the general nature of the property, as to the state of his family, and as to the general condition and claims of the objects of his bounty, as to the nature of the instrument which he executes, and as to the general nature of the general objects and the provisions of which it contains; if he can do that, though he may be very feeble and debilitated in understanding, and be at the point of death, it is enough." (2)

1804. These observations were applied to the will of a person executed during his last illness which the court held had not been executed in a state of mind when he could deliberate upon its nature and character. (3) But in another case the Privy Council upheld the will of a moribund testator against whom all that was proved was that he was generally intemperate and at the time seriously ill and as to the charge of undue influence, all that was shown was that there was motive and opportunity for its exercise which in their Lordships' view was a ground for suspicion such as should justify the scrutiny with special care the evidence of those who propound the will. "But in order to set it aside there must be clear evidence that the undue influence was in fact exercised, or that the illness of the testator so affected his mental facilities as to make them unequal to the task of disposing of his property". (4) Such evidence was lacking in the case and the circumstances attending the making and execution of the will were not reasonably consistent with it.

1805 A will is not validated on the ground of its having been executed under pressure, unless the pressure was such as the testator could not resist. (5)

(1) *Sala Mahomed v. Janbai*, 22 B. 17 (87, 88) P. C. C. 279.

(2) *Swinfen v. Swinfen*, 1 F. and F. 584 followed in *Woomesh Chunder v. Rashmohini*, 21 C. 279 (298, 294).

(3) *Woomesh Chunder v. Rashmohini*, 21

(4) *Bur Singh v. Utam Singh*, 88 C. 855 P. C.

(5) *Jajnekhvata v. Ugneshwari*, 11 C. W. N. 824.

CHAPTER XVIII.

CONSTRUCTION OF GIFTS AND WILLS.

184. Deeds must be literally construed giving effect to the grantor's intention ascertainable, as far as possible, without the aid of any artificial rules of construction.

Construction of Indian deeds.

Synopsis.

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| (1) <i>Construction of Indian deeds</i> | <i>to be avoided</i> (1807). |
| (1806). | (3) <i>Invalid disposition of property</i> |
| (2) <i>Technical rules of construction</i> | (1808). |

1806. Analogous Law.—There are two modes of construction favoured by law, *viz.*, the literal and the benignant construction. The English law enacted in several sections of Chapter II of the Transfer of Property Act and of Part XII of the Succession Act favours the first method of interpretation which is natural owing to the advanced stage of English conveyancing and its phraseology adapted to the rules of interpretation which have become an integral part thereof but the same rule of literal construction cannot be extended to this country where the law of property is different and the art of conveyancing outside the Presidency towns practically unknown.

1807. The only rule possible for this informal mode of expression is that laid down by the Privy Council who said, "deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses".⁽¹⁾ This rule then Lordships have repeated in other cases⁽²⁾ in one of which they emphatically called attention to the following passage in the judgment of Wilson, J which they approved. It is no new doctrine that rules established in English courts for construing "English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing and the success of those rules in giving effect to the real intention of those whose language they are used to interpret depends not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently and speak differently from Englishmen and who have never heard of the rules in question."⁽³⁾

(1) *Hunooman Persad v. Mt. Babooee*, 6 M. J. A. 398 (411, 412).

(2) *Sreemutty v. Sibchunder*, 6 M. J. A. 1; *Gokuldas v. Rambur*, 11 I. A. 126; *Tagore v. Tagore*, 9 B. L. R. 877 P. C. *Rai Bishen v. Asmaida*, 6 A. 560 F. C.; *Bhagabati v. Kali-*

charan, 38 C. 468 P. C.

(3) *Ramlal v. Kamailal*, 12 C. 363 (373) cited with approval in *Bhagabati v. Kalicharan*, 38 C. 468 (474) P. C. affirming O. A. 82 C. 992.

1808. So in the *Tagore case* ⁽¹⁾ it was said: "Another general principle applicable to transfers by gifts (more literally applied in the law of England to wills than to gifts *inter vivos*) is that a benignant construction is to be used and that if the real meaning of the document can be reasonably ascertained from the language used, though the language be ungrammatical or untechnical or mistaken as to name or description or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced and in the form which the law allows. Accordingly if the gift confers an estate describing the kind of inheritance, but showing that it was intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs. If an estate were given to a man simply, without express words of inheritance, it would in the absence of a conflicting context, carry by Hindu Law (as under the present state of law it does by will in England) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass. If again, the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize. If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than that specified by law expressly excluding the legal course of inheritance, as for instance, if an estate were granted to a man and his eldest nephew and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any power to dispose of the estate during his life-time, here inasmuch as an inheritance so described is not legal, such a gift cannot take effect except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would in this case take for his life-time, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from which the gift attempts to confer and that estate of inheritance which it confers, is void." ⁽²⁾

**Grant or bequest
conveys grantor's
entire interest.**

185. A grant or bequest *prima facie* conveys the entire interest of the grantor unless it is limited expressly or by necessary implication.

Illustration.

A the proprietor of the estate B bequeaths it to C with the words "I give B to C." The *quantum* of interest bequeathed to C is that possessed by A at the moment of the grant. ⁽³⁾

1809. Analogous Law.—The rule here stated underlies S. 8 of the Transfer of Property Act and S. 82 of the Succession Act and is therefore in

(1) *Tagore v. Tagore*, 9 B.L.R. 377 P.C.

(3) *Tagore v. Tagore*, 9 B. L. R. 377 (895)

(2) *Tagore v. Tagore*, 9. B. L. R. 377 (895), P. C.
896) P. C.

accordance with the English rule, that every grant must be construed most strongly against the grantor as conveying all that he has not reserved by the words or necessary implication. (1)

Gift to female relation.

186. In the absence of an express direction to the contrary a gift or devise to a female relation is presumed to convey only a life-estate.

Synopsis.

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| (1) <i>Gift to females</i> (1810). | (4) <i>Grant to daughter</i> (1816-1817). |
| (2) <i>Presumption of limited estate</i> (1810-1814). | (5) <i>Gift to co-parceners</i> (1818). |
| (3) <i>Grant to wife or widow</i> (1815). | (6) <i>Gift to several donees</i> (1819). |
| | (7) <i>Donatio mortis causa</i> (1820). |

1810. Analogous Law.—This section is based upon a decision of the Privy Council in a case since followed by the Indian Courts. (2) In that case one Har Narain a wealthy resident of Behar had filed a petition in the court of the Collector of Patna in which after reciting that he was entitled to and in possession of certain ancestral property and that as his wife, son, brother and brother's wife were all dead, mutation by names might be effected in favour of his son's widow Dhankuar and her two daughters except whom "none other is nor shall be my heir and malik Further more, to the said Dhankuar too these very two daughters named above, together with their children who after their marriage may be given in blessings to them by God Almighty, are and shall be heir and *malik*." Har Narain died in 1838 leaving him surviving his daughter-in-law Dhankuar and her daughter's son. In 1854 Dhankuar sold part of the lands mentioned in the mutation petition to one M for Rs. 41,000 of which Rs. 14,000 were devoted to pay off a mortgage thereon. The daughter's son sued both Dhankuar and the mortgagee for cancellation of the sale as not supported by legal necessity. The High Court decreed the claim upon terms against which both parties appealed to the Privy Council. It was contended for Dhankuar and the mortgagee that the bequest vested in her an absolute title but the other side contended that petition intended to devise only the ordinary estate of a Hindu widow; and this view was upheld by Sir Robert Collier who said: "In construing the will of a Hindu, it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that as a general rule at all events, women do not take absolute estates of inheritance which they are entitled to alienate. Having reference to these considerations together with the whole of the will all the expressions of which must be taken together without any one being insisted upon to the exclusion of others, their Lordships are of opinion that the two courts in India, who both substantially agree upon this point, are right in construing the intention of the testator to have been that the widow of his son should not take an absolute estate which she

(1) *Damodar Gas v. Dayabhai*, 22 B. 838. (841). *Nanda Gopal v. Pareshmani*, 17 C. L. J. 461; 6 I C 354. *Mrital v. Advocate-General*, 35 B. 275 (285); *Amba Lal v. Rera*, 6 Bom. I. J. R. 384 (389); *Brijlal v. Suraj Bikram*, 9 A.L. J. 802 (806).

(2) *Shamsul Huda v. Shewakram*, 14 B. L. R. 296 (281, 289) P. C; *Radha Prasad v. Rani Mahi*, 85 C. 896 (902) P. C;

should have power to dispose of absolutely, but that she took an estate subject to her daughters succeeding her in that estate whether succeeding her as heirs of herself or succeeding her as heirs of the original testator is immaterial. It would appear that the testator used the word heir as signifying the person who is to take immediately in succession to another; that he applies it to the Rani as the person who is to take in immediate succession to him, and to the two daughters as the persons who are immediately to succeed to the Rani; and their Lordships think that, viewing the will as a whole, when he uses the expression except Mt. Rani Dhankuar aforesaid, none other is nor shall be my heir and malik, it may be fairly construed as meaning that she shall take a life-interest immediately succeeding him, without that interest being shared by her daughters or by any other person". (1)

1811. This case was followed by the Privy Council in another case in which the testator had bequeathed his estate to his daughters in a certain event. There were no words of limitation or enlargement. The will was drawn up in English by an English solicitor who attested it; but nevertheless the Privy Council construed it to convey to the daughters no more than a woman's estate in property. (2) The same view was taken in another case in which the testator had bequeathed the estate to his daughter-in-law simply with the words "I execute a will in favour of my daughter-in-law . . . who will remain in possession and enjoyment of all the property aforesaid like myself" words which were held to convey no interest in the property beyond that of possession and occupation. (3) But it is submitted that this construction does not give effect to the words "*mist mere*," as myself, which should have been held to convey at least a life-estate if not an absolute one as held in Calcutta. (4) It is true that she had been given the power to nominate any one whom she may think fit as heir "so that the name of the family may continue." But these words are words of enlargement and do not have the effect of limiting the estate already devised. In such crude productions the testator himself has no clear idea of what he is conveying. If the testator himself could be brought back to construe his deed he would probably feel as puzzled as the courts who have at times to evolve a meaning out of meaningless jargon.

1812. The rule here enunciated of course, only applies where the deed is ambiguous and is not sufficiently explicit as to the *quantum* of interest conveyed to a female donee, since it is now established that the words which are sufficient to convey an absolute estate in favour of a male relation are insufficient to convey the same interest where the donee or devisee is a female.

1813. In some cases it has been held that the rules are only applicable when the donee is the wife, being inapplicable, where the donee is any other female relation, e.g., the mother, daughter or sister. (5) So in a case it was observed: "We cannot hold that, when their Lordships of the Judicial Committee speak of a general rule in connection with Hindus' knowledge that women do not take absolute estate of inheritance which they are able to

(1) *Shamshool Huda v. Sheekram*, 14 B L R. 226 (281, 282) P.C.

(2) *Radha Prasad v. Rani Mani*, 85 C. 896 (902, 903) P.C.

(3) *Brijlal v. Suraj Bikram*, 34 A. 405 (411) P.C.

(4) *Raj Narain v. Katyayani*, 27 C. 649

(652).

(5) *Koonj Beehari v. Premchand*, 5 C. 684; *Bhoba v. Pearilall*, 24 C. 446 (651, 652); *Raj Narain v. Katyayani*, 27 C. 649 (652); *Radha Prasad v. Rani Mani*, 83 C. 947 (965) (Daughter takes an absolute estate); *Mahim Chandra v. Hara Kumari*, 42 C. 551 (576).

alienate, they meant a rule of Hindu Law ; since we know that the rule of Hindu Law with regard to gifts to mothers and a daughters is the reverse.”⁽¹⁾ But the Privy Council had formulated the rule in the case of a devise to the daughter-in-law⁽²⁾ and the reason assigned is a reason equally applicable to all female devisees who by reason of their sex are ordinarily precluded from taking an absolute estate. It has been so held in several cases.⁽³⁾ But a gift to a female for maintenance *prima facie* conveys only a limited estate.⁽⁴⁾ And it may be that a gift to the wife or widow is presumably a provision for life.⁽⁵⁾ And so in a case in which the testator had bequeathed his estate to his two wives declaring “that they, shall after my death, be heirs of all the moveable and immoveable properties . . . They shall have in every way, full power and all proprietary rights over all the moveable and immoveable properties” it was held that the intention of the deed was to convey to them as heirs in accordance with the ordinary rules of succession.⁽⁶⁾ In another case the father gifted his estate to his daughter and her descendants for ever which was held convey an absolute estate.⁽⁷⁾

1814. At any rate these cases convey sufficient caution to an intending testator who desires to bequeath an absolute estate to his female relations. He must *ex majore cautela* use unequivocal expressions such as that the donee if given an absolute estate which she is free to possess as if she were a male.

1815. Absolute gift.—But since there is no set form for conveying an absolute title the same sense may be conveyed otherwise,
To the wife. as it was held to be in the following cases. The husband executed a deed of gift in favour of his younger wife in the following terms : “You are my youngest wife and your two sons are minors ; therefore for your charitable expenses I make a gift of the above taluq to you” The gift was held to be absolute.⁽⁸⁾ In another case the wife was given the estate with the words that neither the donor nor his heirs should at any time have any claim to the property—which were held to constitute an-out-and-out gift.⁽⁹⁾ So was the devise to the wife whom the husband had appointed as his executrix and heir providing that if a son be born to him that son should be the owner of the residue and if no son be born, then his wife should be the owner.⁽¹⁰⁾

1816. The same rule seems to control the construction of a devise to a daughter though in some cases the presumption is held
To the daughter. as previously observed, erroneously, to be inapplicable to a daughter or in fact any female donee except the widow.⁽¹¹⁾
 A gift of an acre of land to the daughter on account of pinmoney was held to

(1) *Mahim Chandra v. Hara Kumari*, 42 C. 591 (576). To the same effect *Jagannath v. Jaikishun*, 1 Pat. T. J. 16; 34 I. C. 316. *Daulat v. Nandlal*, 9 C. P. T. R. 95 (presumption inapplicable to daughter)

(2) *Shamsul Huda v. Sherakram* 14 B. L. R. 226 P. C.; *Radha Prasad v. Rani Mani*, 35 C. 896 P. C. *Brijlal v. Suraj Bikram*, 34 A. 405 P. C.

(3) *Anaji v. Chandrabai*, 17 B. 508; *Koonj Beehari v. Premchand*, 5 C. 684.
 (4) *Ganendra v. Mohendra*, 42 I. C. (C) 884; *Braja Kisora v. Kundana*, 22 M. 431 P. C.

(5) *Sambasiva v. Visvam*, 80 M. 356 (362).

(6) *Sasmaz v. Sibrarain*, 1 Pat. L. W. 375; 39 I. C. 755.

(7) *Kanthammal v. Meenakshi* (1917) M. W. N. 807 43 I. C. 15

(8) *Pabitra v. Damodar*, 7 B. L. R. 697.

(9) *Ram Narain v. Peary*, 9 C. 880, *Joti Ram v. Surasri*, (1888) P. R. 18.

(10) *Jairam v. Kessurjee*, 4 Bom. L. R. 555.

(11) *Ramaswami v. Papayya*, 16 M. 466; *Daulat v. Nandlal*, 9 C. P. L. R. 95; contra *Radha Prasad v. Rani Mani*, 35 C. 896 P. C.

convey an absolute estate.⁽¹⁾ Similarly where property was given to a married daughter having male issue the presumption that the gift only a conferred life-estate upon the donee was held to be inapplicable.⁽²⁾

1817. But in another case the father, the holder of an impartible Raj, made a gift of a village to his daughter on the occasion of her marriage, providing that the daughter should hold possession of it without the power of transfer and that on her death it should descend to her children, but that if she died childless the village should revert to the grantor. The daughter having died childless, the grantor's successor sued for resumption and the Privy Council held that resumption was justified under the terms of the grant which conferred an absolute estate defeasible on the failure of issue.⁽³⁾ So where the testator after creating an endowment for religious worship in a pagoda directed that the shebaitship should be held by his wife and after his death by his son, and after his death "by my daughter and her husband Nundoo Lal Bose and their male children successively," the Privy Council held that the word "successively" to control the whole gift to the daughter, her husband and the male children and the intention was held to intend to give life-estates in the shebaitship to the sons of his daughter in succession.⁽⁴⁾ In another case the testator who had no male issue bequeathed certain real property to his eldest daughter and her sons from generation to generation. The legatee who had daughters predeceased the testator who then also died, leaving a widow and other daughters him surviving. The daughters of the deceased legatee claimed the property as the lineal descendants of the testator, contending that although S. 96 of the Indian Succession Act did not apply to the case it should be held to govern it by analogy as affording a guide to justice, equity and good conscience. It was held that English rule embodied in the Succession Act providing that on a gift to the testator's child, the legacy did not lapse on the legatee dying before the testator leaving lineal descendants, could not be extended by analogy to Hindu Law and that on the legatee predeceasing the testator the gift failed altogether.⁽⁵⁾

1818. The question whether a gift made to two or more co-parceners jointly conveys to them a joint or separate interest—a **Gift to co-parceners.** joint tenancy or a tenancy-in-common—has been considered in some cases.⁽⁶⁾ But the question seems to be one of intention⁽⁷⁾ in the absence of which the donees would take as tenants-in-common and not as joint tenants with a right of survivorship *inter se*.⁽⁸⁾ But a gift to two or more persons without indicating an intention that they were to take as tenants-in-common constitutes a joint tenancy. But this is as pointed out by the Privy Council⁽⁹⁾ an extremely⁽¹⁰⁾ technical rule of conveyancing which cannot be extended to Hindu Law as it has been (it is submitted, erroneously) in some cases.⁽¹¹⁾

(1) *Musiligaadu v. Nanigadu*, 15 M. L. J. 492.

(2) *Ramaswami v. Papayya*, 16 M. 466.

(3) *Sham Shivendra v. Janaki Kuar*, 36 C. 911 P. C.

(4) *Gopal Chunder v. Kartickchunder*, 29 C. 716 P. C.

(5) *Ramamirtham v. Ranganathan*, 24 M. 299; *Nanhi v. Nathu*, 1 C P. L. R. 45.

(6) *Jogeswar v. Ramchandra*, 28 C. 670 (678, 679) P. C.; *Kishori v. Mundra*, 8 A. L. J. 757 (767); *Gopi v. Jaldhara*, 33 A. 41;

Elthirejulu v. Mukunthu, 28 M. 868 (870)

(7) *Jogeswar v. Ramchandra*, 28 C. 670 (678) P. C.

(8) *Diwali v. Patel*, 26 B. 445.

(9) *Jogeswar v. Ramchandra*, 28 C. 670 (679) P. C.

(10) *Navroji v. Perojbat*, 28 B. 80 (87) (a case of Parsi will govern by the English law)

(11) *Gobind v. Inayat*, 27 A. 810 (813); *Mankamma v. Balkishan*, 28 A. 39.

1819. The donor's intention must be gathered primarily from the deed of gift construed with reference to the rule of construction adopted in the personal law to which the parties may be subject. Where, for instance, the testator (a Parsi) bequeathed his property to his widow and daughters directing "that the donees were to agree together and to manage the affairs with unanimity after whom his daughter's two sons were the owners of whatever property and estate there may be belonging to me," Fulton, J., held it to constitute a tenancy-in-common, but on appeal this view was overruled, the court applying the English rule of construction applicable to the Parsis and holding that the gift was a joint gift to the two sons. Farran, C. J., observing: "Speaking as a grammarian I apprehend that a simple gift to A and B is a joint gift, that is to say, for the purpose of the gift the two are treated one *person*. The idea is made more clear when a gift is to a class as for example to the inhabitants of a parish is assumed. If a gift is made in that form, no one would, I imagine, suggest that it was a gift to each of the inhabitants of a proportionate share in the bequest. They are all considered as a unit for the purpose of accepting the gift. The Roman jurists adopted the same view." (1) This case was, of course, expressly decided with reference to the English law. But if in the same case the donor were a Hindu, the sons would have taken as tenants-in-common.

1820. A *donatio mortis causa* is an example of a conditional gift dependent upon the death of the donor. Hindu Law makes no distinction between this and any other condition. (2) Where for instance, the donor delivered certain Government promissory notes to the plaintiff in contemplation of death a few months after which he died whereupon the plaintiff sued his heirs for completion of his title by endorsement, the court decreed the claim holding that the donee's title was complete on delivery, whereas in the same case the donee's title under English law would not have been complete until his death. (3) The difference between the English law and the Hindu Law is then this: that while under the one property in the *donatio mortis causa* does not pass until death of the donor, property under the other passes with delivery, subject to the conditional right of resumption. The fact that the donor did not make the endorsement was held not to affect the validity of the gift. The same view was taken by Peacock, C. J., in another case in which he said, "A transfer by deed and delivery, in my opinion, in the case of Europeans, constitutes the relationship of trustee and *cestui que trust* even in favour of a volunteer. In this case, the delivery without a transfer by deed was as valid between Hindus as if there had been a conveyance by deed and a delivery. The notes, therefore, in my opinion passed to the donee." (4)

187. A gift or devise creating an estate of inheritance
 Void gift and inconsistent with the general law of inheritance is void to that extent.

Illustrations.

(a) A devises his estate to B and his eldest nephew and the eldest nephew and so forth for ever. B takes the life-estate but the rest of the devise is invalid for it creates a line of succession inconsistent with the general law. (5)

(1) *Navroji v. Perombai*, 23 B. 80 (98).

(2) 1 Str. H.L. 169; 2 Ib. p. 426; *Krishna Deb v. Krishna Deb*, 12 W. R. (O.C.) 4; *Visalatchumi v. Subbu Pillai*, 6 M H C. R. 270.

(3) *Visalatchumi v. Subbu Pillai*, 6 M. H.

C.R. 270 (278).

(4) *Krishna Deb v. Krishna Deb*, 12 W. R. (O.C.) 4.

(5) *Tagore v. Tagore*, 9 B. L. R. 377 (395, 396) F. C.

(b) A bequeathes his partible estate to B and on his death to his eldest son and thence forward to the eldest son of each holder. The bequest is invalid for it alters the course of ordinary succession to one by primogeniture, a new form of estate which cannot be created by will.

1821. Analogous Law.—"The power of parting with property once acquired, so as to confer the same property upon another, must take effect, either by inheritance or transfer each according to law. Inheritance does not depend upon the will of the individual owner: transfer does. Inheritance is a rule laid down (or, in the case of custom, recognized) by the state, not merely for the benefit of the individuals, but for reasons of public policy. (1) It follows directly from this that a private individual who attempts by gift or will to make property inheritable otherwise than as the law directs, is assuming to legislate and that the gift must fail and the inheritance take place as the law directs." (2) As Turner, L. J., put it: "A man cannot create a new form of estate, or alter the line of succession allowed by law for the purpose of carrying out his own wishes or views of policy." (3) Quoting this passage in another case Willes, J., added: "If the gift were to a man and his heirs, to be selected from a line other than that specified by law expressly excluding the legal course of inheritance, as for instance, if an estate were granted to a man and his eldest nephew and the eldest nephew of such eldest nephew and so forth for ever, to take as his heirs to the exclusion of other heirs, and without any of the persons so taking having the power to dispose of the estate during his life-time, here inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favour of such persons, as could take under a gift to the extent to which the gift is consistent with the law. The first taker would in this case, take for his life-time, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempted to confer, and that state of inheritance which it confers is void."

"It follows that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such and that by Hindu Law no person can succeed thereunder as heir to an estate described in the terms which in English law would designate an estate in tail." (4)

The Tagore case was an attempt to create an estate in tail male, and the Privy Council held the tail void, upholding only the life-estate to the immediate grantee.

188. Where an interest is gifted or devised to a class some of which are incapable of taking by reason of any rule of law or otherwise, the gift or devise will take effect as to the rest.

Synopsis.

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|---|---|
| (1) <i>Gift or devise to a class</i> (1822). | (3) <i>English and Indian law</i> (1824). |
| (2) <i>Effect where some cannot take</i> (1822-1823). | (5) <i>Hindu Law rules</i> (1826). |
| | (5) <i>Law as to remoteness</i> (1825). |

(1) *Damat*, 2418.
 (2) Per Willes, J., in *Tagore v. Tagore*, 9 B. L. R. 377 (894) P. C.
 (3) *Soorjeemoney v. Denobundhoo*, 6 M. I. A. 536 cited per Willes, J. in *Tagore v. Tagore*, 9 B. L. R. 377 (894, 895) P. C.
 (4) *Tagore v. Tagore*, 9 B. L. R. 377 (895, 896) P. C.

1822. Analogous Law.—This section is the very antithesis of S. 15 of the Transfer of Property Act and of S. 102 of the Succession which lay down the contrary rule founded on the English rule enunciated in the leading case of *Leake v. Robinson*.⁽¹⁾ The two rules radically differ in that the one construes a grant benignantly, the other literally. A concrete example will best illustrate the difference. Suppose a fund is bequeathed to *A* for life and after his death to all his children who shall attain the age of 25. *A* survives the testator and has some children (say *B*, *C* and *D*) living at the testator's death. Now *B*, *C* and *D* living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest, which is 18 years after the death of the testator.⁽²⁾ But since *A* may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of *A*, it follows that if the bequest is to be construed literally as benefiting *all A's* children on attaining the age of 25, and as *all* cannot take, it follows that *B*, *C* and *D* cannot take also, that is to say, as the bequest is given to all *A's* children as a class, it is not good as to any division of that class, but is wholly void.⁽³⁾

1823. But there is another view. The bequest might be construed benignantly, giving effect to it as far as possible. In that case *B*, *C* and *D* will take though *all A's* children may not be able to profit by the testator's bounty. This is the Indian rule and adopted as a canon of construction applicable to Hindu gifts and bequests.⁽⁴⁾ The rule was thus stated by Wilson, J., in a case⁽⁵⁾ which in the words of the Privy Council has "set at rest for all practical purposes" the conflict of judicial opinion in India.⁽⁶⁾ In that case one Radha Kristo had on the 27th January 1871 executed a deed of gift conveying certain plots of land to two of his grandsons by name Ramlal and Shamlal and to their brothers who might be subsequently born providing "that the two now existing brothers and their uterine brothers, who shall be born in future, will divide the same in equal shares according to the terms of this deed of gift." Possession was given to the two existing donees. Radha Kristo died on the 21st February 1875. Two other grandsons being subsequently born sued Ramlal and Shamlal for their share on the ground that their grandfather's gift being a gift to a class some of whom were incapable of taking being not in existence at the date of the gift, was wholly void and that the property therefore remained with Radha Kristo till his death and passed to his heirs. The defence was that the gift to the two defendants was a valid one though the deed intended also to benefit others who were not then in existence and therefore as to them, it was void. This contention was upheld by the Trial Judge but on appeal, Wilson, J., (Garth, C. J., concurring) dismissed the suit holding that the English rule of construction followed in some cases⁽⁷⁾ had been discounted by the Privy Council⁽⁸⁾ and that they could not appropriately be referred to as guides in the construction of deeds executed by Hindus, for which the true rule was "to ascertain the real meaning of the parties to the transaction; that when that meaning has been ascertained if it appears that the whole plan cannot be carried out but a part

(1) 2 Mer. 868; which see discussed in 1 Gour's Law of Transfer (4th Ed.) §§ 445-455.

(2) S. 14 Transfer of Property Act, and S. 101, Succession Act.

(3) S. 102, *Ill.* (b) Succession Act.

(4) *Ramlal v. Kanailal*, 12 C. 668; *Bhagabati v. Kalicharan*, 32 C. 992 F. B. affirmed O. A. 38 C. 468 F. C.

(5) *Ramlal v. Kanailal*, 12 C. 668.

(6) *Bhagabati v. Kalicharan*, 38 C. 468 F. C.

(7) *Bramamayi v. Jogesh Chandra*, 8 B. L. R. 400; *Soudaminy v. Jogesh Chandra*, 2 C. 262; *Kherodemoney v. Doorgamoney*, 4 C. 455.

(8) *Bishen Chand v. Asmaida*, 6 A. 560 F. C.

of it can, effect is to be given to that part. And that, accordingly, if the plan be to give a present gift to persons capable of taking, that gift is effectual, although it was intended that other persons incapable of taking should afterwards come in to share in the gift." (1) Then adverting to the deed in suit he said, "There seems to me no great difficulty in ascertaining what the donor intended. I shall first try to state what that intention seems to me to be, without the use of technical words, and in popular language, a course which seems to me the safer course in dealing with the intention of a Hindu gentleman. He intended, I think, that he should at once cease to have himself any interest in the property given; that the two living grandsons should at once enter upon the possession and enjoyment of it; that if brothers should afterwards be born, each of such brothers should at his birth step into an equal share of the property, but without any retrospective effect; and that no act of the living grandsons should prejudice this right of their after-born brothers. . . . (2) and that during the minority of the living grandsons they should manage the property for their benefit without being liable to account to them. Expressing this in more technical language I think he meant to give to the two living grandsons, present title to and the present possession and enjoyment of the property but that their title was liable to be partially divested in favour of after-born brothers." (3)

1824. In the Privy Council case which Wilson, J., followed, the grandfather had with the consent of his son made a gift of his property constituting his grandson and his own brothers who might be born thereafter permanent and rightful owners of the properties. The son's creditor attached some of these properties and the grandson successfully objected to the attachment, whereupon the creditor sued him for a declaration that the gift was fraudulent and void as being a gift to unborn persons. Their Lordships held that two constructions were possible, one contended for by the creditor that all the grandsons were the objects of his bounty and that as all could not take none could take, and that the donor's intention should be given effect to so far as it was possible and their Lordships preferred the latter construction as more consonant with the donor's intention. (4) In such case the donor may be said to express a primary and a secondary intention. His primary intention is to benefit all, but if this cannot be attained he still wishes to benefit those whom he can. Of course if the class is to be ascertained on the death of the testator no question of remoteness can arise, and the general rule is that the gift takes effect in favour of such of the class as are then capable of taking. If the ascertainment of the class is deferred to a later date, those who become members of the class within the extended period are admitted and subject to any question of remoteness, those who are thus capable of taking because born after the date of ascertainment they are simply excluded and the rest take the whole; and this is so even if the gift be to persons born and to be born. (5) If any die in the testator's life-time, they

(1) *Ram Lal v. Kanailal*, 12 C. 668 (676).

(2) This and the following clauses of the deed are not abstracted in the text as unnecessary. They will be found set out in the report of the case *Ramlal v. Kanailal*, 12 C. 663 (664, 665).

(3) *Ramlal v. Kanailal*, 12 C. 668 (677) following *Bishenchand v. Asmaida*, 6 A. 560

P.C. approved in *Bhagabati v. Kalicharan*, 38 C. 468 (478) P.C.

(4) *Bishenchand v. Asmaida*, 6 A. 560 (578, 574) P.C.

(5) *Sprackling v. Ranier*, 1 Dick 344; *Ayton v. Ayton*, 1 Cox. 827; *Whitebread v. Lord St. John*, 10 Ves. 154; *Manu v. Thompson*, Kay 688.

are simply excluded and the rest take the whole. (1) If the gift to one is revoked by a codicil, he is simply excluded and the rest take the whole. (2) If one is incapacitated from taking because he has attested the will, he is simply excluded, and the rest take the whole. (3) So far the English and Indian rules coincide.

1825. But as in England there are rules of law guarding against remoteness, enacted in S. 15 of the Transfer of Property Act and S. 102 of the Succession Act which enact that a gift or devise cannot be made which is to vest more than 18 years after the close of a life or lives in being and it is at this point and with reference to this law that the English and the Indian rules differ. Under the English law enacted in the two sections last named, the rule is to the effect that when a gift is given to a class in such terms that the ascertaining of the class and the vesting of the gift are or may be deferred beyond the period allowed by law, the gift is wholly void and cannot be made effectual for such members of the class as might be ascertainable earlier. That is the whole of the rule. It is a rider upon the law of remoteness and is only applicable to a gift to a class tainted with the vice of remoteness.

1826. As it is, this rule though enacted as a part of the statute law, is wholly inapplicable to Hindus whose deeds should be construed in accordance with the principle enunciated in the section which is supported by the authority of the Privy Council (4) and a large number of other cases. (5)

1827. Moreover, the English rule only applies to a gift to a class, *viz.*, to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, the share of each being dependent for its amount upon the ultimate number of persons. (6) Where therefore, the gift is to a *persona designata* or to a class to each of whose members a distinct and independent right is given there is no difficulty of construction, as each takes in his own right and not as a member of a class. (7)

1828. On the other hand where the intention is to benefit a class as a whole and not any of its individuals then the latter cannot take apart from the class. (8) So a gift or devise to "sons of sons" and "daughters of sons" or "widows of sons" is a gift to a class and not to any of its members. Consequently if any member falling into that class was not formed within 18 years after the testator's death the bequest would be void altogether. (9)

(1) *Stewart v. Sheffield*, 13 East 526. *Re Coleman*, 4 Ch. D. 167.

(2) *Shaw v. McMahon*, 4 Dr. and W. 431.

(3) *Young v. Davies*, 2 Dr. and S. 167; *Fell v. Biddolph*, L. R. 10 C. P. 701.

(4) *Tagore v. Tagore*, 9 B.L.R. 377 P. C.; *Bishenchand v. Asmaida*, 6 A. 560 P. C.; *Tarokessur v. Soshi*, 9 C. 952 (960) P. C.; *Bhagabati v. Kalicharan*, 38 C. 468 P. C.

(5) *Ramlal v. Kanailal*, 12 C. 668; *Bhoba v. Prary*, 24 C. 646; *Bhagabati v. Kalicharan*, 32 C. 999 F. B. affirmed O. A. 38 C. 468 P. C.; *Jairam v. Kuverbai*, 9 B. 491 (503, 507); *Krishnanath v. Atmaram*, 15 B. 448 (549); *Javer Bai v. Kalibai*, 16 B. 492; *Tribhuvandas v. Ganga*, 18 B. 7; *Krishnarao v. Benabai*, 20 B. 571; *Khinji v. Morarji*, 22 B. 538;

Gordhan Das v. Ramcoover, 26 B. 449; *Advocate-General v. Karmali*, 29 B. 138; *Manjama v. Padmanabhayya*, 12 M. 393; *Somasundara v. Ganga*, 28 M. 336; *Ranganadha v. Bhagirathi*, 29 M. 412 contra *Bramamayi v. Jages*, 8 B. L. R. 400 (410); *Soudaminy v. Jagesh Chandra*, 2 C. 262; *Kherdemonney v. Doorgamoney*, 4 C. 455 now overruled by *Ramlal v. Kanailal*, 12 C. 668 approved in *Bhagabati v. Kalicharan*, 32 C. 992 F. B. affirmed O. A. 38 C. 468 P. C. also overruled *Brojomoney v. Trojluikho*, 29 C. 460 (276).

(6) *Krishnanath v. Atmaram*, 15 B. 548.

(7) *Sallay v. Janbai*, 8 Bom. L. R. 785.

(8) *Gordhandas v. Ramcoover*, 26 B. 449.

(9) *Khinji v. Morarji*, 22 B. 533 (588).

189. (1) A will must be construed according to its true intent and purpose giving effect to the actual intention of the testator unaided by any rules of technical construction.

(2) Without prejudice to the generality of the foregoing principle its construction is subject to the rules set out in Ss. 61-77, 82, 83, 85, 88—98 of the Succession Act, and principally these set out in the next following Ss. 190-200.

Synopsis.

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|--|---|
| (1) <i>Construction of Hindu wills</i> (1829-1834). | (5) <i>Bequest void for uncertainty</i> (1840). |
| (2) <i>Formalities necessary</i> (1835). | (6) <i>Quantum of bequest</i> (1841-1845). |
| (3) <i>Construction of general words</i> (1837). | (7) <i>Charitable bequests liberally construed</i> (1846-1847). |
| (4) <i>Extrinsic evidence when admissible</i> (1838-1839). | (8) <i>Bequest void where object of charity is uncertain</i> (1848-1849). |

1829. Analogous Law.—It has again and again been emphasized that Hindu wills must not be construed with reference to the technical rules applicable to the construction of English wills. All that this means is that the rules founded on a different system of tenure and applicable to a society with different habits of thought cannot be extended to the construction of the wills of a people wholly differing from them no less in their religion, ideas and thought than in their social system and the laws of property. But apart from these technical rules of construction, there are those which are equally applicable to both.

1830. Such are, for example, the rules which exempt the language of wills from all technical restraint entitling them to a benignant construction, but nevertheless not wholly abandoned to the license of construction, leaving the intention to be collected upon arbitrary notions, as paramount to the authority of precedents and principles.

1831. Whenever therefore, the courts speak of the intention as the governing principle, what they mean is that the construction though free from technical rules must yet be upon grounds of a judicial nature, as distinguished from arbitrary occasional conjecture. (1)

1832. To a certain extent the grounds are common to all systems. For example both under English as under the Hindu Law rules stated in the several clauses are equally good. It is only when the general rules are to be applied to the interpretation of a Hindu will that the special rules of English law have to be eschewed and those of Hindu Law kept in view.

1833. The two sets of rules will now be examined.

1834. Succession Act, Ss. 61-98.—Sections 61-77, 82, 83, 85, 88, 89, 90, 98 of the Succession Act have been extended by the Hindu Wills Act subject to its provisions. These rules being however consonant with justice, equity and good conscience have been held to have a wider application as guides to the construction of other wills not technically subject to the statute law. (2)

(1) 2 Jarman on Wills (4th Ed.) Ch. L I; 616; 24 I. C. 796; *Vardun v. Luckpathy*, 9 p. 838. M. I. A. 308 (820).

(2) *Raina v. Narayanaswami*, 26 M. L. J.

1835. Of these, S. 62 states that it is not necessary that any technical words or terms of art shall be used in a will, but only that the wording shall be such that the intention of the testator can be known therefrom. This is entirely in accord with the Hindu Law under which a will if reduced to writing might be made in any language, form or order, the only pre-requisite being a sufficient expression of intention, since the intention is to be judged by the expressions used and their general tenor and effect. For this purpose oral evidence is admissible for the purpose and within the limits prescribed in Ss. 64-66, 67 and 68.

1836. A will is presumed to speak from the moment of the testator's death. Consequently, the description contained in a will of property the subject of a gift shall, unless a contrary intention appears in the will, be deemed to refer to and comprise property answering that description at the death of the testator. ⁽¹⁾

1837. General words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted sense; and words may be used in a wider sense than that which they usually bear, where it may be collected from the other words of the will that the testator meant to use them in such wider sense. ⁽²⁾ Where a clause is susceptible of two meanings according to one of which it has some effect and according to the other it can have none, the former is to be preferred. ⁽³⁾ If the same words occur in different parts of the same will, they must be taken to have been used everywhere in the same sense unless there appears an intention to the contrary. ⁽⁴⁾ But no part of a will is to be rejected as destitute of meaning if it is possible to put a reasonable consideration upon it. ⁽⁵⁾ The meaning of any clause in a will is to be collected from the entire instrument and all its parts are to be construed with reference to each other and for the purpose a codicil is to be considered as part of the will. ⁽⁶⁾

1838. Where a will is contained in two or more documents they must be read together as a single deed and it is legitimate to look at a contemporaneous document referred to in the will which the testator caused to be written with the express intent to render clear his wishes with regard to his succession. ⁽⁷⁾ In construing a will, a court must consider the surrounding circumstances, the position of the testator, the family relationship, the particular sense and many other things including the race and religious opinions of the testator and influence, and aims arising therefrom—but all this solely as an aid to ascertaining the meaning of the language used by the probability that he would use words in a particular sense in the particular will. Once the construction is settled, the duty of the court is loyally to carry out the intentions as expressed and none other. This duty is universal and is true alike of wills of every nationality and every religion or rank of life. The court is in no case justified in adding to testamentary dispositions. If they transgress any legal restrictions they must be disregarded. If any eventuality arises which the will leaves unprovided for there will be intestacy. ⁽⁸⁾ For the purpose of determining questions as to

(1) S. 77.

(2) S. 70.

(3) S. 71.

(4) S. 73.

(5) S. 72.

(6) S. 69.

(7) *Narasimha v. Parthasarthy*, 37 M. 199 P. C.(8) *Narasimha v. Parthasarthy*, 37 M. 199 P. C.

what person or what property is denoted by any words used in a will a court must inquire into every material fact relating to the persons who claim to be interested under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used. (1) Where the words used in a will to designate or describe a legatee or a class of legatees sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect. A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name. (2) Where any word material to the full expression of the meaning has been omitted it may be supplied by the context. (3) Where the words of the will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended. (4)

1839. But where there is no ambiguity or deficiency on the facts of the will no extrinsic evidence as to the intention of the testator shall be admitted (5).

Where two clauses or gifts in a will are irreconcilable so that they cannot possibly stand together, the last shall prevail. (6) In this respect a will differs from a deed in which, of two repugnant clauses, the first prevails. This rule is, of course, not to be resorted to in case of inconsistency in the same provision (7) nor where different subjects are referred to (8) and in all cases only when reconciliation is impossible. (9)

1840. A will or bequest not expressive of any definite intention is void for uncertainty. (10) This section is incorporated in the code and its scope will be separately discussed.

When will or bequest fails.

1841. Quantum of bequest.—Ss. 82-98 deal with the *quantum* of bequests. Of these Ss. 84, 86 and 87 do not apply to Hindu wills. S. 82 lays down the rule that where property is bequeathed to any person he is entitled to the testator's interest therein, unless it appears from the will that only a restricted interest was intended for him. (11) Where property is bequeathed to a person with a bequest in the alternative to another person or to a class of persons, if a contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy if he be alive at the time when it takes effect; but if he be then dead, the person or class of persons named in the second branch of the alternative shall take the legacy. (12)

Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy. (13)

(1) S. 62, Succession Act.

(2) S. 63.

(8) S. 64.

(4) S. 67.

(5) S. 68.

(6) S. 75.

(7) *Advocate-General v. Hormasji*, 29 B.

(8) *Damodar Das v. Dayabhai*, 22 B. 888 (841) P. C.

(9) *Amirthayyan v. Kalka*, 14 M. 65 (69-70.)

(10) S. 76, Succession Act

(11) *Id* S. 62.

(12) S. 88.

(13) S. 85,

1842. Where a will purports to make two bequests to the same person, and a question arises whether the testator intended to make the second bequest instead of or in addition to the first, if there is nothing in the will to show what he intended, the following rules shall prevail in determining the construction to be put upon the will.

1843. Where a will purports to make two bequests to the same person and a question arises whether the testator intended to make the second bequest instead of or in addition to the first, if there is nothing in the will to show what he intended, the following rules shall prevail in determining the construction to be put upon the will:—

First.—If the same specific thing is bequeathed twice to the same legatee in the same will or in the will and again in the codicil, he is entitled to receive that specific thing only.

Second.—Where one and the same will or one and the same codicil purports to make, in two places, the bequest to the same person of the same quantity or amount of anything, he shall be entitled to one such legacy only.

Third.—Where two legacies of unequal amount are given to the same person in the same will or in the same codicil, the legatee is entitled to both.

Fourth.—Where two legacies whether equal or unequal in amount are given to the same legatee one by a will and the other by a codicil or each by a different codicil, the legatee is entitled to both legacies.

Explanation.—In the last four rules the word “will” does not include a codicil. (1) A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property. (2) Under a residuary bequest the legatee is entitled to all property belonging to the testator at the time of his death of which he has not made any other testamentary disposition which is capable of taking effect. (3)

1844. If a legacy be given in general terms without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator and if he die without having received it, it shall pass to his representative. (4) If the legatee does not survive the testator the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appear by the will that the testator intended that it should go to some other person.

1845. In order to entitle the representatives of the legatee to receive the legacy it must be proved that he survived the testator. (5) If a legacy be given to two persons jointly and one of them die before the testator, the other legatee takes the whole. (6) But where a legacy is given to legatees in words which show that the testator intended give them distinct shares of it, then if any legatee die before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property. (7) Where the share that lapses is a part of the general residue bequeathed by the will, that share shall go as undisposed of. (8) Where a bequest shall have been made to any child or other lineal descendant of the testator, and the legatee shall die in the life-time

(1) S. 88, Succession Act.

(2) S. 89.

(3) S. 90.

(4) S. 91.

(5) S. 92, Succession Act.

(6) S. 93.

(7) S. 94.

(8) S. 95.

of the testator but any lineal descendant of his shall survive the testator the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention shall appear by the will. (1) Where a bequest is made to one person for the benefit of another, the legacy does not lapse by the death in the testator's life-time, of the persons to whom the bequest is made. (2) Where a bequest is made simply to a described class of persons the thing bequeathed shall go only to such as shall be alive at the testator's death.

Exception.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as shall be then alive and to the representative of any of them who have died since the death of the testator. (3)

1846. Charitable bequests.—Both the English and Indian rules of construction permit a latitude of construction in giving effect to the testator's religious or charitable bequests which if made to an individual would be unquestionably void. Charitable bequests are no exception to the rule that a benignant construction must be placed upon wills and charitable bequests. (4) In ascertaining whether or not a general intention to make a bequest to a public charity is expressed with definiteness the test to be applied is, whether a man of ordinary common sense wishing to follow the directions of the testator with a willing mind will have any practical difficulty in giving effect to the bequest. So where the testator directed his brothers to start a "*Sadavari*" for the needy in his name and the bequest was opposed as void for uncertainty though it was admitted that "*Sadavari*" meant charity which took the form of a periodical distribution at regular intervals of money and goods the court held the bequest good on the ground that the testator had expressed his general intention to give a legacy to charitable purpose and he only left uncertain the particular mode by which his intention was to be carried into effect. In such a case the trustees or, failing them, the court could draw up a scheme giving effect to the testator's general intention. (5)

1847. The principle of Hindu Law which invalidates a gift other than to a sentient being capable of accepting it (6) does not apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death, and does not make such a bequest void. (7)

So a direction to establish a Thakur at a place to be selected by the executors has been upheld, (8) as was the direction that the executors should get a *Shiva's* temple erected at a reasonable cost in a suitable place within the compound of the brick built *baithak khana* house inclusive of the building and

(1) S. 96.

(2) S. 97.

(3) S. 98.

(4) Per Lord Loreburn, L. C. in *Weir v. Crum Brown*, (1908) A. C. 162 (167).

(5) *Jamunabai v. Khimji*, 14 B. 1; *Advocate-General v. Strangman*, 6 Bom. L. R. 56 (*Sadavari* and *Anna Chitra* the same); *Krishna Bai v. Notan Das*, 8 S. L. R. 185; 4 I. C. 1158

(6) *Moti Vahoo v. Mamootai*, 21 B. 709 P. C.

(7) *Bhupati v. Itamlal*, 37 C. 128 F. B. overruling *Upendra v. Hemchandra*, 25 C. 405; *Rajomoyee v. Troylukho*, 29 C. 260 (278, 274); *Nogendra v. Benoy* 30 C. 521 To the same effect *Moharsingh v. Het Singh*, 82 A. 387; *Chatur Bhuj v. Chatterji*, 8 A. L. J. 384; contra *Phundan v. Srimatarya*, 88 A. 798.

(8) *Rajomoyee v. Troylukho*, 6 C. W. N. 267.

garden thereof. (1) So are bequests to build a well and avada or cistern for animals to drink out of (2) or for the performance of *Shradha* and the giving of feasts to Brahmins. (8) So was a bequest for the worship of *Saiv Thakur* (4) and *Dharam Sabha* with a power to the executor to receive the surplus income after defraying expenses but with no power to alienate the property. (5) So again was a direction to executors and trustees to "pay to my sons or their heirs and representatives such sums for the *Seva* or service of my family idols, and the usual *Pujas* that are celebrated in my house and the periodical *Shradha* of my ancestors of my late wife and of myself when dead, as to the executors and trustees may seem fit and proper." (6) A bequest to a charitable object to be selected by the executor is of course a valid charitable bequest since its object is certain, in that it is capable of being made certain by the executor. (7)

1848. Void for uncertainty.—But the case was held different where the executor was to apply a bequest for "such charitable uses or for such emigration uses" (8) or "to charitable or other indefinite uses." (9) Such will be a bequest for "Sara Kam" or good works (10) or "for purposes of popular usefulness or for purposes of charity" as the executors, may, in their plenary discretion select (11) or any similar vague purpose which the executor might select to spend the same, "in proper and just acts for the testator's benefit." (12)

1849. Such is a bequest to "Dharm" a vague expression connoting "virtue," legal or moral duty and law. A bequest to "Dharm" *simpliciter* or when coupled with equally vague explanations such as "Dharm or doing all good acts of a permanent nature and acting in such a manner as to give me a good name," (13) such and similar bequests are void both because of vagueness as because their object can only be attained by the creation of a trust which cannot be administered effectively. (14)

190. Extrinsic evidence is inadmissible to alter, detract from, or add to the terms of a will, though it may remove a latent ambiguity arising from words equally descriptive of two or more subjects or objects of gift.

Extrinsic evidence
when admissible

Synopsis.

- (1) *Extrinsic evidence inadmissible to vary terms of will, etc.* (1850). (3) *Provisions of the Statute law on latent ambiguity* (1850).
(2) *Evidence admissible to remove the subject* (1851).

1850. Oral evidence.—It is a sovereign rule of construction that in interpreting the intention of the testator the primary and paramount object

(1) *Gokoll v. Issur*, 14 C. 222.

(2) *Jannabai v. Khimji*, 14 B. 1.

(3) *Lakshmi v. Vajjnath*, 6 B. 24 (25).

(4) *Kedar v. Atul*, 12 C.W.N. 1083 following *Dwarkanath v. Burroda*, 4 C. 443; followed in *Lakshmi v. Vajjnath*, 6 B. 24 (25).

(5) *Benodi v. Sita Ram*, 6 A. L. J. 144; 1 I. C. 666.

(6) *Ananda v. Rajenda*, 4 B.L.R. (O.C.) 231.

(7) *Parbuti v. Rambharun*, 31 C. 895.

(8) *Hingston v. Sudney*, (1908) 1 Ch. 488.

(9) *Hunter v. A-G*, (1899) A. C. 803.

(10) *Bapi v. Jamna Das*, 22 B. 774.

(11) *Trikum v. Haridas*, 31 B. 583; following *Runchor Das v. Pravati Bai*, 23 B.

725.

(12) *Gokool v. Issur*, 14 C. 222.

(13) *Motivahoo v. Mamobai*, 21 B. 709 P. C.; 1 B. H. C. R. 71; *Cursandas v. Vundravandas*, 14 B. 452; *Mararji v. Nembai*, 17 B. 351; *Devashenkar v. Motiram*, 18 B. 136; *Vundravandas v. Cursandas*, 21 B. 646; *Runchordas v. Parvatibai*, 23 B. 725; *Parthasarathi v. Thiruvengadam*, 30 M. 840 (Per Subramanya Iyer, J. dissentiente), *Upendra Lal v. Hem Chandra*, 25 C. 405; *Gurdiit Singh v. Sher Singh*, 14 I. C. 247.

(14) See the subject discussed in 3 Goar's Law of Transfer (4th Ed.) S. 2834, p. 1867.

one should keep in view is to ascertain the testator's real intention. He must take his seat in the testator's easy chair and with the unfolded will upon his lap think his thoughts for the moment. But in doing so he must not take leave of the actual words used by the departed occupant of that chair. For it is his duty to interpret not in the light of intention nor by a flight of imagination but by the stern realities of the written will. (1) As Turner, L. J., said: "In determining that construction, what we must look to, is the intention of the testator. The Hindu Law no less than the English law points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect unless the language of the will or the surrounding circumstances displace that assumption." (1) "To put the matter another way, the question is, not what the testator intended to do but what he did mean by the words which he actually used. The true enquiry is not what a testator meant to express; but what the words used do express; extrinsic evidence cannot be received as evidence of a testator's intention outside and independent of the written words employed by him. In other words, where the meaning is fairly certain, it cannot be allowed to be modified by speculative inferences drawn from his conduct, as to what he intended to do or thought he had done; extrinsic evidence, when admissible, is used as an aid to the correct interpretation of the language of the will; but it cannot be relied upon for misconstruing the will." (2)

1851. The admissibility of oral evidence affecting the terms of a will is subject to the provisions of Chapter VI (Ss.91-100) of the Evidence Act, S. 109 of which however provides that nothing in that chapter shall be taken to affect any of the provisions of the Indian Succession Act as to the construction of wills. Now, since these provisions have been extended to the wills of Hindus subject to the provisions of the Hindu Wills Act it follows that Hindu wills made under that Act are subject to the rules of construction enacted in the Succession Act and Chapter VI of the Evidence Act so far as its provisions do not "affect" those of the Succession Act. But since the Hindu Wills Act does not apply to the mofussil outside Bengal, it follows that their construction is subject to the Evidence Act unaffected by the Succession Act. In other words, a Hindu will is subject to two different modes of construction according as it is or is not subject to the Hindu Wills Act.

191. The surrounding circumstances under which the deviser made his will, as the state of his property, of his family and the like is admissible.

(1) *Soorjeemoney v. Denobundoo*, 6 M. I. A. 526 (550, 551).

(2) *Srinibash v. Monmohini*, 8 C. L. J. 224 (254).

1852. There is no radical contrariety between the two sets of rules. And generally speaking, the rule stated in the section applies equally to all wills whether those made by a Hindu or non-Hindu, and whether or not subject to the Succession Act. Extrinsic evidence is admissible to prove intention to make, alter or revoke, to ascertain the person named in the will, to ascertain the thing bequeathed—that is to ascertain the subject and the object—to ascertain whether a codicil is cumulative or substituted, and other similar matters which do not contradict, add to or detract from its terms.

192. A will must be liberally and not too literally construed.

Construction of will.

Synopsis.

- (1) *Benignant construction* (1853). *intention of testator* (1854).
 (2) *Construction so as to effectuate*

1853. Benignant construction.—It is again a general rule applicable alike to English and Hindu Law, that a will must be benignantly construed, the testator's intention being carried out, if ascertainable, to the extent and in the form which the law allows. (1) "To construe one will by reference to expressions of more or less doubtful import to be found in other wills is for the most part an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To search and sift the heaps of cases on wills which encumber our English law reports in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought, and brought up under different conditions of life seems almost absurd. In the Subordinate Courts of India such a practice, if permitted, would encourage litigation and lead to idle and endless arguments." (2)

1854. The language of the will to be construed must be the best guide to its interpretation. It must be read as a whole and its paramount purpose ascertained. If all its clauses are interdependent but consistent then effect must be given to them all; but if some of them are inconsistent, then the inconsistencies must, if possible, be reconciled and effect given to such of them as are reconcilable. It may be that the two clauses though appearing to be antagonistic are intended to provide for different circumstances. Such was the will of which the 8th, 13th, and 18th clauses were seemingly antagonistic in that they left uncertain whether the interest conveyed to the two sons of the testator was absolute or limited. The High Court held them to convey only a limited estate since there was a gift over which precluded the possibility of an absolute devise; but on appeal, the Privy Council reversed their decree holding that the limitation over was not intended to limit the son's estate but to provide for a contingency. (3) So a gift under a will to certain persons and their heirs for ever, of certain annuities being fixed portions of the nett profits of an estate, was held to amount to a gift of proportionate shares in the *corpus* of the estate, in the absence of a conflict of such an interpretation with the general intention as gathered from the whole will. (4)

(1) *Tagore v. Tagore*, 9 B.L.R. 877 P. C. ;
Gordhan Das v. Ram Cooverbai, 26 B. 449 ;
Ellens v. Cyllan, 18 N. L. R. 51.

(2) Per Lord Maonaghten in *Norendra v. Kamalhasini*, 28 C. 568 (572) P. C.

(3) *Damodar Das v. Dayabhai*, 21 B. 1
 (2, 3) where they are set out; reversed O. A.
 22 B. 893 (841) P. C.

(4) *Hemangini v. Nobin Chand*, 8 C. 788.

193. Where a specific charitable bequest fails for uncertainty in the object and there is no direction, upon its failure that the bequest should go to the residue, the court will apply the gift *cypres*, that is to say, to other objects as nearly as may be of a similar character.

Cypres doctrine

Synopsis.

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| (1) <i>Cypres doctrine</i> (1855). | (5) <i>Essence of a charitable bequest</i> (1859). |
| (2) <i>Operation of doctrine, limited to religious and charitable bequests</i> (1855). | (6) <i>Subject of charitable bequest to be certain</i> (1860). |
| (3) <i>Application of the doctrine</i> (1856-1857). | (7) <i>What are valid objects of a charitable bequest</i> (1862-1863). |
| (4) <i>Power of court to settle a scheme</i> (1858). | (8) <i>Bequest void for uncertainty of object</i> (1864-1867). |

1855. Analogous Law.—In the first place the *Cypres* doctrine only applies to religious and charitable bequests. It has no application to bequests generally. (1) In the second place the doctrine has no application even as regards charitable bequests, where there is a direction that on failure of a bequest the property shall fall into residue, or where the objects of the original trusts are capable of being carried into effect, but remain unsatisfied or where the original trusts are still subsisting. As the Privy Council observed, “The jurisdiction of the court to act on the *Cypres* doctrine upon the failure of a specific charitable bequest, arises whether the residue be given to charity or not, unless upon the construction of the will, a direction can be implied that the bequest, if it fails should go to the residue.” (2) This passage occurs in a case in which the testator had made a bequest for the discharge and relief of poor debtors detained in prison in Calcutta which having failed by reason of the abolition of imprisonment for debt, the Privy Council held that the gift was capable of being applied *cypres* notwithstanding that the residuary bequest was to charity; that upon the construction of the will, there was not such a necessary inference of intention to be found in the terms and provisions of the will as to raise the implication of a bequest over by the testator of these legacies upon the failure of the particular charities and that the appellant was not competent under his present petition, which was confined to the claim of a share of the residue as residuary legatee, to re-open the scheme, which had been settled and confirmed by the High court, for the *Cypres* application of the fund in dispute, on the ground that the appellant was excluded from participation therein. (3)

1856. The doctrine of *Cypres* as applied to charities rests on the view that charity in the abstract is the substance of the gift and the particular disposition merely the mode, so that in the eye of the court, the gift, notwithstanding the particular disposition may not be capable of execution, subsists as a legacy which never fails and cannot lapse. It cannot be laid down as a general

(1) *A.G. v. Haberdasher's Co.*, 1 My. & K. 420; *Thomson v. Shakespeare*, 1 De G. F. & J. 399; *Carve v. Long*, 2 De G. F. & J. 75; *Re Clark*, 1 Ch. D. 497; *Pearse v. Pattinson*, 32

Ch. D. 154 cited in 4 Hals. L.E. §. 846 p. 197.

(2) *Mayor of Lyons v. Advocates-General*, 26 W.R. 1 (7) P.C.

(3) *Mayor of Lyons v. A.G.*, 1 O. 308 P. C.

principle that the *Cypres* doctrine is displaced where the residuary bequest is to a charity, or that among charities there is anything analogous to the benefit of survivorship, since cases may easily be supposed where the scope of the charitable object is such or requires so small an amount to satisfy it, that it would be absurd to allow a large fund bequeathed to a particular charity to fall into it.

1857. On the failure of a specific charitable bequest, jurisdiction arises to act on the *Cypres* doctrine, whether the residue be given in charity or not, unless upon the construction of the will a direction can be implied that the bequest if it fails, should go to the residue.

In applying the *Cypres* doctrine, regard may be had to the other objects of the testator's bounty, but primary consideration is to be given to the gift which has failed, and to a search for objects akin to it. The relief of misery in a particular locality may guide the court in framing a *Cypres* scheme to benefit that locality. Unless the *Cypres* scheme framed by the Lower Court be plainly wrong, a court of appeal should not interfere with it. (1)

1858. A testator had by his will directed his executors to set apart a sum of Rs. 16,000 for a charitable dispensary and Rs. 50,000 for its upkeep. He directed his executors to demarcate a portion of his garden house at Ramkristipur for the erection of the dispensary. By the partition of the garden house the land was not available for the dispensary. The executors were all dead. But the court held the *Cypres* doctrine to apply and gave directions for carrying out the charity with the money and the accumulated interest thereon. (2)

1859. Charitable bequest.—The essential characteristic of a charitable bequest is that it must be for the benefit of the public or mankind. A bequest to a poor relation or friend by name is howmuch soever charitable in intention and in fact, is not a charitable bequest in law. In this respect there is no distinction between the English and the Indian view of the subject. So in an old English case charity is defined as a "gift to a general public use which extends to the poor as well as to the rich." (3) The difficulty of attempting an exhaustive enumeration of objects which constitute charity is obvious and admitted. (4) But it is not difficult to understand what charity means. The difficulty arises when it is diverted from its public purpose and becomes what is sometimes called, "a private charity" which however, is only a charity in the legal sense when it is at least a charity restricted to a special class or administered by individuals without the intervention of any corporate organisation. (5) "Each particular object may be private but it is the extensiveness which will constitute it a public charity." (6)

1860. Subject certain and uncertain.—The subject of a charitable bequest must be reasonably certain, that is, it must be ascertainable with a reasonable degree of certainty as to what property the founder has dedicated or set apart for charity. There is this difference between a secular and a charitable

(1) *Mayor of Lyons v. A. G.*, 1 C. 308.

(2) *A. G. v. Belchambers*, 38 C. 261

(3) *Jones v. Williams*, (1767) Amb. 651.

(4) *Attorney-General v. Pearce*, (1740) 2

Atk. 87; *Hall v. Darby Sanitary Authority*, 16

Q. B. D. 163.

(5) *Re Sinclair*, (1884) 13 L. R. Ir. 150

(1854).

(6) *Nash v. Morley*, 5 Beav. 177 (183).

bequest that if the testator has supplied a measure of the bequest, the court will ascertain how much should be applied and will settle a scheme.

1861. The subject is, however, not uncertain where the testator devises the remainder over after a succession of life estates to charity. (1) So he may devise the income of a certain field or fund, the rent of certain properties, (2) half his income (8) or a sum of money (4) specified or unspecified, provided its amount can be estimated. Such was the bequest to "get a Shiva's temple erected at a reasonable cost in a suitable place" which the court fixed at Rs. 2,843-10-6 being 3 per cent of the value of the moveable property left by him. (5)

1862. Not void.—It has already been stated that a bequest may be void because its subject or object is uncertain (§ 1848). It has also been seen that a somewhat different rule prevails as regards the construction of bequests the object of which is charity and that a bequest may be upheld if made to charity, though it would be void if made for a secular purpose.

The courts have accordingly upheld bequests for performing the testator's funeral ceremonies and for feeding Brahmins according to the custom of the caste (6) or for feeding and paying Brahmins on the day following the Shivratri festival (7) or for feeding indigent men at the outer gate of his house. (8) So where a gift was made to the inmates of a hospital, it was held that the gift was in reality for the proper management and use of the hospital. Gifts to charitable institutions are valid and upheld even though the institution be not a corporate body provided there is some responsible authority charged with the general administration of the funds of the institution. (9) So a bequest to an *Anna Chatra*, (10) and for a *Sadavart* for the needy have been upheld. (11) A *Sadavart* is a periodical distribution of food, money, cloth or goods. It is a well known form of charity the scheme of which can be easily settled. As such it cannot be held void for vagueness. Such is the bequest of the residue to such religious and charitable purposes as the trustees may think proper (12) though on this point the contrary is also maintained. (13)

1863. As compared to this the following are more certain, *e.g.* settlement of Rs. 500 a month for continuance of the charity at the testator's Dharmshala at Benares, (14) or for the construction of a temple to Shiv within the compound of a specified house. (15) In fact it is now settled that a bequest to a named deity is valid (16) even though its image or temple be non-existent at the testator's death; or if existent, was mutilated or destroyed since the image is

(1) *Tagore v. Tagore*, 9 B. L. R. 377 P. C.; *Gobind v. Gombi*, 80 A. 288.

(2) *Morarji v. Nenbai*, 17 B. 351; *Jamnabai v. Khimji*, 14 B. 1.

(3) *Jadunath v. Sitararamji*, 39 A. 553 P. C.

(4) *Gordhan v. Chunnilal*, 80 A. 111; *Rajendra v. Raj Coomari*, 84 C. 5; Money includes investments; *Callicott v. Eyskens*, [1918] 1 Ch. 88.

(5) *Gokool v. Issur*, 14 C. 222 (230).

(6) *Lakshmi v. Baijnath*, 6 B. 24.

(7) *Kedar v. Atul*, 12 C. W. N. 1088.

(8) *Rajendra v. Rajcoomari*, 84 C. 5.

(9) *Famindra v. A. G. C. W. N.* 321.

(10) *A.G. v. Strangman*, 6 Bom. L. R. 56.

(11) *Jamnabai v. Khimji*, 14 B. 1; *Morarji v. Nenbai*, 17 B. 351; *Kashni Bai v. Hembai*, 8 S. L. R. 185.

(12) *Parbati v. Ram Barun*, 81 C. 895.

(13) *Surbomlingola v. Mohendronath*, 4 C. 506; *Jamnabai v. Dharsey*, 4 Bom. L. R. 898.

(14) *Gordhan v. Chunnilal*, 80 A. 111 (112).

(15) *Gokool v. Issur*, 14 C. 222.

(16) *Bhupathi v. Ram Lal*, 87 C. 128 F. B. *Moharsingh v. Het Singh*, 3 A. 258; *Chatarbhuj v. Chatarjit*, 88 A. 253.

but a symbol of the deity and may be renewed again and again. (1) So a bequest to establish an idol at such place as the executor shall think fit is valid. (2) So is also one for the performance of Durga and Laxmi Pujas to be carried out in the manner indicated by the testator. (3)

1864. Void for uncertainty.—But with all the liberality of construction the object may at times be wholly unascertainable. Whenever it is so the court has to consider whether the bequest wholly fails or may be upheld *cypres*. A bequest to Dharm has been held by the Privy Council to be wholly void. (4) The same view had been previously held here. (5) Such are also bequests to Sarakam or “good works” (6) or to “purposes of popular usefulness or charity” (7) since a charitable bequest is mixed up with “popular” or “useful” “purposes.” It has been held that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the court cannot execute them, such as “charitable or benevolent,” (8) or “charitable or philanthropic” or “charitable or pious” purposes, or where the description includes purposes which may or may not be charitable such as undertakings of public utility and a discretion is vested in the trustees, the whole gift fails for uncertainty. (9)

1865. Such would be a bequest to an unnamed deity. Such is a bequest to “the Thakurji in his Thakurdwara” (10) though in this case there was evidence that the testator was building a “Thakurdwara” or temple for installation of the image of “Thakurji” or Ramchand. In this view it is submitted that the case was wrongly decided as both the subject and the object were ascertainable with reasonable certainty and in any case the application of *cypres* should have been considered.

1866. But there can be no doubt that a bequest to spend the residue of a fund “in proper and just acts for the testator’s benefit” is wholly void for the reason given by Lord Davey in the case before cited. (11) Such would also be a devise to “religious purposes,” since in a Hindu mind the phrase might denote something more than and different from charitable purposes. (12)

1867. A bequest to the testator’s agnates or to Brahmins is void for ambiguity as to the object in that it is uncertain as to which of them the testator intended to take. (13)

(1) *Purnachandra v. Gopal*, 8 C. L. J. 369; *Bhupati v. Ramlal*, 37 C. 128; *Bijoychand v. Kalipada*, 41 C. 57 (64) contra per Mc Donell and Tottenham, JJ. “We believe that according to Hindu notions when an idol has once been, so to say consecrated by the appropriate ceremony performed and *mantra* pronounced, the deity of which the idol is the visible image resides in it, and not in any substituted image, and the idol is spiritualized, become what has been termed a juridical person. It does not by any means follow that, because the idol now in question has passed into the possession of the defendant together with the property dedicated to it, it has thereby fallen into the condition of a lost or broken idol, which by Hindu Law may be re-placed.” *Doorga v. Sheo Prashad*, 7 C. L. J. 278 (280-281).
(2) *Brjomoyee v. Trilokhomohini*, 29 C.

260.

(3) *Profulla v. Jogendra*, 9 C. W. N. 522.

(4) *Runchordas v. Parvatibai*, 23 B. 725 P. C.

(5) *Cursandas v. Vundravandas*, 14 B. 482; *Morarji v. Nembai*, 17 B. 351; *Devshankar v. Motiram*, 18 B. 136; *Parthasarathy v. Thiruvengada*, 30 M. 340 (Subramania Iyer, J. dissentiente.)

(6) *Bapi v. Jannadas*, 22 B. 774.

(7) *Trikumdas v. Haridas*, 31 B. 583 (590).

(8) *A.G. v. Brown*, [1917] A.C. 393 (395, 396)

(9) Per Lord Davey in *Hunter v. A.G.* [1899] A.C. 309 (323) followed in *Trikum Das v. Harihar*, 31 B. 588 (585)

(10) *Phundun v. Arya*, 33 A. 793.

(11) *Gokool v. Issur*, 14 C. 222.

(12) *Parbati v. Ram Barun*, 31 C. 895.

(13) *Shyama v. Naba*, 17 C. W. N. 39; 14 I. C. 708.

194. All words must be construed in their ordinary Construction of popular sense, unless there is a clear indication words. that they are used in another sense.

Synopsis.

- (1) *Construction of words in popular sense* (1868). *ed to have a technical meaning* (1868-1869).
- (2) *General words judicially recognised* (3) *Gift or rents and profits* (1870).

1868. Construction of words.—It is a rule equally applicable to the construction of all documents, whether deeds or wills, that ordinary words should be construed in their ordinary sense, and not in their technical sense unless there is anything in the context to shew the contrary. As many of the wills of Hindus are written or spoken in the vernacular, English Judges are not in a position to construe them with the same advantage as native Judges. But this is no reason for the court not conversant with the language to consult and decide upon the opinion of a native Judge who had not heard the case. As their Lordships observed in a case : “The learned Judges say that in the construction of the clause they have had the advantage of the opinion of Mr. Justice Gupta, who is fully conversant with the Bengali language which is his mother tongue, and who agrees with them in the meaning to be attached to it. Their Lordships remark upon this that Judges who have heard the arguments and who are responsible for the decision, can hardly with propriety rest it on the authority of one, who has not heard the arguments and is not responsible for the decision although he may be a Judge of the High Court. It is true that this case is a peculiar one in which Judges have to interpret a language which seems to be imperfectly known to themselves and to be familiar to a colleague. But then their Lordships are not informed how Mr. Justice Gupta translates the Bengal words. It is only said that he agrees with the meaning which the other learned Judges below attach to the clause in question. He does not appear to have thrown any new light on the rendering of the words into English. It must be taken that on this point he agrees with his colleagues of the High Court and with their sworn interpreter and with the official translation in the record. If so, the agreement with the decision must be on account of that further reasoning, which has led the courts below to inferences from which their Lordships dissent.”⁽¹⁾

1869. The case from which this passage is cited related to the construction of the critical words in a will “*parjyapt baibek*” translated by the English words “will become vested,” as to which the High Courts said : “The technical meaning conveyed by the English expressions ‘shall vest’ and ‘shall become vested’ are not in our opinion conveyed by the Bengal words ‘*Parjyapt baibek*’ which really mean ‘shall devolve or go’ and indicate the line of devolution.”⁽²⁾ Quoting this passage the Privy Council said : “This appears to their Lordships to be a misconception of what words are necessary for the vesting of a bequest or legacy. A bequest in favour of a person simply (that is without any intimation of a desire to suspend or postpone its operation) confers a vested interest. It must be remembered that it is within a comparatively recent period that Indian testators have adopted English modes of creating interests in their estates. There is no line of precedents attaching to Bengali terms meanings which make them understood as terms of art by Bengali lawyers. It is not suggested

(1) * *Harris v. Brown*, 28 C. 621 (685) P.C.

(2) *Harris v. Brown*, 28 C 621 (685, 686) P. C.

in this case that the meaning affixed by the courts to the testator's language is a sense required by a course of practice known to vakils. The only safe course is to give to his words the plain ordinary meaning." (1) In the end the Privy Council held the words to convey no more than a direct and simple gift to the eldest son. This case is then an instance of the danger to which the interpreter is exposed by ascribing to a non-technical expression a technical meaning.

1870. But nevertheless certain words such as "*malik*" "*putra putradik-rama*" "*Istemrari*" and the rest have now acquired a definite sense in conveyancing and when the context permits, they must be understood in that sense.

So it is held to be a well established rule of construction that a gift of the rents and profits of property is equivalent to a gift of the property itself, and it has also been decided that a gift of the income of property will also carry the legal and beneficial interest in the property itself. (2) The testator bequeathed to his daughter-in-law his property "detailed below" which comprised "all cash, ornaments, utensils included and also two houses." After execution of the will the testator had invested some money on the security of mortgage bonds and the question was whether they could be held as comprised in the term "cash" bequeathed. It was held that they did. "The words in which the gift to her is made are very general and seem to us to be comprehensive enough to include all the property, which is described in the body of the will as ornaments, cash, utensils *et cetera*. True it is that the words *et cetera* do not appear in the details of the property but it was, we think, intended by the testator that all moveable and immoveable property of which he was or should be possessed should pass." (3) Where however the testator gave his wife a life-interest in the houses in his possession, and in those which he might afterwards "purchase," and the testator acquired a house by inheritance in consequence of the death of his younger brother and the question arising whether this house equally passed under the will, it was held that the term "purchase" (*khareed*) was used in its normal sense and did not include the house acquired by inheritance. "It may be thought that at the time of the execution of the will he did not contemplate the contingency of his acquiring any immoveable property otherwise than by purchase, and that, had he contemplated such a contingency he would have provided for it, and would have left to his widow all his real property, however acquired by him subsequently to the date of his will. This is a surmise not destitute of plausibility, although, if it be true, the circumstance that he did not add a codicil to the will, after he had inherited the house in question from his brother, for the purpose of supplying the defect in the terms of the clause which is the subject of consideration, and securing the devolution to his widow of the afore-said house is not easily explained." (4)

1871. In another case the testator had died in 1857 leaving a will, dated January 1857, clause 11, of which provided that all his residuary estate "shall descend in equal shares to the eldest son to be born to each of the daughters of my late brother who are now alive." By clause 15 of the will the testator declared that "until the majority of whoever may be the eldest at the time amongst the sons of my brother's daughters, the estate shall remain in the hands of the executor absolutely and for all purposes." At the

(1) *Harris v. Brown*, 28 C. 621 (684) P. C.

(2) *Durga v. Dunichand*, 2 A. L. J. 568

(572) following *Shookmoy v. Manoharri*, 11 C. 691; *Mannox v. Greener*, L. R. 14 Eq. 456.

(3) *Parsanne v. Ghareeb Das*, 5 A. L. J. 708 (712).

(4) *George v. George*, 6 N. W. P. H. C. R. 219 (221, 222).

time of the testator's death two daughters of his brother were living, of whom *C* was married and *F* unmarried, *C* had a son born in 1858 who lived to be 21 years of age, and to whom on his attaining that age a moiety of the estate was made over by the executor. *F* married *W* in 1878, the only issue of the marriage being a son born in 1883, who lived only a few hours. It was held that a moiety of the estate vested in the sons of *C* and *F* on their birth and that the vesting was not suspended by the direction, that the estate should remain in the hands of the executor, who should "make over the share" of each on his attaining 21 years; those words merely pointed to the possession and enjoyment of the shares, which had already been vested. The words "the sons of those daughters" following the bequest referred to the sons to whom it was made, namely the eldest son of each daughter. On the birth of *F*'s son, therefore, a moiety of the estate vested in him, and on his death passed to his father as his heir. (1)

195. Technical terms must be presumed to bear their Construction of legal sense, unless the context clearly indicates the contrary.
technical terms.

Synopsis.

- (1) *Technical terms to be construed* (1872).
in their legal sense (1872). (3) *Technical terms in vogue in*
(2) *But may be varied by context* India (1872-1876).

1872. Technical terms.—There are no technical terms, strictly so-called. By consensus of opinion the courts ascribe to certain words a definite meaning. In this sense these words may be taken to have become terms of art as connoting a certain sense when used in deeds and wills.

Such are the words *malik* and *putra pouradi Krame*⁽²⁾ or *putrapoutrad*⁽³⁾ which are understood as words of general inheritance and generally as conveying an absolute interest, but this sense may be limited by the context. As observed by Lord Davey: "There are two cardinal principles in the construction of wills, deeds and other documents, which their Lordships think are applicable to the decision of this case. The first is that clear and unambiguous words are not to be controlled or qualified by any general expression of intention. The second is to use Lord Denman's language, that technical words or words of known import must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense."⁽⁴⁾ A will contained the following in favour of the testator's sister's son, *viz.*, that he "becoming my substitute and becoming *malik* of all my estate and properties shall enjoy, with son, grandson, and so on, in succession (*putra pouradi Krame*) the proceeds of my estate." Provisions followed for the maintenance of his nephew's widow and of his daughter, should he die; and a gift over that "in the absence of the said nephew's son, grandson, great-grandson, and so on, then of the sons born of my sisters . . . the eldest with son, grandson, and so on with succession, shall"

(1) *Harris v. Brown*, 28 C. 621 P. C.

(2) *Chukkun Lal v. Lalil Mohan*, 20 C. 906 reversed O. A. *Lalit Mohan v. Chukkun Lal*, 24 C. 884 P. C.; *Ramlal v. Secretary of State*, 7 C. 804 P. C.; *Hari v. Secretary of State*, 5 C. 228; *Motilal v.*

Advocate-General, 18 Bom L. R. 471.

(3) *Padam Lal v. Teksingh*, 29 A. 217; *Gooroo Das v. Sarai Chunder*, 29 C. 699.

(4) *Lalit Mohan v. Chukkun Lal*, 24 C. 884 (846) P. C.

receive the ownership. On a claim by the nearest gotraj sapinda of the testator against the nephew for the construction of the will, it was held by the High Court that there being expressions excluding the succession of females and conferring the succession to male heirs, and the gift over referring to the failure of male issue at any remote time and not to the event of Lalit's death without having male issue, and there being also expressions indicating an intention not to grant an absolute alienable estate, the will should be construed as giving to Lalit only a life-estate. But this view was reversed by the Privy Council who said: "Their Lordships cannot find any sufficient reasons for importing into the gift to the appellant an implied prohibition against females succeeding as heirs so as to limit the nature or extent of the estate taken by the appellant or confine it by construction to heirs male although his estate may be defeasible if the gift over is valid and the event on which it takes effect should occur." (1)

1873. In Bombay where a more favourable view prevails as regards the rights of female heirs, it has been held that a gift over to the daughter as my "wars" (heir) conveys the same absolute estate which would have passed if the term used were *malik* (owner). (2) But it will be presently seen that words which are sufficient to convey an absolute estate in favour of a male have not necessarily the same effect when the donee is a female. The same sense is conveyed by the phrase *Santan Sreni Kramic* (3) or words which convey the sense that the estate is granted to the donee's "children and grand-children" which are words of enlargement and not of limitation. The testator granted a *talug* to his sister K "with all rights appertaining thereto . . . to you and the generations born of your womb successively to enjoy the same. No other heir of yours shall have right or interest." On the question arising as to the nature of the estate thus conveyed the Privy Council held that the words "you and the generations born of your womb" were intended to convey an absolute estate the effect of which was not cut down by the negative words which were capable of being read as referring to the time of K's death and "that their effect is to make the absolute estate before given, defeasible in the event of a failure of issue living at the time of her death, in which event the estate was to revert to the donor and his heirs." (4)

1874. It has already been seen that the term "*putra*" means in Sanskrit and in Bengali not only a son, but also a son's son and a son's son's son the three being regarded as one person in law. Consequently, when the testator spoke of a person as dying without leaving sons, the condition is satisfied only if he dies leaving no son, grandson or great-grandson in the male line. (5) And the term "issue" not only includes children but also a son adopted by the widow under authority from her husband. (6) Unless the term is qualified by the word "*auras*" or self-begotten it does not exclude an issue by adoption. (7) Again the terms "*aulad*" or *santan* import issue both male and female. (8) Unless a different intention appears from the context limiting it only to male issue, that term is however ordinarily confined only to legitimate issue though

(1) *Lalit Mohan v. Chukkun Lal*, 24 C. 884 (851) P.C.

(2) *Chunilal v. Mulid*, 24 B. 420.

(3) *Bhoobun v. Hurrish Chunder*, 4 C. 23 (25) P. C.

(4) *Bhoobun v. Hurrish Chunder*, 4 C. 23 (29) P. C.

(5) *Bissonanth v. Bamasoondery*, 12 M.I.A. 41 (47).

(6) *Beemchurn v. Heeralal*, 2 I. J. (N. S.) 225.

(7) *Suriya Rau v. Raja of Pittapur*, 9 M. 499 (595) P. C.

(8) *Kumud v. Jogendra*, 21 C.W.N. 854 (858); 41 I.C. 11; *Dhan Devi v. Mahan*, (1900) P.R. 114; *Krishna Rao v. Bena Bai*, 20 B. 571 (children cannot mean only sons).

if the gift is made by will of the *corpus* of a fund, or a life-interest in a fund to the children of the testator or of another as a class, it would probably include also the illegitimate issue. (1) The word "*Bans*" is of doubtful import and may mean either agnatic kinsmen or descendants. The last term again is confined only to children and grand-children and not to the testator's brother or widow. (2) So where the testator gave his widow the power to adopt from amongst my father's "*Bans*" it was held to refer to his paternal agnatic kinsmen and not to the descendants of his father. (3)

1875. The word "family" is an elastic term and may mean a person and his wife and children or the larger group of a person and his descendants and their wives. So where the testator created a trust for the support of the testator's "family" the question arose what that word included and it was held by White, J., to mean the relatives of the testator whether connected by marriage or blood who were living at the time of the testator's death and then formed part of his household and were maintained by him. But on appeal this construction was held to be too wide, the court restricting it to include only the testator's descendants and their wives living at the time of his death. (4)

1876. The word "*hamesha*" "always" or "for ever" though implying perpetuity, may be limited in their import by the context. And taken by themselves they do not *per se* extend the interest beyond the person who is named. They are not inconsistent with limiting the interest given, but the circumstances under which the instrument is made or the subsequent conduct of the parties may show the intention with sufficient certainty to enable the court to presume that the grant was perpetual. (5) So where a decree provided that A should always pay B Rs. 70 per month and the question arising whether the charge was to cease with B's death or was heritable, the court held that there was nothing to show that the payment was to continue after B's death. (6)

196. The construction must be uniform, the same words being construed in the same sense, unless a contrary intention appear by the context, or unless the words be applied to a different subject.

Construction must be uniform.

Synopsis.

- (1) *Construction to be uniform* (1877). *the same sense, in the absence of*
 (2) *Same words presumed to have* *contrary intention* (1878).

1877. Construction must be uniform.—This rule is though equally general, does not coincide with the English rule which does not favour the same construction of words though appearing in one clause, if they apply to realty and personalty respectively. (7) So where there is a gift of realty and personalty together to children "or their heirs" the word "heirs" is read in a dual sense, as denoting *heir-at-law* as regards the realty and *next of kin* as regards the personalty. (8) But this is an artificial rule due to the statute

(1) *Sher Bahadur v. Ganga*, 36 A. 101 (121, 122) P. C.

(2) *Arumugam v. Ammi*, 1 M.H.C.R. 400.

(3) *Dayabai v. Chunilal*, 10 Bom. L. R. 97.

(4) *Khetler v. Ganga*, 4 C.W.N. 671 F.N.

(5) *Toolshi Pershad v. Ram Narain*, 12 O. 117 P. C.; *Abdul Majid v. Fatima Bibi*, 8 A. 39 P. C.; *Asizunmissa v. Tasaddug*, 23 A. 324

P. C.

(6) *Asizunmissa v. Tasaddug*, 23 A. 324

P. C.

(7) *Forth v. Chapman*, 1 P. Wms. 667; 2 Williams Executors (9th Ed) 938, 967 F. N.

(8)

(8) Williams Executors (9th Ed.) 969 F. N.

of distribution for which there is no parallel in this country; and no such distinction is therefore authorized by the law of construction. The context may of course indicate that the same word was intended to be used in a dual sense. So while the term "aulad" or "issue" is normally used to mean only a legitimate issue, where the context shows that the testator intended to benefit all his issue whether legitimate or illegitimate, it will be so construed. (1)

1878. The rule on the subject is thus formulated in the Succession Act :

Interpretation of words repeated in different parts of will.

73. If the same words occur in different parts of the same will, they must be taken to have been used everywhere in the same sense, unless there appears an intention to the contrary.

This is a general rule, and applies not only to the wills of Hindus subject to the Hindus Wills Act, (2) but all wills alike. (3) "The will is the dictionary from which you are to find the meaning of the terms which the testator has used." (4) "The principle is, that if words acquire a special meaning by reason of their context, that meaning cannot be safely given to them when used in a different context." (5) Considerations which only show that a testator has made a disposition in his will which the court is surprised to find there, though they might have determined the sense in which the testator had used an ambiguous expression, cannot of themselves lead the court to refuse to give effect to the plain language he has employed. Where for instance, the testator makes a bequest to his children it cannot be read as one limited only to the sons to the exclusion of the daughters. (6) So where the testator made a will whereby he appointed his wife as his executor and heir; and provided that if a son be born to him that son should be the owner of the residue, and if no son be born then his wife should be the owner, the court held that on the failure of the contingency contemplated the wife took an absolute estate. (7) Where words of contingency form part of the description of the class of persons to take, as in the case of a gift to those 'who shall attain the age of 21' the words must receive their natural construction, and no estate vests in any one till he attains the prescribed age. In such a case there must be something in the context pointing to a different construction, or something in the will inconsistent with the literal construction, to justify a court in adopting any but the literal construction. In the words of contingency occurring in the description of the class of persons to take, a mere gift over is not sufficient to alter their meaning. (8)

1879. So where the testator appointed four trustees to his will, and provided: "upon your death, these properties shall similarly devolve on your heirs" and it was contended that while the words "your" referred to the four trustees "your death" was intended not to refer to the death of all the trustees, the court rejected the construction holding that there was nothing in the context to justify departure from the normal rule. (9)

(1) *Sher v. Ganga*, 36 A. 101 (121, 122) P. C.

(2) S. 2, Act XXI of 1870.

(3) *Krishna Rao v. Bena Bai*, 20 B. 571 (592).

(4) Per Lord Cairns in *Hill v. Crook*, 6 H. L. 283 (285); *In re Birks*, (1900) 1 Ch. 417 (418).

(5) Per Wilson, J., in *Ballin v. Ballin*, 7

C. 218.

(6) *Krishna Rao v. Bena Bai*, 20 B. 571 (591, 592).

(7) *Jairam v. Kessowjee*, 4 Bom. L.R. 555 (557).

(8) *Ballin v. Ballin*, 7 C. 218 (224).

(9) *Aghore Nath v. Kamini*, 11 C. L. J. 461 (478).

197. Of two modes, preference must be given to the construction which gives effect to every expression.
All words must be considered.

Synopsis.

- (1) *All words to be considered* (1880). *able construction possible* (1880).
 (2) *No part to be rejected if reason-*

1880. All words must be considered.—Again it is evident that all words used in a will must receive their due importance. This is emphasized by Jaimini who quotes Karik's—terse aphorism—"more words, more meaning" (202). This rule is thus enacted in the Succession Act.

72. No part of a will is to be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.

The rule is taken from the English law and may be thus illustrated. (1)
No part rejected if it can be reasonably construed If one devises land to *A* in fee and later on in the same will devises to *C* for life, both parts of will stand. *C* will take first and *A* on determination of *C*'s interest. (2)

1881. Although the cardinal rule in the construction of wills is to give effect to the intention of the testator, the duty of the court is to discover not what the testator meant but what is the meaning of his words. (3)

Construction must be benignant.

198. That construction, must be preferred which will prevent a total intestacy.

Synopsis.

- (1) *Construction against intestacy* (1882). (2) *Rule as to benignant construction* (1882).

1882. Construction against intestacy.—This rule is a natural corollary of that which favours the benignant construction of wills, giving effect to its bequests as far as possible and after straining every nerve to make a sense out of the most uncouth declaration of the deceased. Consequently, of two modes of construction law favours that which will prevent a total intestacy. (4) So where the testator bequeathed his estate to his two wives *A* and *B* and his nephew *C* in equal shares providing that so long as his wives *A* and *B* will remain alive all the three shall enjoy in equal shares, and on the death of *A* her share will be enjoyed by *B* and *C* in equal shares and on the death of both *A* and *B*, *C* shall obtain the estate absolutely. *C* survived *A* but predeceased *B*

(1) 2 Jarman Wills (5th Ed.) 1656; 1 Williams Executors (10th Ed.) 837 citing *Grey v. Minnethorpe*, 3 Ves 105; *Constantine v. Constantine*, 6 Ves 102; *Hall v. Warren*, 9 H. L. C. 420.

(2) *Anonys Eliz* 9; *Doe v. Daires*, 4 M. and W. 599.

(3) *Aghore Nath v. Kamini*, 11 C. L. J. 461 (174); 6 I. C. 54 following *Abbott v. Middleton* 7 H. L. C. 68; 11 E. R. 28; *Scarle v. Rawlins*, (1852) A. C. 842 (844).

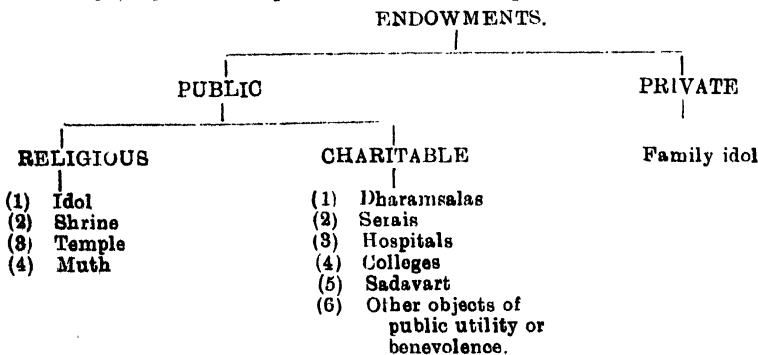
(4) *Mandakini v. Arumbala*, 8 C. L. J. 515; following *Turner v. Hellard*, 30 Ch. D. 390 (395).

CHAPTER XIX.

RELIGIOUS AND CHARITABLE ENDOWMENTS.

1900. Topical Introduction.—The present law relating to religious and charitable endowments has grown out of the numerous inculcations commending and enjoining the making of gifts to such objects. The rest is statute and case law. The sacred texts contain no rules for the management of charities in which the pious founders have invested their fortunes. Probably no other country in the world can boast of such munificent bequests made in the case of religion and charity. But like all other countries these endowments have to a large extent been diverted from their original purpose and are now held in quasi-proprietary rights. Unavailing efforts have been made from time to time to control their administration; but the Government, pledged to religious neutrality, is slow to move; and the only provisions to be found in the statute book are those contained in the Religious Endowments Act and S. 92 of the Code of Civil Procedure. The Trusts Act does not touch them and the Religious Endowments Act is a misnomer since it merely transfers to Government the powers previously possessed by the Board of Revenue. It merely deals with public religious foundations. Apart, however, from the statute law, the common law has laid down in terms, which admit of no equivocation, that religious and charitable endowments whatever their nature and character, are essentially trusts of which the manager for the time being—by whatever name he may be called—whether Shebait, Mahant or Dharmadhikari, is a trustee and that as such he has no power of alienation of the corpus which he is bound to maintain for the purpose for which it was created. Even the Mahant of a *Muth* who was at one time held to be in the nature of a proprietor has now been accorded a place alongside of other trustees and in no way distinguishable as regards his power of administration and alienation.

1901. Hindu endowments may be divided into public and private. The following graphic table presents their leading connection:—



It will thus be seen that all charitable endowments are public. A private charity is not an endowment, since its benefaction is limited and does not

reach the class of persons sufficiently large to be classed as public. The only instance of a private endowment is that furnished by a family endowment for the benefit of a private idol. Neither the public nor the court has any control over it. The vast majority of endowments are those designated public and of these, religious endowments form an important class. They are subject to uniform rules stated in this chapter. Endowments which are charitable without being religious will probably occupy a greater prominence in the future. They are also governed by the same rules. They are both subject to the *Cypres* rule of construction which enables the court to give effect to them even when as bequests to secular uses, they would have failed.

203. (1) Endowment is the dedication of property by
Endowment defined. gift or devise to religious or charitable uses.

(2) An endowment must be certain both as to the subject and the object.

(3) A dedication of property to an endowment may be partial or complete.

(4) It is partial when there is merely a charge or trust created.

(5) It is complete when the property is dedicated absolutely and no person has any beneficial interest therein.

Explanation :—An endowment is distinguishable from a bequest in that its operation is perpetual and the object general.

Synopsis.

- | | |
|--|---|
| (1) <i>Hindu texts on endowments</i> (1902). | (5) <i>Subject and object to be certain</i> (1908). |
| (2) <i>Pious gifts commended by early Hindu Law</i> (1903) | (6) <i>Dedication—partial and complete</i> (1908-1910). |
| (3) <i>Essentials of a valid endowment</i> (1906-1908). | (7) <i>Absolute dedication</i> (1911). |
| (4) <i>Dedication of property to religious or charitable uses</i> (1905-1907). | (8) <i>Gift to an idol</i> (1912). |
| | (9) <i>Endowment and bequest distinguished</i> (1913). |

1902. Analogous Law.—The following are but a few out of the numerous texts to be found on the subject of endowments:—

Manu :—328. Should the king be near his end through some incurable disease, he must bestow on the priests all his riches accumulated from legal fines; and having duly committed his kingdom to his son, let him seek death in battle, or, if there be no war, by abstaining from food. (1)

Yishnu :—81. Let him (the king) bestow landed property upon Brahmins.

82. To those upon whom he has bestowed (land) he must give a document, destined for the information of a future ruler which must be written upon a piece of (cotton) cloth, or a copper-plate and must contain the names of his three immediate ancestors, a declaration of the extent of the land and an imprecation against him who should appropriate the donation to himself, and should be signed with his own seal.

88. Let him not appropriate to himself landed property bestowed (upon Brahmins) by other (rulers).

84. Let him present the Brahmins with gifts of every kind. ⁽¹⁾

Mitakshara :—Both he who accepts land and he who gives it are performers of a holy deed, and shall go to a region of bliss. ⁽²⁾

Id. (citing the last) Since donation is praised, if a sale be made it should be conducted for the transfer of immoveable property, in the form of a gift, delivering it with gold and water (to ratify the donation).

Sancha :—Wealth was conferred for the sake of defraying sacrifices.

Though in the case of secular gifts delivery of possession is necessary to complete a gift, it is dispensed with when the gift is in favour of religion or charity. And though other gifts are void if made by a man who is afflicted with disease and the like, a gift to religion is irrevocable and may on death of the promisor be enforced against his son. ⁽³⁾

Katyayan :—What a man has promised in health or in sickness for a religious purpose must be given, and if he die without giving it, his son shall doubtless be compelled to deliver it ⁽⁴⁾

1903. The Hindu Law of gifts being applicable to wills, it follows that while the Smritis encourage unfettered gift to religion and charity, the only check that the clerical inculcations receive is from the inclination of the testator and the calls of other claimants upon his affection and liberality. But where no such claimants exist or the testator is susceptible to the influences of religion, he is known to make wholesale bequests of his estate to religious charity. ⁽⁵⁾ And such bequests have been held to be even free from the rule against perpetuities. "It being assumed to be a principle of Hindu Law that a gift can be made to an idol, which is a *caput mortuum* and incapable of alienating, you cannot break in upon that principle by engrafting upon it the English law of perpetuities." ⁽⁶⁾

1904. The encouragement which charitable bequests have thus received both from the sacred and the secular laws have naturally prompted persons to make illusory bequests where while the form is religious, the intention is to benefit the devisee. Such illusory devises are however subject to the ordinary law.

1905. In England and in the law as enacted in S. 17 of the Transfer of Property Act religious trusts are classed as charitable trusts. So Lord Langdale, M. R., said: "All the cases with one exception go to support the proposition that a religious purpose is a charitable purpose." ⁽⁷⁾ But as will be seen from the definition given in the section the two purposes though allied, are yet distinguishable and different.

1906. The first essential of a valid endowment is that it must dedicate some certain property to religious or charitable uses. This implies that the donor must divest himself of the ownership of the property to the extent it is transferred or charged for the support of the endowment. A deed which is not intended to be acted upon by the executant and which does not divest the owner of his share in the property is inoperative. ⁽⁸⁾ When there has been no direct endowment to support the family idol or other religious or charitable object, Hindu usage and custom, although it would create a moral obligation, still such obligation will not be held to have the effect of a legal obligation. ⁽⁹⁾ One test of an

(1) Vishnu III-81-94; 7 S. B. E. 21, 22.

(2) Brahm-Vaivart, cited in Mit. I-1-32.

(3) 8 Dig. 484.

(4) 2 Dig. 96.

(5) F. Maon. H.L. 820, 828, 881, 885, 886, 847, 849, 850, 871; App 58.

(6) Per Markby, J., in *Aseme v. Krishna*, 2 B. L. R. (O. C.) (47); *Jamshedji v. Soonabai*,

38 B. 122; now see S. 17 Transfer of Property Act.

(7) *Baker v. Sutton*, 1 Keen 224 (238) followed in *Touresend v. Corne*, 3 Hare 257.

(8) *Watson & Co. v. Ramchand*, 13 C. 10 P. C.

(9) *Shamlall v. Huroondry*, 5 W. R. 29.

endowment as to whether it is *bona fide* or nominal is to see how the founder himself treated the property, and how the descendants have since treated it. (1)

1907. There can be no endowment without dedication. (2) Where, therefore, in a document there was nothing to shew that there was such a dedication except the use of the word "debutter" and the grant was made apparently for the personal enjoyment of the grantee, though the grantor may have contemplated that the profits of the property, after satisfying the personal wants of the grantee would be devoted to the service of the God whom he attended, it was held that such an expectation may explain the use of the word "debutter" but does not suffice to constitute a valid dedication to the God. (3) The mere fact of the proceeds of a piece of land having been appropriated for the worship of an idol does not constitute it an endowed property but the fact of the assignment to the idol must be specifically proved. (4) The mere fact of its being released by Government on the ground of its being appropriated to the service of an idol does not impose on it the character of a religious endowment. (5)

1908. Secondly, both the subject and the object must be certain, that is to say, it must be certain what is given, and to whom. (2) **Subject and object must be certain.** Instances have already been given where bequests have failed because either the subject or the object was vague and indefinite.

1909. Dedication,—partial and complete.—While dedication is of the essence of an endowment it is not necessary that the dedication should be absolute or complete as regards the quantum of interest possessed by the owner, who may endow a specific sum or interest thereof, such as "Rs. 500 per annum charged on my estate or such surplus as may remain after defraying the household expenses." So where the testator by will devised all his moveable and immoveable property to his family idol, and after stating that he had four sons or grandsons in succession, but that they should enjoy "the surplus proceeds only" and the will after appointing one of the sons manager to the estate, to attend to the festivals and ceremonies of the idol and maintain the family, further directed that whatever might be the surplus after deducting the whole of the expenditure, the same should be added to the corpus, and in the event of a disagreement between the sons and family, the testator directed, that after the expenses of the family, whatever net proceeds and surplus there might be, should be divided annually in certain proportions among the members of the family, it was held that the bequest to the idol was not an absolute gift but was to be construed as a gift to the testator's four sons and their offspring in the male line, as a joint family, so long as the family remained joint and that the four sons were entitled to the surplus of the property after providing for the performance of the ceremonies and festivals of the idol and the provisions in the will for maintenance. (6) In other words, this was a secular bequest in the guise of a religious endowment but in which the religious motive was not illusory. As Turner, L. J., said: "According to the true construction of the will the property granted to the idol is effectually granted for the

(1) *Ganga v. Brindaban*, 8 W. R. 142.

(2) *Watson & Co. v. Ramchand*, 18 C. 10 (18) P. C.

(3) **Shamacharan v. Abhiram*, 8 C. L. J. 306 following *Ram Kanai v. Narayan*, 2 C. L. J. 546 (552).

(4) *Narain v. Roodur*, 2 Hay 490; *Ram Pershad v. Sreechuree*, 18 W. R. 899.

(5) *Nimaye v. Jogendro*, 21 W. R. 865.

(6) *Somaiy v. Juggitsomaree*, 8 M. I. A. 66 (87, 88)

benefit of the testator's four sons and their offspring in the male line as a joint family, subject to the performance of acts, business, ceremonies and festivals and to the provision for maintenance in the will contained and that the surplus income, after answering the performance of such provisions, is in like manner well and effectually given for the benefit of the four sons and their offspring in the male line in the joint family." (1) This case was followed in another case in which the court had to decide upon the following facts. The plaintiff sued for partition alleging the property was joint, but that out of the profits certain expenses for the worship of God and performance and celebration of certain religious festivals and ceremonies were incurred, all of which were alleged to be patrimonial, the balance being divided amongst the co-sharers. The defence was that the whole of the *ijmalce* land was the property of the idol. It was held that since there was no dedication of the property to the idol by its transfer from the family in its favour, the land was partible but subject to a trust in favour of the idol. (2)

1910. The converse case was that of the testatrix who left by will to her sons lands belonging to her, to support the daily worship of an idol, and defray the expenses of certain other religious ceremonies with a provision that in the event of there being a surplus after these uses had been satisfied out of the revenue of the said lands, such surplus should be applied to the support of the family. It was held that this provision amounted to a bequest of the surplus to the members of the joint family for their own use and benefit, and that each of the sons of the testatrix took a share in the property which after satisfying the religious and ceremonial trusts might be considerable and could not be presumed to be valueless. In so holding Sir Barnes Peacock said: "It cannot be said that the property was wholly *debutter*. They consider that it created a charge upon the property for the expenses of the daily worship of the idol as it was performed at the death of the testatrix." (3) Referring to these cases, the Privy Council said: "There is no doubt that an idol may be regarded as a judicial person capable as such of holding property though it is only in an ideal sense that property is so held. And probably this is the true legal view when the dedication is of the completest kind known to the law. But there may be religious dedications of a less complete character. The cases of *Sonatum Bysack v. Juggutsoondree Dossee* (4) and *Ashutosh Dutt v. Doorga Churn Chatterjee* (5) are instances of less complete dedications, in which notwithstanding a religious dedication property descends (and descends beneficially) to heirs subject to a trust or charge for the purposes of religion. Their Lordships desire to speak with caution but it seems possible that there may be another class of cases of partial or qualified dedication not quite so simple as those to which reference has been made." (6) Then their Lordships confessed that if they had to determine the nature of the dedication in the case before them, they would have felt great difficulty in doing so. This question their Lordships had not to consider for the purpose of the case. But the question raised was whether the land in suit was *debutter* so granted by Government to the plaintiff's predecessor and so described in the settlement pattas of 1868 and 1877, referring to which their Lordships observed: "On the one hand the use of the term 'Sebait' in the settlement pattas of 1868 and 1877

(1) *Sonatum v. Juggutsoondree*, 8 M.I.A. 66 (87, 88).

(2) *Ram Coomar v. Jogender*, 4 C. 56 following *Sonatum v. Juggutsoondree*, 8 M.I.A. 66

(8) *Ashutosh v. Doorga*, 5 C. 488 (448)

following *Sonatum v. Juggutsoondree*, 8 M. I. A. 66.

(4) 58 M. I. A. 66.

(5) 5 C. 488 P. C.

(6) *Jagadindra v. Hemanta*, 32 C. 129 (140, 141) P. C.

and in the plaint in this suit, points rather to a dedication of the completest character. On the other hand the provisions in those pattas which impose liability upon the grantees to the whole extent of their own property and not merely to the extent of what they might hold as Shebaita suggest a different conclusion. And so does the clause in the patta of 1868 empowering Government to determine the term on death." (1) Their Lordships then assumed, for the purpose of their argument, the religious dedication to have been of the strictest character.

Absolute dedication. 1911. On the other side of the line fall cases such as the following :—

The family dwelling house belonged to a lady who executed a deed of gift purporting to give it to an idol. By this deed she appointed her sons managers of the trust and provided that they should live in the house; that they should not be able to partition or sell any part of the endowed property and that the surplus profits after providing for the Government revenue, expenses of establishment and worship and salary of the manager, for the time being, should be expended in the purchase of adjacent lands in the name of the idol for the accommodation of the families of the managers and in the erection of a new building thereon. Wilson, J., held this to constitute an absolute gift to the idol "but that subject to a trust for worship there was a gift for the benefit of the members of her family mentioned in the deed. . . . The deed in terms gives the house to the idol and appoints the four surviving sons managers. The house is to be the perpetual habitation of the idol." (2)

1912. Under the Hindu Law an idol as symbolical of certain religious purposes is capable of being endowed or vested with the property. But it is not an essential condition of a valid endowment that it should take the form of an express gift to an idol. All that is necessary is that the religious purposes or objects of the testator should be clearly specified and that the property intended for the endowment should be set apart for or dedicated to these purposes. (3) In 1544 a village was granted to the head of a Gossavi *Muth* to be enjoyed from generation to generation and the deed of grant provided that the grantee was "to improve the *muth*, maintain the charity and be happy." The office of the head of *muth* was hereditary in the grantee's family. In 1866 an inam title-deed was issued to the then head of the *muth* whereby the village was confirmed to him and his successors tax free to be held without interference so long as the conditions of the grant are duly fulfilled. It was found, regard being had to usage, that the trusts of the institution were the upkeep of the *muth*, the feeding of pilgrims, the performance of worship, the maintenance of water-shed and the support of the descendants of the grantee. From before 1840 it had been usual for the head of the *muth* for the time being to make grants to his brothers or younger sons for their maintenance. In 1842 the father of the present plaintiff being the head of the *muth* granted certain lands of the village above referred to to his younger brother, the deed of grant being in terms absolute. The grantee died about 30 years before the suit and the lands in question came into possession of the widow and a mortgagee from her respectively. In 1863 the plaintiff's father placed certain other lands in possession of defendant 3 who paid rent therefor and received pattas for some years from the plaintiff, who sued for possession when defendant 3 pleaded a right of permanent occupancy.

(1) *Ib.*, p. 141

(2) *Rajunder v. Shamchund*, 6 C. 106 (117, 118).

(3) Per Sale, J. in *Bhuggobutty v. Gooroo*, 25 C. 112 (127) overruled on a different point in *Bhupati v. Ramlal*, 87 C. 128 F.B.

The court however ejected him holding that the village was granted as an endowment for the muth and charities connected with it and that what might remain after due execution of those trusts was intended to be applied to the maintenance of the grantee or his descendants. An absolute grant could not be made and the grant was good to that extent only. (1)

1913. Endowment and bequest distinguished : A charitable endowment must be distinguished from a charitable bequest in that it is perpetual and the object benefited more general. One is a public charity, the other a private charity. To a

Expl.

certain extent they are both subject to the same liberal rule of construction, it being held that where the object is charitable, a bequest should not fail for uncertainty. So a direction to the executors to set apart a specific sum for distribution among the testator's "poor relations, dependants and servants" was held to be a valid charitable bequest, the court construing the word "poor" to apply to all beneficiaries. (2)

204. (1) A religious endowment is one which has for its object the establishment, maintenance or worship, of an idol or deity, or any object or purpose subservient to religion.

Religious and charitable Endowments defined.

(2) A charitable endowment is one which has for its object the benefit of the public or of mankind.

(3) No endowment is valid except when made in accordance with the following rules stated in this chapter.

Synopsis.

- (1) *Objects of endowments* (1914). (2) *History of Hindu endowments* (1915).

1914. Analogous Law.—The following definition of charitable purpose occurs in the Charitable Endowments Act. (3)

S. 2. In this Act "charitable purpose" includes relief of the poor, education, medical relief and the advancement of any other

Definition.

object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship.

S. 17 of the Transfer of Property Act also alludes to religious and charitable endowments as being for "the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind." There is a clear distinction between religious and charitable endowments—the one proceeds from a motive of piety, the other from benevolence. But in practice the two are at times combined—as where an endowment is made for the establishment of a temple and distribution of alms to the poor. But an endowment may be charitable without being religious. Such is an endowment to found a professorship (4) a University (5) or support a *Serai*, Dharamsala or a hospital. (6)

(1) *Sathianama v. Saravantabagi*, 18 M. 266 (276).

(2) *Manorama v. Kalicharan*, 31 C. 166 (171) following *A-G v. Duke of Northumberland*, 7 Ch. D. 745. In *Elkins v. Cullan*, 13 N. L. R. 51 in construing the will of a Christian the court held that the word "chari-

table" should be so within the meaning of the term in English law

(3) Act VI of 1890.

(4) *Tagore v. Tagore*, 9 B. L. R. 377 P. C.

(5) *Manorama v. Kalicharan*, 31 C. 266.

(6) *Banindra v. Administrator-General*, 6 C. W. N. 821.

1915. Gifts for religious and charitable uses have been the first to be favoured in all countries overridden by priestly influences.

History of Hindu Endowments. In mediæval Europe practically everything a man possessed was left to the Church. And similar abuses had crept into England till they brought into existence the statute ⁽¹⁾ passed in 1547 restraining bequests to superstitious uses which ordained that if any real or personal property whatever shall have been or shall be, since assigned, limited, or appointed to have continuance for ever, or for a time only, towards or for the finding or maintenance of a stipendary priest, or for the maintenance of an anniversary or obit, or chapel, or other like intent, these and such like gifts and dispositions as these, are to be accounted within the superstitious uses intended to be suppressed by the Act. Establishments or foundations for securing prayers for the souls of the dead were to be deemed superstitious within the statute. ⁽²⁾ Other bequests to superstitious uses not mentioned by the Act are deemed void by the general policy of the law as a devise for the good of the soul of the devisor. ⁽³⁾ The statute provides that bequests made void by it shall vest in the crown beneficially though if it is for charitable purposes the crown may order to what charitable purpose it shall be disposed. ⁽⁴⁾ This statute was amended and re-enacted from time to time ⁽⁵⁾ and it was consolidated and re-enacted as the Mortmain and Charitable Uses Act 1888. ⁽⁶⁾

1916. In India the statute prohibiting the gift or devise of property to superstitious uses was never in force, and there is no other law to restrain the priestly inculcations to make pious and charitable bequests in the name of religion.

**Public and private
religious endow-
ment.**

205. (1) A religious endowment may be public or private.

(2) A public religious endowment is dedication of property for the use or benefit of the public.

(3) A private religious endowment is dedication of property for the worship of a family God in which the public are not interested.

Synopsis.

- (1) *Public and private endowments* (1917).
(2) *Differences between them* (1917).
(3) *Test of public endowment* (1918).

1917. Analogous Law.—It has already been stated that a charitable endowment must be public but a religious endowment may be either public or private provided that if it is private, it must not be personal to the donor, but must at least be one in which the donor's family is interested. Otherwise there is nothing to discriminate between this and a benami transaction and such endowments if permitted, would lead to fraud and confusion of titles. This has

(1) 1. Edw. VI-C-14.

(2) * *Attorney-General v. Fishmonger's Co.*,
2 Beav. 151.

(3) *R. v. Lady Portington*, 1 Salk 162.

(4) *R. v. Lady Portington*, 1 Salk. 162

(5) 1736 Mortmain Act (9. Geo. II-C-36).

(6) 53 and 54 Vict. C 16 (1890).

been laid down in several cases. (1) Of course it is quite open to a person to set up his own *Thakur* and endow it with property but so long as he does not divest himself of property for the benefit of his proprietary *Thakur* there is no dedication but if there be a dedication by the appointment of trustees or otherwise, the endowment would be valid, whatever suspicion may attach to it on the ground that it might be a colourable device to evade the law relating to the devolution of property in accordance with the ordinary law. (2) Where for instance the testator bequeathed certain property to his mother who was to have managed it on behalf of the idol to whom the property was dedicated but the testator had added, "The right and power of gift are yours; I and my heirs shall have no liberty, claim or right" it was held that the property vested in the donee and that therefore there was no absolute dedication of the property which was a pre-requisite of an endowment. (3) "A public endowment for religious uses is one which distributes its benefits to all men of all classes professing a defined form of religion; a similar endowment for pious and charitable purposes would include all members of the community who chose to avail themselves of the means afforded them by the appropriation. Every one would have an equal right to participate, and that at all times and at all seasons." (4) The difference between a public and a private endowment is one of degree. But the difference between the two when they constitute a religious endowment is material, since the public are interested in and possess a right in the one which they have not in the other.

1918. Public endowments.—Where the nature of the trust cannot be ascertained from the deed of endowment, its character has to be ascertained from extrinsic evidence as to the founder's intention and how it was regarded by the founder or his family and the public, if any, interested in it. Two facts are in this case material, how was it regarded by the founder and his heirs and how was it regarded by the public. If for instance there is anything to show that the founder intended to benefit the public as that it was open to them, and that the customary religious festivals had been celebrated there in a public manner, the court may treat the trust as public. (5) The fact that a temple is open for public worship, that the rites and ceremonies are such as are observed in public temples and that numerous *inam* lands have been granted to the temple constitute strong evidence of its public character. (6) To be public, it is not necessary that the institution should be open to the public at large. All that is necessary is that it should benefit a caste, a section of a caste, a class or a body of men sufficiently general to be called public.

206. (1) An endowment may be created by an oral dedication by a person divesting himself of specific property for religious or charitable uses.

Form of endowment.

(2) But where an endowment is created by a will subject to the Hindu Wills Act such will must be in writing and attested as therein provided.

(1) *Mahatab Chand v. Tej Chandra*, 5 B. S.R. 814; 7 I.D. (O.S.) 571; *Brāja Sundari v. Lachmi*, 2 B.L.R. 155 affirmed O.A. 15 B.L.R. 176 F.N.P.C.

(2) *Bhuggobutty v. Gooroo*, 25 C. 112; *Benode v. Sita Ram*, 6 A.L.J. 444; 1 I.C. 686; *Drigbijai v. Mahant*, 30 C. 281.

(3) *Hara v. Basanta*, 9 C.W.N. 151.

(4) *Debrus v. Abdoor Rahman*, 29 W.R. 458 (454).

(5) *Lakshmi v. Murasi*, 5 O.L.J. 97; 45 I. C. 231.

(6) *Jafar v. Ibrahim*, 24 M. 248; *Muthia v. Periamann*, 4 M.L.W. 228; 34 I.C. 551.

Explanation (1)—No express words are necessary to create an endowment.

Explanation (2)—A trust is not necessary to create an endowment; all that is necessary is a complete dedication.

Synopsis.

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| (1) <i>Form of endowment</i> (1919) | (5) <i>Mode of subsequent dealing with property immaterial if dedication established</i> (1924-1925). |
| (2) <i>Oral endowment valid</i> (1920). | |
| (3) <i>Express words not necessary</i> (1921). | (6) <i>Registration when necessary</i> (1926). |
| (4) <i>Creation of trust unnecessary</i> (1923). | |

1919. Analogous Law.—A religious and charitable endowment may be created by gift or devise. Where it is created by gift, it is not subject to the provisions of S. 123 of the Transfer of Property Act. And as the Trusts Act does not apply to such endowments, ⁽¹⁾ it need not be in writing registered as therein provided. ⁽²⁾ Even the creation of a trust is not necessary. As West, J., said: "A Hindu who wishes to benefit a religious or charitable institution may, according to his law, express his purpose and endow it, and the ruler will give effect to the charity, or at least protect it so far, at any rate, as it is consistent with his own *Dharm* or conceptions of morality. A trust is not required for this purpose; the necessity of a trust in such a case is indeed a peculiarity and a modern peculiarity of the English law. In early times a gift placed, as it was expressed, "on the altar of God" sufficed to convey to the Church the lands thus dedicated. Under the Roman law of pre-Christian ages such dedications were allowed only to specified national deities. After Christianity had become the religion of the Empire, dedications to particular churches or for the foundation of churches and of religious and charitable institutions were much encouraged." ⁽³⁾ They have been also encouraged by the Hindu *Smritikars*.

1920. There being no legal prohibition against the creation of an oral endowment, all that is necessary being dedication, an endowment may be created by word of mouth ⁽⁴⁾ or in writing at the discretion of the founder. But if it is created by a non-testamentary writing, then it must be registered in accordance with the provisions of S. 17 of the Registration Act.

1921. Again where the endowment is created by a will subject to the provisions of the Hindu Wills Act, then it must be in writing and attested as required in S. 50 of the Succession Act ⁽⁵⁾ which does not exempt endowments from its operation.

1922. Express words unnecessary.—Since law prescribes no form of dedication it follows that no words are necessary to constitute a dedication. "All that is necessary is that the religious purposes or objects of the testator should be clearly specified, and that the property intended for the endowment should be set apart for or dedicated to those purposes." ⁽⁶⁾ In another case the testator bequeathed his house

(1) S. 1, Trusts Act (II of 1882).

(2) *Ib.* S. 5.

(3) *Manohar v. Lakhmiram*, 12 B. 247 (268, 264); *Bhuggobutty v. Gooroo*, 25 C. 112 (127); *Prasulla v. Jogendranath*, 9 C. W. N. 528 (584).

(4) *Muddun Lal v. Komel*, 8 W. R. 42;

Pallaya v. Ramadhanalalu, 18 M. L. J. 864; *Ramalinga v. Sivachidambar*, 9 M. L. W. 224; 49 I. C. 742.

(5) S. 2, Hindu Wills Act (XXI of 1870).

(6) Per Sale, J., in *Bhuggobutty v. Gooroo*, 25 C. 112 (127); *Prasulla v. Jogendra*, 9 C.W. N. 528.

to his daughter for her life and after sundry bequests empowered his executors to sell the residue of the landed property and make over the proceeds to the University of Calcutta. No express words were to be found in the will as to what would become of the house on determination of the daughter's life-estate; but the court held it to fall into the residue which was bequeathed to the University and as such directed the executors to sell it and make over the proceeds with that of the residue of the other estate to the University. ⁽¹⁾

1923. Trust unnecessary.—Under English law no endowment is possible without the creation of a trust but it is held unnecessary for the creation of a Hindu endowment. But though

Expl. (2).

this is the law it is seldom that an endowment is created without the creation of a trust. Suppose for instance, a person were to declare, "I dedicate my village *B* to the god *C*." How is the purpose of his dedication to be fulfilled? The god *C* is a judicial person and cannot take *B* and unless there is somebody to accept and administer the gift on behalf of *C*, how are the founder's wishes to be fulfilled. It may be that *A* administers the fund himself and there is nothing to prevent him from doing so. In that case he becomes the trustee of the fund and his subsequent acts and conduct will show whether he had really divested himself of his property *B* or had merely used it as a shield for some ulterior purpose. Where therefore, his *bona fides* are challenged, say by a creditor who attaches *B*, the burden is heavy on *A* to show that he had dedicated it to *C*. ⁽²⁾ As the Privy Council observed, "Very strong and clear evidence of such an endowment ought to exist." ⁽³⁾ The mere fact that the rents and profits of the property have been for some years applied for the worship of the idol may be inconclusive, unless separate accounts are shown to have been kept and the income of the endowed property treated as distinct from the family income showing "that property has been inalienably conferred upon an idol to sustain its worship." ⁽⁴⁾

1924. The fact that certain property was purchased in the name of his own idol is equally inconclusive. As the Privy Council said: "The question is whether there is any evidence of an endowment properly so called. Now what is the evidence of an endowment? This was clearly not an endowment for the benefit of the public. The idol was not set up for the benefit of the public worship. There are no priests appointed, no Brahmans who have any legal interest whatever in the fund. It is not like a temple endowed for the support of performing religious service for the benefit of any Hindu who might please to go there. It is simply an idol set up by the Maharaja apparently in his own house, and for what purpose? Why, for his own worship. We constantly have suits claiming certain turns of worship; but here there is no turn or right of worship established. There is nothing stated in any way to show that the Maharaja intended that the idol should be kept up for the benefit of his heirs in perpetuity and before it can be established that lands have been endowed in perpetuity so that they can never be sold and must be tied up in perpetuity, some clear evidence of an endowment must be given. What are the objects of the endowment? None of the essentials of an endowment are stated. The Maharaja appears to have purchased the property in the name of the idol, and that is all. Then he deals with the funds of the idol, as if it were his own

(1) *Manorama v. Kali Charan*, 31 C. 166 (189).

(2) *Doorganath v. Ramchunder*, 2 C. 841 P. C.; *Ramoomar v. Jagender*, 4 C 56; *Watson & Co. v. Ramchund*, 18, C. 10 P. C.

(3) *Doorganath v. Ramchunder*, 2 C. 841 (849) P. C.

(4) *Doorganath v. Ramchunder*, 2 C. 841 (849) P. C.; *Dharma Das v. Gesta*, 8 L. C. (C) 894.

property. There is no evidence at all of any of the essentials of an endowment in favour of the idol." (1) But while the founder of a private idol has an uphill task to establish his dedication, the task though difficult is not impossible. Where for instance the fact of the dedication was supported by an ancient document added to which there was the evidence of appropriation of profits for the support of the idol, the Privy Council said: "The mere fact of the proceeds of any land being used for the support of an idol may not be proof that those lands formed an endowment for the purpose (2) but it is a fact that may well be taken into consideration when, as in this case the intention of the founder has to be gathered from an ancient document expressed, to say the least, in ambiguous language *contemporaneo expositio est optima.*" (3)

1925. When once an endowment is established the mere fact that there had been sales and mortgages (4) of the property by some members, of partition of it amongst the shebais (5) or that the conditions of the trust have not been performed (6) does not alter its character, though properties dedicated to a family idol may be converted into secular property by the consensus of the family. As the Privy Council observed, "Where the temple is a public temple the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction." (7) Consequently in the case of such endowment the fact that a certain property was at one time *debutter* raises no presumption of its continuance which must be proved by the manner it has been held and enjoyed and its income appropriated. (8)

1926. Registration when necessary.—This section only deals with the *creation* of an endowment, but not with the endowment of an existing foundation. If, for instance, a person wishes to endow a temple, *muth* or an idol his endowment must take the form of a gift either to the trustees or to the idol. In the first case the gift would, it is said, be subject to S. 123 of the Transfer of Property Act, though not if the gift is made directly to the idol. (9)

1927. In this case strictly speaking there is no gift, since there can be no acceptance by the idol. All that the giver can do is to dedicate the property for its acceptance. (10)

207. Any property which a person can dispose of by gift or will may form the subject of an endowment.

Subject of endowment.

Synopsis.

(1) *Subject of endowment* (1928).

(2) *Intangible property* (1929).

(1) *Brojosoondery v. Lachmee*, 20 W.R. 95 (96) P.C. affirming O. A. 11 W.R. 13

(2) *Muddun Lal v. Komal*, 8 W.R. 42 (49) cited in *Abhiram v. Shyama Charan*, 36 C. 1008 (1012) P. C.

(3) *Abhiram v. Shyama Charan*, 36 C. 1008 (1012) P. C.

(4) *Dharma v. Gosta*, 16 C.W.N. 29; 8 I.C. 894.

(5) *Bhabataran v. Behari*, 10 I. C. 899.

(6) *Kasheeshuree v. Krishnakaminee*, 2 Hay 557; *Madhab v. Sarat Kumari*, 6. I.C.

(C) 26.

(7) *Doorganath v. Ramchunder*, 2 C. 341 (347) P.C., *Abhiram v. Shyama Charan*, 36 C. 1008 P.C.; *Dharma Das v. Gosta*, 16 C.W.N. 29; 8 I. C. 894; *Gobinda v. Debendra*, 12 C.W.N. 98.

(8) *Gobinda v. Debendra*, 12 C.W.N. 98.

(9) *Ramalinga v. Shivachidambara*, 9 M. L. W. 224; 49 I. C. 742.

(10) *Bhupoti v. Ramlal*, 37 C. 128 (140,158); *Ramalinga v. Sivachidambara*, 9 M. L. W. 224; 49 I. C. 742.

1928. Analogous Law.—Since an endowment is the gift of one's property to the service of God or of men in whom resides the spirit of God, a property which a person is competent to dispose of by gift or will, he is equally competent to dispose of in charity.

1929. A mere easement may however be dedicated, though it cannot be transferred. The deceased had built a ghat as the last resting place of persons on the point of death where the rites of antarjali (or last rite of water) was performed. It was held that as the deceased had appointed no *shebait* he did not intend to part with the ownership of the ghat but that nevertheless there was the dedication of an easement in favour of the Hindu community. (1)

Operation of endowment.

208. An endowment takes effect from the moment of dedication.

Synopsis.

- (1) *Operation of endowment* (1930). (2) *Question of intention* (1930).

1930. Analogous Law.—An endowment may be created to take effect from any time *in presenti*, as from the execution of the deed of endowment, *in futuro* as on the death of the testator; or at any time on determination of one or more life estates. (2) In each case it is a question of intention. And since endowments are free even from the rule against perpetuity, there is practically no legal impediment to their creation. So where the testator bequeathed his house to his daughter for her life, the residue to be sold by his executors and the proceeds made over to University of Calcutta. No express provision was to be found in the will as to what would happen to the house in question on determination of the daughter's life-estate. It was held that the reversion in the house expectant on the determination of the daughter's life-interest passed under the specific residuary devise in favour of the University of Calcutta. (3)

209. In the absence of any thing appearing to the contrary the beneficial interest in dedicated property vests in the religious or charitable object, while the trustee or manager is entitled to its possession and management.

(2) Debutter property is property dedicated to a god or gods. The trustee or manager of such property is called a *Sarbarakar*, *Shebait*, *Dharm Karta* or *Mahant*.

Synopsis.

- (1) *Vesting of the endowment* (1931). (3) *Position of shebait or manager*
(2) *Gift to idol or muth* (1931). (1932).

1931. Analogous Law.—There is no uniform rule governing religious and charitable endowments. The endower may make a direct bequest to the object of his bounty without the intervention of trustees; or he may transfer the property in trust. But whatever the nature of the bequest, ownership in the

(1) *Jaggamoni v. Nilmoni*, 9 C. 75.
(2) *Gobind v. Gombi*, 30 A 288 (289).

(3) *Monorama v. Kali Charan*, 31 C. 166 (169).

property so bequeathed vests in the idol, muth, temple or other object of his bounty, while the manager possesses the right of possession and management.

Debutter property is property dedicated to a god or gods. (1)

An idol (2) a *muth* (3) or a temple is a juridical person and can hold property. But it is like the Church a person in perpetual minority and requires someone to manage its estate.

1932. Such manager is variously called *Sarbarakar*, *Shebait*, or *Mahant*, but his legal character is identical. He is the trustee of the fund, and his rights and liabilities are those of a trustee. He may appoint a *Pujari* or servant to perform the services for the idol. (4) The destruction of an image does not destroy the endowment (5) since the endowment is not to the idol but to the God of which it is a visible symbol. So the Privy Council said: "The Taluq itself, with which these Jamas were connected by tenure, was dedicated to the religious services of the idol. The rents constituted therefore, in legal contemplation, its property. The *Shebait* had not the legal property but only the title of manager of a religious endowment." (6) In another case they said: "There is no doubt that an idol may be regarded as a juridical person capable of holding property, though it is only in an ideal sense that property is so held. And probably this is the true legal view when the dedication is of the completest kind known to the law. But there may be religious dedications of a less complete character. The cases of *Sonatun Bysack v. Juggutsoondree Dossee* (7) and *Ashutosh Dutt v. Doorga Churn Chatterjee* (8) are instances of less complete dedications in which notwithstanding a religious dedication, property descends (and descends beneficially) to heirs, subject to a trust or charge for the purpose of religion. Their Lordships desire to speak with caution but it seems possible that there may be other cases of partial or qualified dedications, not quite so simple as those to which reference has been made." (9)

1933. The presumption stated in clause 1 however applies "in the absence of anything appearing to the contrary." This must depend upon the terms and condition of the dedication and where these cannot be ascertained by usage. (10)

210. An endowment may be created in favour of an idol, muth or other object, not in existence at the death of the testator.

1934. Analogous Law.—This is an exception to the ordinary Hindu Law which requires that a gift to be valid must be in favour of a sentient being in existence at the moment the gift takes effect. Hence where a gift is made by a will which takes effect on the death of the testator, under Hindu Law, unaffected

(1) *Shyama Charan v. Abhiram*, 33 C. 511.

(2) *Shibessonree v. Mothooranath*, 18 M. I. A. 270 (278); *Jagadindra v. Hemanta*, 32 C. 129; *Jodhi v. Basdeo*, 8 A.L.J. 817 F.B.; 11 I.C. 47; contra *Raghunathji v. Shah Lal*, 19 A. 886.

(3) *Babaji v. Laxman Das*, 28 B. 215 (223)*

(4) *Indurj v. Chundemun*, 16 W. R. 99.

(5) *Purna v. Gopal*, 8 C. L. J. 369.

(6) *Shibessonree v. Mothooranath*, 18 M.I. A. 270 (278).

(7) 8 M. I. A. 66.

(8) 5 O. 438 P. C.

(9) *Jagadindra v. Hemanta*, 32 C. 129 (141) P. C.

(10) *Kailasam v. Nataraja*, 33 M. 265 F. B.

by the Hindu Disposition of Property Act, the donee must be then in existence. Otherwise the gift shall fail. But religious and charitable endowments being favoured by the sacred law are an exception to the rule. (1) The contrary was laid down in some cases in which it was held that the principle of Hindu Law which invalidates a gift other than to a sentient being capable of accepting it, applied equally to a bequest to trustees for the establishment of an image and the worship of a Hindu deity and made such bequest void. (2) But these cases have been overruled and the law stated as in this section.

211. An endowment is illusory and void if it is a device to preserve the estate to the family of the endower, or defraud, defeat or delay his other claimants or creditors.

Illustrations.

(a) A being indebted dedicates his property to his family god, retaining all control. The endowment is void.

(b) A endows a god to spite his son. The endowment is void.

Synopsis.

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| (1) <i>Illusory and void endowments</i> (1935). | (3) <i>Fraud on creditors</i> (1938). |
| (2) <i>Evasion of law</i> (1936). | (4) <i>Substantial bequest to charity necessary</i> (1939). |

1935. Analogous Law.—From the fact that a religious endowment is not subject to the rule against accumulations and perpetuities nor was it at one time subject to the ordinary rule of Hindu Law that the donee must be in existence at the death of the testator, testators often resorted to this device for the purpose of evading those laws, added to which an endowment offered a tempting bait to deceive creditors. At one time such pseudo endowments were quite common being truly resorted to for the purpose of withdrawing property alike from the grasp of the oppressor or from the disintegrating action of the ordinary rules affecting it. (3) And the fact that an endowment might be validly made in favour of one's private tutelary god without the intervention of trustees or the requirement of an instrument or other mode of publicity, facilitated the use of the god as a *benamidar* to shuffle out of the creditor's reach property which the debtor could not otherwise shield from their grasp. The crucial test in such cases is of course the intention and the only evidence of intention afforded is that to be found in the act and conduct of the endower. As observed, "In dealing with the question whether an endowment is real or nominal only, the manner in which the dedicated property is held and enjoyed is the most important point for consideration. Now, in the present case, there is no reliable and sufficient evidence to show how during the few months for which the donor lived after the dedication, the income of the properties in dispute was spent, nor is there any such evidence in respect of any period subsequent to his death. It is true there is some vague oral evidence that Rani Anandamoyi all along performed the worship of the idol but the idol being a family idol, she would perform its worship, as every Hindu does, whether there is any endowment in favour of the idol or

(1) *Bhupathi v. Ram Lall*, 87 C. 128 F.B. overruling *Upendra v. Hemchandra*, 25 C. 405; *Brojomoyee v. Troylukho*, 29, C. 260; *Nogendra v. Benoy*, 30 C. 521; *Mahar Singh v. Het Singh*, 32 A. 337; *Chatarbhauj v. Chatarjit*, 33 A. 243.

(2) *Upendra v. Hemchandra*, 25 C. 405; *Brojo Moyee v. Troylukho*, 29 C. 260; *Nogendra v. Benoy*, 30 C. 521.

(3) Phillips and Trevelyan's Hindu Wills. (2nd Ed.), pp. 36, 37.

not." (1) The question in such cases is what outward indicia are there available to prove the reality of the transaction.

1936. The fact that separate accounts were maintained of the rents and profits collected and applied for the worship of the idol is material but not conclusive⁽²⁾ since such accounts might be maintained by any unscrupulous person but where they were so maintained for a period going over half a century it will be strong corroborative evidence of a dedication⁽³⁾ as the fact that the dedicator had been appropriating its income⁽⁴⁾ or that the property had been the subject of a partition would be evidence against it.⁽⁵⁾ The mere fact that an idol has been maintained out of the income of a property is no proof of dedication, since such contributions might be voluntary and liable to discontinuance at any time.⁽⁶⁾ In order to prove an endowment it must be established that an absolute grant was in the first place made with the intention that the profits should be applied for the service of an idol, that the profits have since been so applied, and that members of the family of the founder have not treated the property as one the profits of which were mainly intended to be applied for their benefit.⁽⁷⁾

1937. There may be a dedication and yet only a partial dedication as where it is burdened with a charge in respect of a charity in which case the beneficial interest is liable to seizure in execution of a decree.⁽⁸⁾ Here again a distinction must be made between the bequest of property subject to a certain charge and a bequest of property subject to certain duties.⁽⁹⁾ To constitute a valid dedication it is not necessary that any specific property should be set apart. A share of the income derivable from the family properties may be dedicated. The family properties will then become subject to a charge for that amount and whoever takes the family properties by alienation or partition will take them subject to that charge. Whether the amount has been set apart by the family is a question of fact to be decided on the evidence adduced in each case.⁽¹⁰⁾ Where the testator dedicated his house to the God Shiv and directed that the income from certain promissory notes worth Rs. 10,000 should be appropriated for his worship, the fact that he had also empowered his executor to live in the house did not make the bequest colourable.⁽¹¹⁾

1938. The question whether the endowment is real or illusory depends upon whether it is a substantial bequest to charity or to the testator's family.⁽¹²⁾ "To determine whether any particular case answers the test, all the circumstances existing at the date of the deed must be taken into consideration, such as the financial position of the grantor, the amount of the property, the nature and needs of the charity, their probable or possible expansion, the priority of their claim upon the extinct fund and such like."⁽¹³⁾ Where therefore the grantor created a trust of his property for the performance of the customary *Fateha*

(1) *Ramchandra v. Ranjit*, 27 C. 242.

(2) *Doorganath v. Chunder Sen*, 2 C. 341 P. C.; *Abhiram v. Shyama Charan*, 36 C. 530 P. C.; *Ramchandra v. Ranjit*, 27 C. 242.

(3) *Muddun Lal v. Komul Bibee*, 8 W. R. 42; *Radha v. Judoomonee*, 23 W. R. 869 P. C.

(4) *Sookheemoney v. Mohendro*, 4 B. L. R. 16 P. C. *Suppammal v. Collector*, 12 M. 387; *Asizuddin v. Legal Remembrancer*, 15 A. 321 (322).

(5) *Kunee v. Saheba*, 8 W. R. 819.

(6) *Muddun Lal v. Komul*, 8 W. R. 42; *Ram Pershad v. Sreemuree*, 18 W. R. 899; *Shurfoounissa v. Koolsoom*, 25 W. R. 447; *Doorganath v. Ramchunder*, 2 C. 841 P. C.; *Abhiram*

v. Shyama Charan, 36 C. 1008 P. C.

(7) *Madhab v. Sarat Kumari*, 15 C. W. N. 128; 6 I. C. 26; *Kulada v. Kali Das*, 42 C. 536.

(8) *Dassa v. Narasimha*, 85 B. 156; *Muthu v. Shunmoogatha*, 8 M. L. T. 224; 7 I. C. 79.

(9) *Lalchand v. Nandlal*, (1912) P. L. R. 171; 16 I. C. 888.

(10) *Nagar v. Ramappaya*, 25 I. C. 899.

(11) *Benode v. Sitā Ram*, 6 A. L. J. 444; 1 I. C. 666.

(12) *Matibunnissa v. Abdul*, 23 A. 239 (243) P. C.

(13) *Ramanadan v. Vava*, 40 M. 116 (121, 122) P. C.

and the distribution of food and clothes to the poor in the month of Ramzan every year, the surplus being equally divided by his sons, grandsons and their heirs from generation to generation, his estate yielding an annual income of Rs. 1,500 out of which Rs. 300 was spent on charity and Rs. 300 paid to the trustee as his salary leaving a balance of Rs. 900 per annum to feed the family and descendants of the grantors in perpetuity, it was contended that the endowment was illusory in that only 2-5th went to charity while 3-5th went to the heirs; but the Privy Council overruled the contention holding held that the income might fluctuate or decrease permanently and the needs of the charity might expand. It was contended that the trustee might spend little or nothing on charity to which the Privy Council replied that if the trustee failed to perform his trust, the court could interfere. They then said "The sum devoted to these charities is according to any standard not large, though for the present it is abundant for their needs. Having regard to the wealth of the grantors at the date of the deed, the provision made by it is a modest provision."

1939. Their Lordships take the view that, having regard to all the circumstances of the case, the dominating purpose and intention of the grantors in executing this deed evidently was to provide adequately for these charities. That was their main and paramount object. The secondary and subsidiary objects was to secure for their families and descendants any surplus that might remain over after the needs of the charities had been satisfied. As the gift for the charities was perpetual, it was necessary and right that the provision for capturing any possible residue should also be perpetual. The provisions of the deed carry out these objects, and that being so it is, in their Lordships view, only right to hold that the effect of the instrument is not to give the trust to the grantors, but to give it in substance to the charitable purposes named in it. If this is so, as they think it is, the deed is within the authorities a good and valid deed of *wakf* and must be allowed to take effect according to its tenor." (1)

While the father is entitled to make "pious and reverential gifts to Brahmins and also "gifts from affection towards Vishnu and other divinities" (2) still, he is not entitled to do so out of spite towards his son. Such endowment is not *bona fide* and as such it is void. (3)

Invalid endowment.

212. No endowment can be made the purpose or object of which is illegal.

Illustration.

A Hindu endows a mosque. The endowment is invalid. (4)

1940. Analogous Law.—It is provided by the Contract Act that no contract is legal the purpose or object of which is illegal. (5) A transfer in the same circumstances is prohibited by the Transfer of Property Act. (6)

A person cannot achieve by a bequest what he could not do by a transfer. So an endowment made to start a suicide club would be invalid as opposed to public policy.

Again, and apart from the statute law, a person cannot endow an object not warranted by his personal law. So a Hindu cannot endow a Mahomedan mosque. Such a dedication is doubly void, being prohibited both by the Hindu as well as by the Mahomedan law. (7)

(1) *Ramanadon v. Vava*, 40 M 116 (124) 114; 11 I. C. 436.

P. C. (5) S. 23 Contract Act.

(2) *Gopal v. Kunwar Singh*, (1843) S. D. (6) S. 6 (h) Transfer of Property Act.

A. B. 24. (7) *Fazle v. Anath Bandhu*, 16 C. W. N.

(3) *Raghunath v. Gobind*, S. A. 76 114; 11 I. C. 436.

(4) *Fazle v. Anath Bandhu*, 16 C. W. N.

But though the Mahomedan law interdicts a gift received from an infidel there is nothing in that law to preclude a Mahomedan ruler from making a religious or charitable grant to a Hindu. (1)

**Endowment when
revocable.**

213. (1) An endowment once completed is both irrevocable and unalterable.

(2) Provided that an endowment in favour of a family idol may be revoked, altered or transferred by the consensus of the family.

Synopsis.

(1) *Endowment irrevocable, if once completed* (1941). (2) *Difference in the case of endowment to a family idol* (1942).

1941. Analogous Law.—A gift once completed becomes irrevocable. *A fortiori* so is an endowment which is a gift to sacred uses. It was in one case argued that an endowment should be regarded as merely revocable appropriation, of which the founder may vary the use, but the contention was dismissed by the Privy Council with these words: "No authority whatever was adduced in support of this position, which strikes at the root of most modern endowments of the like nature." (2) Of course an endowment brought about by coercion, fraud or undue influence may be set aside to the same extent as a gift. But otherwise when it is a voluntary act of public benevolence, it cannot be recalled without detriment to the public in whom a right has become vested.

1942. The case of an endowment in favour of a private family idol is however different. It is an endowment in which the family alone is interested and it is for them to decide whether to continue or abandon it. As the Privy Council observed: "Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction." (3) This does not contemplate a decision obtained at a family conclave. All it means is that the family who are interested in the upkeep of the idol may by agreement convert debutter into secular properties. (4) But there must be consensus of the family. Where, therefore a private debutter has been partitioned between members of the family for the better enjoyment thereof, and there had been sales and mortgages of portions of the property by some members but there was nothing to show that there was a consensus to give the property a different turn it was held that these facts alone did not alter the debutter character of the property. (5)

1943. Where land has been given as debutter land and the requisite services are not performed, all that the donor can do is to take steps to have the services performed. He cannot recover it in a suit for khas possession. (6)

(1) *Puran v. Darson* 11 I. C. (A) 166, 170.

(2) *Juggut Mohini v. Sokheemoney*, 14 M. I. A. 289 (802).

(3) *Doorganath v. Ramchunder*, 2 C. 886 (847) P. C.

(4) *Gobind v. Debindra*, 12 C. W. N. 98;

Dharma v. Gosta, 16 C. W. N. 29; 8 I. C. 894.

(5) *Dharma v. Gosta*, 16 C. W. N. 29; 8 I. C. 894.

(6) *Gopeenath v. Gooroo*, 18 W. R. 472; *Ram Narain v. Ramoon*, 28 W. R. 76.

Who may be appointed manager.

214. (1) No person is disqualified by reason of his caste or sex to be appointed a manager.

(2) A female is not disqualified by reason of her sex from holding a priestly office, though she might not be competent to perform its spiritual duties.

Synopsis.

- (1) *Qualification for managership of endowment* (1944). (3) *Married men* (1945).
(2) *Eligibility dependent on the nature* (4) *Females* (1946-1947).

1944. Analogous Law.—The question of eligibility cannot be determined without reference to the nature of the endowment. If its purpose is secular charity there is no limit as to the person that may be appointed its manager. Where the institution is religious, its nature must determine the eligibility of any person to be its manager. In a new foundation the founder usually appoints someone to manage it. And as any Hindu may validly create a religious endowment, it follows that caste is no disqualification. Nor is the sex. But since a gift to Brahmins is commended by the Brahman text writers, pious endowers generally appoint a Brahman to the shebaitship of an idol or temple. But Kshatriyas and even Shudras (1) are hereditary shebaites of many a temple and the Jains appoint one of their own creed to that office, while in the case of *Muths*, Gossavi Bairagis are invariably appointed their Mahant. As these orders are open to all Hindus, caste plays but a secondary part in the election to Mahantship. But it is nevertheless a qualification.

1945. A married man may be appointed a shebait, unless celibacy is made a condition of the office or is necessarily implied by the nature of the institution, e.g., a *muth*, the Mahant of which must of necessity be a celibate. (2)

1946. As regards females, it is competent to a founder to appoint a female shebait (3) whose succession to that office may be, moreover, supported by usage. (4) In one case it was contended on the authority of Manu (5) that as women are not instructed in the Vedas and are simple creatures, they are not fit for priestly duties, but the court held that as in the case before them, the female shebait had been nominated by her husband and gave *mantras* which were accepted and not objected to, there was nothing to shew that she was disqualified to be an *Adhikaree*. (6)

1947. In another case a similar contention was raised but not decided. (7) But the fact that in no case has a female been declared disqualified by reason of her sex from filling the office shows that sex no longer stands in the way of woman's eligibility to management of a religious trust though whether she is equally competent to discharge the priestly duties must depend upon the usage

(1) *Radha Mohun v. Jadoomonee*, 23 W. R. 869; *Sundarambal v. Yogovana Gurukkal*, 38 M. 860 (859).

(2) *Ram Parkas v. Anand Das*, 48 C. 707 P. C.

(3) *Surendra v. Doorgascondery*, 19 C. 513 (587) P. C.

(4) *Janokee v. Gopaul*, 2 C. 365 O. A. 9 C.

766 (770) P. C. *Semle in Sitaram v. Sitaram*, 6 B. H. C. R. (A. C.), 250; *Quare in Keshava v. Bhagirathi*, 3 B. H. C. R. (A. C.), 75; *Joy Deb v. Huroputty*, 16 W. R. 282.

(5) IX-18.

(6) *Poorun v. Kasheessuree*, 3 W. R. 179 (180).

(7) *Joy Deb v. Huroputty*, 16 W. R. 282.

of the institution. In practice the goddess Devi prefers a priestess of her own sex while the phallic God Shiv would never tolerate a woman high priestess (1) though even here, she may validly fill the office of manager, (2) and even as regards her qualification to the priesthood (*Archak* or *Purohit*) she has been permitted to hold the office, being held entitled to have the actual worship performed through a male substitute appointed for the purpose, (3) But even here it is open to the founder to appoint a female shebait (4) and usage has recognised the right of a woman to act as Mahant of Biragi *muth* (5) while there is no objection to her holding the office of trustee of a charitable endowment. (6)

1948. Qualification of manager.—No qualification is necessary for eligibility as manager—though it is obvious that the appointment of a person claiming adversely to the endowment would place him in a position when his interest will conflict with his duty. (7) A minor might be appointed a manager as he might be appointed an agent. But a person who is disqualified by reason of bodily deformity, of bodily disease such as leprosy, of disease of the mind or of the leading of a life which is immoral or is inconsistent with the religious vows, of the office such as that of a Mahant of a *muth*, cannot be appointed to that office. (8) So again a married man cannot be appointed to be the head of a *muth*. If he is married and has children he must renounce them before entering upon a life of enforced celibacy and asceticism. (9) In one case the Privy Council held a *Beldar* (stone-mason) incompetent to be the assignee of a Brahman shebait's right on the ground that he was incompetent to perform worship of the deity at the temple adding: "The office of shebait of a temple was an hereditary office which could not be held by any one who was not a Brahman Panda." (10) But this statement must not be taken as laying down any general rule which would not be in consonance with the established practice.

215. (1) The founder is entitled to provide for the management of any endowment created by him.

Appointment and succession of manager.

(2) He may nominate a shebait and provide for his successor and effect will be given to his wishes if not inconsistent with the general law.

(3) Where the founder makes an endowment without providing for its management, the right of management vests in the founder and his heirs.

(1) *Sundarambal v. Yogavana Gurukkal*, 88 M. 850 (860, 861) dissented from in *Rajeswari v. Subramania*, 40 M. 105

(2) *Sundarambal v. Yogavana Gurukkal*, 88 M. 850 (859).

(3) *Seshammal v. Soondarajiengar*, (1853) M. S. D. A. 261 explained as obiter in *Sundarambal v. Yogavana Gurukkal*, 88 M. 850 (859) dissented from in *Rajeswari v. Subramania*, 40 M. 105 following contra in *Ramasundaram v. Savundrathammal*, 16 M. L. T. 428; *Tangirala v. Manikya*, 27 M. L. J. 179.

(4) *Surendro v. Doorgasoondery*, 19 C. 510 (531, 532) (P. C.)

(5) *Dhunccoverbai v. A-G*, 1 Bom. L. R. 743.

(6) *Mallikarjun v. Sridevamma*, 20 M. 162 P. C.

(7) *Krishna v. Kali Sunkar*, 1 I. C. (C.) 916.

(8) *Ram Parkash v. Anant Dos*, 48 C. 707 (719) P. C.

(9) *Ib.*

(10) *Jalandhar v. Jharula*, 12 C. 244 (252) P. C. reversing O. A. *Jharula v. Jalandhar*, 89 C. 887.

(4) The right of the founder to provide for the management devolves upon his heirs on his death.

(5) The court may appoint a manager in the last resort.

Synopsis.

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| (1) <i>Right of management of endowment</i> (1949). | (1950). |
| (2) <i>Right of founder and his heirs</i> | (3) <i>Who are the founders</i> (1951). |
| | (4) <i>Appointment by court</i> (1952). |

1949. Analogous Law.—The founder of an endowment naturally possesses the right to arrange for its management. As such it is for him to set out a scheme of management, nominate trustees, give general directions as to the mode and manner in which he wishes to serve the object of his bounty. (1) Even where he endows an existing institution it is for him to state the conditions of his offer, since according to Hindu Law when a religious endowment has been founded the right to appoint a manager or superintendent remains in the founder and his descendants, unless there is evidence to show that the founder or his descendants have made any inconsistent disposition. (2)

1950. Where the founder establishes an idol or endows for the establishment of one, without making any provision for its worship, the office of shebait presumably vests in the founder and on his death, in his heirs (3) unless there is any custom or usage showing that the devolution is otherwise. (4)

Even where the founder appoints trustees, in the absence of custom or any provision in the deed of foundation to the contrary, the right of appointment of new trustees vests in the founder's heirs. (5) As regards the members of a Mitakshara family who are joint shebait, the right of shebaitship passes by survivorship. (6)

1951. Who are the founders.—Where the endower is a single individual he is of course the founder. But an institution is sometimes founded by subscriptions by members of a caste, sect or tribe, in which case all the original subscribers alone would be classed as founders. (7) So where the same community founded a temple dedicated to the public, it was held that "although the donations were irrevocably dedicated to certain public purposes, the donors have never lost the right, which was attached to the caste since the beginning, to manage the temple which they founded and the management can only be interfered with as a public charitable trust on proof of maladministration." (8)

(1) *Kamini v. Asutosh*, 16 C. 103 P. C.; *Baldeo v. Gobind*, 86 A. 161; *Lahar Puri v. Purn Nath*, 87 A. 298 P. C.; *Jadunath v. Sitaramji*, 39 A. 553 P. C.; *Sheo Prasad v. Ayo Ram*, 29 A. 668; *Rajbans v. Korya*, 8 A. L. J. 286; 10 I. C. 824.

(2) *Sheo Prasad v. Ayaram*, 29 A. 668. *Narsingh v. Durjan*, (1881) A. W. N. 52.

(3) *Mohan v. Madhusudan*, 32 A. 461; *Girdharji v. Romanlalji*, 17 C. 3 P. C.; *Jagadindra v. Hemanta*, 32 C. 129 P. C. *Ravichand v. Somal*, (1886) B. P. J. 278.

(4) *Girdharji v. Romanlalji*, 17 C. 3 P. C. *Peet v. Dharee*, 18 W. R. 396; *Ramchandra v. Ram Krishna* 33 C. 507; *Mohan v. Girdhar*, 35 A. 283 P. C. *Lahar v. Purn*, 37 A. 298 P. C. *Jadunalli v. Sitaramji*, 39 A. 553 P. C.

(5) *Jai Bansi v. Chhattar Dhari*, 5 B. L. R. 181.

(6) *Kokilasari v. Rudramani*, 6 C. L. J. 527.

(7) *Luchmee v. Rookmanee*, (1857) S. D. A. M. 152; *Endowed Societies Act (In re)* 10 A. C. 304 (308, 309)

(8) *Thackersey v. Hurbhum*, 3 B. 432 (462).

Where several members are entitled to management in rotation or by turns, the exclusion of one by the other, may become adverse, conferring on the member excluding a title by prescription or at least as a valid family arrangement which will hold good until altered by the court or superseded by a new scheme effected with the concurrence of all parties interested. (1) No person can be appointed as shebait whose interest is adverse to that of the idol. Such are persons who deny the endowment and assert a personal right to the property who cannot be appointed shebait or custodians of the income of the properties and supervisors of the worship of the deity. (2)

The owner of the soil who dedicates a way to the public is entitled to sue for an injunction against one who destroys the improvements effected by him. He is not required to prove special damage. (3)

1952. Appointment by court.—Since a trust cannot fail for want of

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trustees the court will appoint a manager on the failure of those entitled to appoint him. Where a shebait is dead and there is no provision in the deed of endowment about the mode in which the office is to be filled up, the court will not read into the deed of endowment a provision for appointment to the office of shebait which is not to be found therein. It becomes incumbent upon the representatives of the founders to make an appointment to the office of shebait, and upon failure to do so the court has power to appoint a new trustee and will exercise the power whenever there is a failure of a suitable person to perform the trust either from original or supervening disability to act. The appointment of a fit and proper person to be a new trustee is, however, not a matter of arbitrary discretion of the court. The appointment must be made subject to well known and defined rules, stated by Turner, L. J., as follows : (1) The court will pay due regard to the wishes of the author of the trust if known or ascertainable ; (2) the court will not appoint a new trustee with a view to the interest of some of the persons, beneficially interested under the trust, in opposition either to the wishes of the founders or to the interest of other *cestuis que trusts* ; and (3) the court, in appointing a trustee, will have due regard to the question, whether the appointment will promote or impede the execution of the trust, for the very purpose of the appointment is that the trust may be better carried into execution. (4)

216. (1) In the absence of any custom or usage to the contrary, the rights and liabilities of the **Manager's right of alienation.** manager of an endowment are those of the guardian of a minor's estate, that is to say, he may incur debts, charge or alienate the corpus of an endowment if justified by legal necessity or its benefit.

(2) Property belonging to an endowment may be attached and sold in execution of a decree obtained against the manager as such.

(3) Any person interested in the endowment may sue to set aside an improper alienation of its property by the manager.

(1) *Ramanathan v. Murugappa*, 27 M. 192 affirmed O. A. 29 M. 283 (288) P. C.

(2) *Krishna v. Kali Sunkar*, 1 I. C. (C) 216.

(3) *Bahadur v. Parash Nath*, 81 C. 889.

(4) *Raj Krishna v. Bipin*, 40 C. 251 (258)

(4) Any person suing to enforce an alienation made by the manager must prove both its *factum* and necessity.

Explanation 1.—The term “manager” in clause (1) includes any person actually filling that character whatever may be the defect in his appointment.

Explanation 2.—The term “manager” in clause (1) means and includes a shebait, trustee or mahant of a *mutt*, and any other person by whatever name called, provided he discharges the duties of manager.

Synopsis.

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| (1) <i>Manager's rights of alienation</i> (1953). | (10) <i>Exchange of properties</i> (1965). |
| (2) <i>Power of manager analogous to that of guardian of infant or widow</i> (1954). | (11) <i>Power of manager to grant leases</i> (1966). |
| (3) <i>Alienation of corpus when justified</i> (1955-1956). | (12) <i>Compensation money to be invested, on compulsory acquisition of land</i> (1967). |
| (4) <i>Personal remedy of creditor against manager</i> (1957). | (13) <i>Decree against manager when binding on the trust</i> (1968). |
| (5) <i>Legal necessity or benefit</i> (1958-1959). | (14) <i>Powers of de facto manager</i> (1970). |
| (6) <i>Powers of head of a mutt</i> (1960). | (15) <i>Legal status of shebait, Mahant and Dharmkarta</i> (1971). |
| (7) <i>Meaning of “necessity”</i> , (1961). | (16) <i>Setting aside improper alienations</i> (1972). |
| (8) <i>Benefit</i> (1962-1963). | (17) <i>Burden of proof of necessity justifying alienation</i> (1973). |
| (9) <i>Partition of endowment if permissible</i> (1964). | |

1953. Analogous Law.—The general rule here formulated is in accord with the statement of law by the Privy Council who speaking of the powers of the manager and head of the family said : “The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or *mutt*, or of the guardian of an infant family.” (1) This was laid down as far as back as 1875 when the same Board said : “The authority of the *shebait* of an idol's estate would appear to be in this respect analogous to that of the manager of an infant-heir which was thus defined in a judgment of this committee, delivered by Lord Justice Knight Bruce : “The power of the manager of an infant-heir to charge an estate not his own, is under Hindu Law, a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir grounded on a necessity which his own wrong has helped to cause. Therefore, the lender in this case,

(1) *Sahu Ram v Bhup Singh*, 39 A. 437 (443) P. C.

unless he is shown to have acted *mala fide*, will not be affected though it be shown that with better management the estate might have been kept free from debt." (1)

"It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must, in the nature of things, be entrusted to some person as shebait or manager. It would seem to follow that the person so interested must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant- heir. If this were not so, the estate of the idol might be destroyed or wasted and its worship discontinued, for want of the necessary funds to preserve and maintain them." (2)

1954. Referring to this case, their Lordships in another case said that the position of a shebait was analogous to that of a manager of an infant, and that he had the same authority, which in both cases arises from the necessity of the case, to raise money for the benefit of the estate. (3) In some cases, the shebait is likened to a Hindu widow. (4) In another case of the Calcutta High Court, it was said: "The powers and duties of a shebait may now be taken as almost settled. Apart from his duties in connection with the worship and service of the idol a shebait has the possession and management of the properties. In other words, his possession is that of a manager and he is not only empowered, but bound to do, whatever is necessary for the benefit or preservation of its properties. The liability of the estate of an idol for wrongs committed by its shebait in the reasonable management of its properties is analogous to the liability of a corporation for wrongs committed by its agent in the course of their employment and in the apparent furtherance of its purpose, (5) and in both cases it is founded on the policy of law and without regard to personal default, for both the idol and the corporation are incapable of personal wrong doing. Neither can be invested with rights or duties, except through natural persons who are their agents." (6)

These powers may be exercised even by a *de facto* manager. (7)

1955. Power of transfer—The manager possesses the power to sell, mortgage or let all or any portion of the endowed property in case of necessity (8) or benefit of the trust. He must not, however, alienate the corpus, if the necessity can be met by borrowing or an alienation of the rents and profits. (9) Even such property may be settled on a permanent lease such as *mirasi putni* and *mokurari* grant. (10) Such a lease was granted by the shebait for the

(1) *Hunooman Persaud v. Mt. Babooee*, 6 M. I. A. 398 (423).

(2) *Prosumo v. Golab*, 14 B. L. R. 450 (458, 459) P. C. followed in *Sheo Shanker v. Ram Shewak*, 24 C. 77 P. C.; *Hossein v. Mahania*, 34 C. 249 (255); *Abhiram v. Shyamcharan*, 86 C. 1008 P. C.; *Parsotam v. Dat Gir*, 25 A. 296 (304, 311); powers those of a widow *Juggessur v. Rodro*, 12 W. R. 299 (301).

(3) *Doorganath v. Ramchunder*, 2 C. 841 (352) P. C.

(4) *Juggeshur v. Rodro Narain*, 12 W. R. 299.

(5) *Mersey & Co. Trustees v. Gibbs*, L.R. 1 H. L. 93; *Taff Vale Railway v. Amalgamated Society*, (1901) A. C. 426.

(6) *Pramada v. Poorna*, 85 C. 691 (699).

(7) *Sheo Shankar v. Ram Shewak*, 24 C. 77 (82); contra *Ramdas v. Moheerur*, 7 W. R. 446.

(8) *Abhiram v. Shyamcharan*, 86 C. 1008 P. C.; *Parsotam v. Dat Gir*, 25 A. 296; *Trimbak v. Lakshman*, 30 B. 495; *Nritya Gopal v. Mani Chandra*, 12 C. W. N. 63; *Devasigamani v. Palaniappa*, 84 M. 585; *Vira v. Valappil*, (1914) M. W. N. 909; 26 I. C. 289.

(9) *Vira v. Valappil*, 16 M. L. J. 508; 26 I. C. 289; *Devasigamani v. Palaniappa*, 84 M. 585.

(10) *Ramachandra v. Kasinath*, 19 B. 271; *Doorganath v. Ramchunder*, 2 C. 841 (352) P. C. contra *Motee Dass v. Modhoooodum*, 1 W. R. 4.

completion of a temple which the Privy Council upheld with these words: "Here can it be said the grant of a *mokurari* patta was an improvident way of raising money, if it were necessary to do it at all. It still left a rent for the sustentation of the idol; and if the transaction be *bona fide*, any subsequent sale of part of the rent was justified by the imperious necessity of finishing the temple which had been commenced."⁽¹⁾ But apart from legal necessity or benefit, a shebait has no authority to lease debutter property even to a co-shebait. (2) A permanent lease unsupported by justifying necessity would, on the most favourable construction, enure only for the life-time of the grantor. (8) But there is nothing to prevent a shebait from transferring debutter land to another member of his family for the purpose of continuing the worship of the idol. (4)

1956. In one case it was held that the profits of a debutter may be assigned so long as the worship is duly kept up.⁽⁵⁾ But the profits of an endowment are as much debutter property as the corpus and the same rule applies to both. As the Privy Council observed, "The Taluq itself with which these Jamas were connected by tenure, was dedicated to the religious services of the idol. The rents constituted, therefore, in legal contemplation, its property. The shebait had not the legal property but only the title of manager of a religious endowment."⁽⁶⁾ The power to transfer, is of course an incident of the office. Where, therefore, the manager is suspended or removed from office or is merely a disputed claimant to office⁽⁷⁾ he cannot transfer any of the debutter land even for a justifiable necessity, though if the creditor was a *bona fide* transferee without notice, he would be necessarily protected. (8)

1957. The question what remedy the creditor has personally against the manager on failure of the security is one which cannot be answered without reference to the facts of each case, since the personal liability of the debtor must largely depend upon the representation, express and implied, that induced the loan. *Prima facie* the *Suami* of a *xilli* has no private property and must be assumed to be pledging the credit of the *malli* when he borrows money for its purpose. Consequently the personal liability of the shebait in such a case is out of question and the *malli* would be liable if the loan is shown to have been contracted for the benefit of the *malli* or that the creditor had *bona fide* reason to suppose it was intended for such purpose. (9) But in any other case, where the manager has means of his own, he is bound by his contract, though the security he had offered failed. (10) But a debt so binding by estoppel cannot be recovered from his successors in the trust, though it might be available against his personal representatives. (11)

1958. Legal necessity.—The legal necessity or benefit justifying alienation of the debutter property must naturally be adapted to the special requirements of the endowment and measured by the existing necessity justifying it. Besides the ordinary work of necessary reconstruction, completion or repairs

(1) *Doorganath v. Ramchunder*, 2 C. 841 (352, 353) P. C.

(2) *Prosunno Kumar v. Baroda Prosunno*, 22 C. 989.

(8) *Abhiram v. Shyamacharan*, 86 C. 1008; *P. O. Revaji v. Vasudeo*, (1987) B. P. J. 5; *Papaya v. Ramana*, 7 M. 85.

(4) *Baroda v. Hemdata*, 18 C. W. N. 242.

(5) *Shibbessuree v. Beckwille*, 8 W. R. 152

(6) *Shibbessure v. Molhooranath*, 13 M. I. A.

270 (273).

(7) *Madho v. Ramratav*, 15 C. W. N. 838 P. C.; 11 I. C. 507.

(8) *Kasim v. Sudhindra*, 18 M. 859

(9) *Shankar v. Venkapa*, 29 B. 422 (425); *Krishnan v. Sankara*, 9 M. 411 (444).

(10) *Krishnan v. Sankara*, 9 M. 441 (444) following *Elkington's case*, L. R. 2 Ch. 511; *Bridger's case*, L. R. 9 Eq. 75.

(11) *Ganesh v. Keshav*, 15 B. 625 (687).

of the buildings constituting or comprised in the endowment,⁽¹⁾ there are heads of expenditure which are equally necessary, such as the cost of restoration of the image ⁽²⁾ the cost of litigation connected with the trust, defence of its title against hostile attack,⁽³⁾ and the observance of customary practices such as the performance of the puja or worship with due ceremonies, ⁽⁴⁾ the distribution of cloth at a festival, ⁽⁵⁾ the constant burning of a lamp where so required ⁽⁶⁾ and the like.

1959. In judging of necessity, the first question is what is the character of the institution and what objects was the income derived therefrom to be devoted to. The question of necessity cannot be decided upon the analogy of other institutions. ⁽⁷⁾ Where no deed of endowment is forthcoming, the rules according to which property and its income are to be dealt with in order to carry out the intention of the original endower can only be ascertained by inference from the practice proved by evidence to have been followed in the particular case. But these rules, so to be inferred must not be inconsistent with or repugnant to the very nature and purpose of the endowment. If, for instance, the worship of the idol in the temple be intended to be perpetual as it could hardly fail to be, then the preservation and use of the dedicated property to support and maintain that worship must be assumed to have been similarly intended to be perpetual. A rule therefore which would authorize and empower the shebait of such temple arbitrarily and at his own mere will and pleasure to alienate the dedicated property, either piecemeal or *enbloc* would be so repugnant to the whole purpose and object of the endowment, that it could not be rationally held to embody the intention of the original founder. A shebait is not justified in selling debutter land solely for the purpose of raising capital to embark in money-lending business however lucrative that business may be. He is not entitled to sell debutter land solely for the purpose of so investing the purchase of it as to bring in an income larger than that derived from the probably safer and certainly more stable property, the debutter land itself. ⁽⁸⁾

1960. A shebait is entitled to mortgage the endowed property to prevent its forfeiture or sale for non-payment of land revenue or other paramount charge. ⁹ So again where title to the "*gaddi*" was in dispute, expenses incurred in defending it were held chargeable on the endowment. ⁽¹⁰⁾

Though the head of a *muth* possesses larger powers of disposition over its income, he has no larger authority to alienate the *corpus* than the head of any other religious institution. ⁽¹¹⁾

1961. The term "necessity" implies pressure. There may be a debt, a legal debt chargeable on the trust and yet no pressure. The manager cannot forecast wants and incumber the property which might otherwise have never been lost. So where there was a decree against a *muth* but no attachment, the court held a bond executed by the manager as supported by no necessity, adding: "It was given in respect of antecedent transactions, and there was no necessity

(1) *Doorganath v. Ramchunder*, 2 C. 841 P. C.; *Tahboonissa v. Sham Kishore*, 15 W. R. 228; *Collector v. Hari*, 6 B. 546.

(2) *Tahboonissa v. Sham Kishore*, 15 W. R. 228.

(3) *Jagannath v. Bibi*, 18 I. C. 85; *Parasotam v. Dat Gir*, 25 A. 296; *Vidyapurna v. Vidyasidhi*, 27 M. 435; *Peary Mohun v. Narendra*, 87 C. 229 (284) P. C. following *Walters v. Woodbridge*, 7 Ch. D. 504.

(4) *Pandara v. Karutha*, 21 M. L. J. 129; 9 I. C. 150.

(5) *Samantha v. Sellappa*, 2 M. 175.

(6) *Collector v. Hari*, 6 B. 546 (549).

(7) *Dost Mohamed v. Nasir Ali*, 6 M. L. W. 184; 42 I. C. 474; *Ramanadhan v. Vava*, 40 M. 116 P. C.

(8) *Palaniappa v. Sreemath*, 40 M. 709 P. C.

(9) *Parasotam v. Dat Gir*, 25 A. 296 (811, 812); *Palaniappa v. Sreemath*, 40 M. 709 P. C.

(10) *Parasotam v. Dat Gir*, 25 A. 296 (811, 812).

(11) *Pandara v. Karutha*, 21 M. L. J. 129; 9 I. C. 150.

for Sheocharan giving such a bond. There was no danger to the estate which the money was advanced for the sake of averting. The plaintiff might have sought any remedy which he had against the *muth*: but it does not appear that any proceedings were taken for sequestration or attachment of the property; and there was not therefore, any necessity for giving this bond and thus really giving a fresh right of suit, when as regards at least a portion of the claim, a suit for it would have been barred by the law of limitation (1)."

1962. Benefit.—Benefit as distinguished from necessity is a distinct and recognized head of expenditure permitted by law. As stated before, it was at one time classed under the head of necessity (§ 1072) from which it is however, clearly distinguishable (Ss. 97, 98). The term has already been generally defined (S. 98) and its application with reference to cases arising in connection with religious and charitable endowments is all that calls for notice here.

1963. What is benefit to an endowment must necessarily depend upon the nature and character of the endowment. For instance the construction of a Dharmasala to accommodate pilgrims visiting a shrine may be a "benefit" to the shrine though it would not justify its mortgage. On the other hand its mortgage to secure the repayment of money borrowed and applied to prevent its own extinction by sequestration would be a distinct benefit. (2) But the grant of a perpetual lease to fill up a tank on the property which the shebait could not afford to do, is not such benefit as would justify alienation of the trust property. (3)

1964. Partition.—An endowment is sometimes used in a dual sense as signifying the property dedicated to an object as also the object itself. Closely connected with the subject of endowment is that of the offices held by those entrusted with its management. A religious endowment would thus comprise (i) the property, (ii) the sacred object and (iii) the persons charged with the management of (a) the property and (b) the object. As regards the object and the sacred office, they are ordinarily both impartible, though in a family partition, even idols are known to have been thrown into the hotchpot and as regards religious offices, though they are strictly speaking indivisible, still modern custom has sanctioned a departure by permitting their partition by allowing the persons entitled to a share to officiate by turns, (4) but such partition is only allowed when (a) it is in accordance with the wishes and intentions of the founder of the endowment or (b) is justified by the usage or practice in the family. (5)

1965. Exchange.—The manager's right to effect an exchange of the dedicated property is of course to be tested by the same touchstone of necessity. If the property had deteriorated in value owing to the deposit of sand or other deleterious material or by the shifting course of a stream, an exchange would be *prima facie* justifiable. So again it may be justified by more economic management as where an outlying village is given away in exchange for another village more conveniently situated. The question in such case is not why there was an exchange, but whether it was necessary and conducive to the good of the endowment.

(1) *Ramohurn v. Nunhoo*, 14 W. R. 147.

(2) *Palaniappa v. Sreenath*, 40 M. 709 : P. C.

(3) *Inananjan v. Adormoney*, 18 C. W. N. 805 ; 8 I.O. 92.

(4) *Trimbak v. Lakshman*, 20 B. 495 ; *Rajeswar v. Gopessur*, 84 C. 838.

(5) *Rajeswar v. Gopessur*, 84 C. 828 ; *Ramkumar v. Jogender*, 4 C. 56 ; *Mancharam v. Pran Shanker*, 6 B. 298.

1966. Lease.—The manager's power to grant permanent leases must be measured by the same rule of necessity or benefit to the estate. Ordinarily, he has no power to grant permanent leases of endowed property. (1)

A permanent lease granted by the manager without necessity at fixed rent, though adequate at the time, was a breach of duty, and could, on the most favourable construction only enure for the life of the grantor and was not binding on his successors. (2) There is no presumption that the lease of debutter property is permanent though the rent was fixed. The presumption in favour of a permanent tenancy implies that there is ground for inferring that the tenure was always intended to be and always was hereditary, or that it acquired that character by subsequent grant. But a presumption in favour of a transaction assumes its regularity; it cannot be made in favour of that which offends legal principle. (3)

The fact that the lessee is itself a charitable institution does not validate an otherwise invalid lease. So it is immaterial that the site leased was a house site and yielded no rent and had been let at an unvarying rent on a fixed premium. (4)

A long lease for 40 years by a manager about to vacate office is open to the same objection as a permanent lease. (5)

A lease treated as permanent and acquiesced in by successive trustees cannot, however, be determined by notice. (6) But though the manager cannot without necessity grant permanent leases he is not debarred of his right as manager to grant leases for a reasonable term and create derivative tenures and estates in conformity with usage or as an act of ordinary prudent management. (7)

The general rule as to a manager applies equally to the Mahant of a *muth* who, though possessing larger power of internal management, has not the power to grant a permanent lease except for necessity or benefit of the institution. (8)

1967. Acquisition of endowed land.—Since a manager is not "competent to alienate the land" within the meaning of S. 13 of the Land Acquisition Act, it follows that the price payable on compulsory acquisition of land should be invested as provided in S. 32 of that Act. (9)

(1) *Prosunno v. Saroda*, 22 C. 989; *Abhiram v. Shyama Charan*, 96 C. 1003 P.C. reversing O.A. *Shyama Charan v. Abhiram*, 88 C. 511; *Krishna v. Sukhas*, 10 C.W.N. 1000.

(2) *Shibessoree v. Mothooranath*, 13 M. I. A. 270 (275) followed in *Abhiram v. Shyama Charan*, 96 C. 1003 (1013) P.C. *Motee v. Modhoosoodun*, 1 W. R. 41; *Sufawat v. Busheeroodeen*, 2 W. R. 139; *Rumone v. Baluck Dass*, 14 W. R. 101; *Goluck v. Rughoonath*, 17 W. R. 441; *Jnananjan v. Adoremoney*, 13 C.W.N. 805; 3 I. C. 98; *Muthuvelu v. Aiyaswami*, 7 M. L. T. 886; 6 I. C. 7; *Prahalad v. Behary*, 13 I. C. (C) 686; *Narendra v. Atul*, 41 I.C. (C) 837; *Palaniappa v. Sreemath*, 40 M. 709 P.C. *Balaswamy v. Venkataswamy*, 40 M. 745; *Chirakkal v. Saidamadathi*, 8 M.L. T. 309;

7-I. C. 253; *Devasigamani v. Palaniappa*, 34 M. 535; *Kasi v. Srimathu*, 16 I. C. (M) 692.

(3) *Satya Sri v. Kartik*, 16 C.W. N. 227; 13 I.C. 535; *Murugappa v. Rangaswami*, 38 I. C. (M) 57.

(4) *Devasigamani v. Palaniappa*, 34 M. 535; *Muthusamier v. Sreemethanithi*, 38 M. 356; *Palaniappa v. Sreemath*, 40 M. 709 P.C.

(5) *Palaniappa v. Sreemath*, 40 M. 709 P. C. *Mangalasami v. Raja of Ramnad*, 1. M. L. W. 1074; 27 I. C. 861.

(6) *Narasimha v. Gopala*, 28 M. 391.

(7) *Prosunno v. Golab*, 14 B. L. R. 450 (459) P. C.

(8) *Balaswamy v. Venkataswamy*, 40 M. 745

(9) *Kamini v. Promatho*, 39 C. 38 followed in *Itam Prasana v. Secretary of State*, 40 C 895 P. C.

1968. Decree against manager binds the trust.—From the fact that the manager represents the trust in all suits affecting its interest, it follows that decrees fairly obtained by or against the manager as representative of the trust equally bind both his successor and the trust. But before applying the principle of *res judicata* to such judgments, the court should be satisfied, that the judgments relied upon are untainted by fraud or collusion, and that the necessary and proper issues have been raised, tried and decided in the suits which led to them and the execution of such judgments should be decreed only against the rents and profits of the debutter property ⁽¹⁾ but this is not an invariable rule since if the rents and profits are inadequate to satisfy the decree, the *corpus* itself may be seized and sold. ⁽²⁾

The trust estate is liable for a tort committed by its trustee in the reasonable management of the trust. ⁽⁸⁾

1969. Manager's personal liability.—The fact that a person is the manager of a trust does not suspend his civil rights. He is able to contract in his own name and on his own credit and a decree obtained against him on his personal contract or security does not affect the trust ⁽⁴⁾ which is only liable for a debt contracted by him on its behalf and a decree passed against him as its representative.

1970. De facto manager.—The powers of a *de facto* and a *de jure* manager are the same ⁽⁵⁾ provided he is in actual possession. So where the plaintiff sued to recover on a bond given by the *de facto* manager of a *muth* as a charge on the *muth*, it appeared that the obligor had turned the manager out of possession and as his own right to possession was contested at the time he executed the bond, he was in no better position than a trespasser and a wrong doer and as such incompetent to represent the *muth* in its dealings with its creditors. ⁽⁶⁾

1971. Shebait, Mahant, Dharmakarta.—The liability of the manager is not affected by the designation of his office. He may be a Mahant of a *muth* ⁽⁷⁾ or the shebait of a temple or a mere trustee of a charitable public trust, but in each case his right of alienation is subject to the same rule. ⁽⁸⁾

1972. Setting aside improper alienation.—An improper alienation made by the manager being in breach of trust and in excess of his power, may be set aside by suit instituted by any one interested in the endowment. Where for instance it is a public religious

(1) *Golab v. Prosonno*, 11 B. L. R. 332 affirmed *O. A. Prosonno v. Golab*, 14 B. L. R. 450 P. C.

(2) *Pramada v. Poorna*, 35 C. 691.

(3) *Raybould v. Turner*, 1900, 1 Ch. 199; *Pramada v. Poorna*, 35 C. 691 (699).

(4) *Bishen Chand v. Nadir*, 15 C. 329 P. C.; *Peary Mohan v. Narendra*, 5 C. W. N. 273; *Ram Krishna v. Padama Charan*, 6 C. W. N. 668; *Babai Rao v. Luzman Das*, 28 B. 215.

(5) *Saminatha v. Purushottama*, 16 M. 67; *Kasim v. Sudhindra*, 13 M. 359.

(6) *Ramohurn v. Nunhoo*, 14 W. R. 147; *Madho Prasad v. Ramratton*, 15 C. W. N. 88.

(7) *Basudeo v. Jugat Kishore*, 36 M. L. J. 5 P. C.

(8) *Gopal Dass v. Kerpalam*, (1850) B. S. D. A. 250; *Shubeesuree v. Mothooranath*, 13 M. I. A. 270; *Prosonno v. Golab*, 14 B. L. R. 450 P. C.; *Aphiram v. Shyama Charan*, 36 C. 1003 (1018) P. C.; *Jnananjan v. Adoremoney*, 13 C. W. N. 305; *Sambanda v. Narasambanda-pandara*, 1 M. H. C. R. 298; *Gnanasambanda v. Telu*, 23 M. 271 P. C.; *Vidyapurna v. Vidyavidhi*, 27 M. 435 (439, 456); *Murugesam v. Manickavasaka*, 40 M. 402 P. C.; *Narayan v. Chiniaman*, 5 B. 393; *Collector v. Hara*, 6 B. 546; *Ganesh v. Keshavarar*, 15 B. 625.

endowment it may be set aside by suit instituted by any worshipper suing in the interest of his class. No sanction such as is provided for in S. 92 of the Code of Civil Procedure or S. 18 of the Religious Endowment Act is necessary to maintain it. (1) The same right belongs to all beneficiaries who sue only in the right of the trustee. They are his *aliases* and in England they are bound to use the name of the trustee as co-plaintiff. (2) On the alienation being set aside, the court should order delivery of possession of the alienated property to the trustee without driving the latter to a fresh suit for possession. For this purpose it is necessary that the trustee should also be impleaded in the suit as plaintiff if willing, otherwise a defendant. (3)

1973. Burden of proof.—Following the rule already stated before it has been laid down that it lies on him who sues to enforce an alienation made by a manager to prove both its *factum* and necessity. (4) But though this is the rule, the burden may be discharged by proof of the fact that successive holders of the office had recognised the validity of the alienation and acted upon that basis "and as time goes on this may itself come to be a not unimportant element of probabation upon the issue. It must also be fully borne in mind that with the lapse of time the parties to the transaction may die or disappear . . . and it is conceivable that, as years elapse, in such cases nearly all the material evidence may, in course of time, disappear while, the debt itself still remains, having from its initiation till almost the date of suit been recognised by all concerned as a debt truly constituted by the *adynam*. In such a case a court is much more easily satisfied that the debt was properly incurred than where the transaction was itself recent and can therefore be the subject of more exact evidence, or where the transaction, although remote, has been the subject of challenge or dispute by those charged with the interests of the institution." (5)

Manager's Office
how far transfer-
able.

217. The office of manager is inalienable except to the following extent:—

(1) The manager of a private endowment may transfer it with the consent of the founder or his whole family.

(2) In other cases, it may be relinquished if allowed by the terms of the foundation or usage, in favour of a member of the family or failing such member, a stranger eligible to discharge the duties of the office.

(3) Provided that notwithstanding any usage, no transfer can be made for the pecuniary benefit of the transferor or which is incompatible with the interest of the trust.

Illustration.

A bequeathes his shebaitship to B. The bequest is invalid for since A's office only enures for his life, there remains nothing on A's death which he could bequeath. (6)

(1) *Venkataramana v. Kasturiranga*, 40 M. 212 (223, 226) F. B. ; *Chidambaramatha v. Nallagirva*, 41 M. 124.

(2) *Chidambaramatha v. Nallasiva*, 41 M. 124.

(3) *Subramania v. Nagarathana*, 20 M. L.

J. 151 ; 5 I. C. 901.

(4) *Basdeo v. Sri Kishen*, 18 O. C. 79 ; 5 I. C. 1005.

(5) *Murugesam v. Manickavasaka*, 40 M. 402 (408) P. C.

(6) *Rajeshwar v. Gopeshwar*, 85 C. 226 (230)

Synopsis.

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| (1) <i>Manager's office inalienable</i> (1974) | (6) <i>Adverse possession against manager affects trust</i> (1980). |
| (2) <i>Transfer of private endowment</i> (1975). | (7) <i>Mutts: Their origin and history</i> (1981-1983.) |
| (3) <i>Alienation allowed to a limited extent by custom</i> (1976-1977.) | (8) <i>Position of Mahant or Matathipathi</i> (1984-1986.) |
| (4) <i>Limits of allowable custom</i> (1978) | (9) <i>Succession to Mahantship</i> (1987). |
| (5) <i>Decree against manager binds institution</i> (1979). | (10) <i>Gossains and Sanyasis</i> (1988). |

1974. Analogous Law.—The office of manager is ordinarily inalienable both because it is a sacred office and as such a *res extra commercium* as also because it is of a personal nature and the discharge of its duties requires personal qualifications. As such it was at one time held to be wholly inalienable and was exempt from seizure in execution of a decree against the shebait. (1) But since such offices are hereditary, the objection on the ground of personal fitness could not be pressed and with the right of heredity followed the right of partition. (2) The next stage was the qualified right of alienation to a member of the shebait's family (3) and failing him, to a stranger provided the stranger was fit to discharge the trust. (4) But the right is still such as cannot be attached in execution of a money decree against the shebait, since if such property be subject to attachment and sale the purchaser might be a Mahomedan or a Christian, who would be both unwilling and incompetent to perform the service of the idol (5) or prepare food for it. (6) Such a devolution would thus be not only destructive of the endowment but wholly inconsistent with the presumed intention of the founder. (7) The present law is thus a compromise between the ordinary rights of property and its special character. It permits sale within limits and those limits are stated in the section.

1975. Transfer of private endowment.—As regards a private endowment, the Privy Council stated that "the consensus of the whole family might give the estate another direction." (8)

CI. (1). The founder has, of course, the same right. The public are not interested in such endowment—the only persons interested are the founder and his family and it is for them to say who shall be its manager. It has been accordingly held that in a case of a private endowment, an alienation of the shebait's office made with the concurrence of the founder or of his whole family and for the benefit of the endowment is valid. (9) But consideration of benefit of the endowment was no part of the Privy Council *dictum* and does not appear to be an essential condition to its validity, though any transfer made to its detriment would doubtless be vetoed by the family. But it is their look out.

(1) (1870) *Dube v. Srinibas*, 5 B. L. R. 617; *Juggurnath v. Kishen*, 7 W. R. 266.

(2) *Mitta v. Neerunjun*, 14 B. L. R. 166.

(3) *Srinivasa v. Rangasami*, 2 M. 804.

(4) *Mancharam v. Pranshankar*, 6 B. 298.

(5) *Juggurnath v. Kishen*, 7 W. R. 266; *Kalicharan v. Bangshi*, 6 B. L. R. 727; *Mancharam v. Pranshankar*, 6 B. 298 (300); *Rajaram v. Ganesh*, 25 B. 181; *Manjunath v. Shankar*, 16 Bom. L. R. 598; *Durga v.*

Chanchal, 4 A. 81.

(6) *Dube v. Srinibas*, 5 B. L. R. 617.

(7) *Rajahwurmah, v. Ravi Vurmah*, 1 M. 285 P. C.

(8) *Doorga Nath v. Ramchunder*, 2 C. 841 P. C.

(9) *Khotter v. Hari*, 17 C. 557 (562); *Rajeshwar v. Gopeshwar*, 34 C. 881 affirmed O. A. 35 C. 226; *Nirad Mohini v. Srinivas*, 36 C. 975 (977).

1976. What alienation allowed.—In the case of public endowments the alienation of shebaitship can only be permitted if authorized by the deed of foundation or usage. Even if so permitted the objections which apply to its attachment, equally apply to its transfer by treaty except to persons otherwise qualified to fill that office. In the case of heritable shebaitship, it may be transferred to one in the line of heirs, but if no such heir exists, its transfer is permitted even to a qualified stranger. But such alienations are in the nature of exceptions ⁽¹⁾ and tolerated on the ground that they are in the end in the interest of the endowment. Strictly speaking they should be wholly inalienable. As was observed: "The duties to be performed are the protection of this property devoted by the piety of former ages to the service of religion against all invaders and especially against the invasion of the powerful. The property itself is, by the principles of all law, that of no individual whatever. A trustee cannot by any act of his own denude himself of his character of trustee until he has performed his trust. It is manifest that where the trust is one of perpetual obligation, where the *cestui que trusts* are the whole Hindu community and where the property is *res extra commercium*, in no sense the subject either of bargain or sale, and if not of sale, then not of gift, the attempt of trustees to surrender the trust property and thus throw out their character would not only be a gross breach of trust, but would be quite powerless to vest any rights in the persons in whose favour they had committed such breach of trust." ⁽²⁾

1977. This question was considered by the Privy Council in 1877 in an appeal arising out of a suit in which the plaintiff claimed to manage a Pagoda by his right of assignment from the authorized trustees. The courts in India dismissed the claim and in affirming their decision the Privy Council said that the plaintiff's assignors had no power, under what may be termed the common law of India, to transfer the trust. ⁽³⁾ At the same time they conceded that such transfer would be possible if sanctioned by usage adding however, "that if the custom set up was one to sanction not merely the transfer of a trusteeship, but as in this case, the sale of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that the circumstance alone would justify a decision that the custom was bad in law." ⁽⁴⁾ This case narrowed down the scope of alienation by excluding therefrom all alienations not warranted by the foundation or custom. ⁽⁵⁾ Even the assignor could sue to recover back the trust he had no right to assign. ⁽⁶⁾ That custom has broken in upon the inviolability of the sacred office will be clear from the decided cases. ⁽⁷⁾ So custom may permit the assignment of a right to receive offerings ⁽⁸⁾ or a turn of worship ⁽⁹⁾ though they are ordinarily unassignable.

(1) *Raja Ram v. Ganesh*, 23 B. 131.

(2) *Rajahvurmah v. Ravi Vurmah*, 1 M. 239 (240, 241) F. N.

(3) *Rajahvurmah v. Ravi Vurmah*, 1 M. 235 (250) P. C. followed in *Gnanasambanda v. Velu*, 28 M. 271 P. C.

(4) *Ib. pp. 251, 252.*

(5) *Ayancheri v. Acholathil*, 5 M. 8 (lease for 96 years held void); *Janman v. Nilakandan*, 7 M. 337 (338); *Subbarayudu v. Kotayya*, 15 M. 389; *Alagappa v. Sivaramasundara*, 19 M. 411; *Gnanasambanda v. Velu*, 28 M. 271; *Lakshmanaswami v. Rangamma*, 26 M. 31; To the same effect *Keyake v. Yedattil*, 3 M. F. C. R

330, *Rup Narain v. Junko*, 8 C. L. R. 112; *Krishna v. Loldhari*, 40 I. C. 276.

(6) *Subharayudu v. Kittaya*, 15 M. 389; *Rangasami v. Ranga*, 16 M. 146; *Mallika v. Ratanmani*, 1 C. W. N. 498.

(7) *Sukhlal v. Bishambhar*, 89 A 196 (199). (Mahabrahmin's right might be mortgaged.)

(8) *Puncha v. Bindeshri*, 19 C. W. N. 580; in *Jati v. Mukunda*, 89 C. 227—transfer acted upon for 25 years upheld.

(9) *Rajeshwar v. Gopeshwar*, 34 C. 818. In *Mohamaya v. Haridas*, 42 C. 455 assignment of turns of worship upheld.

1978. Limits of allowable custom.—It has already been seen that the

Ol. (3).

courts will not enforce any custom which permits trafficking in sacred offices. (1) It is only in a special case that alienation of such office is permitted and he who relies upon it must make out a case for its validity. A transfer which is a sale of such office (2) or one which is intended, or will have, the effect of altering the form of worship cannot be permitted. (3)

1979. Since the manager is entitled to represent the trust in all suits relating to it, a decree obtained against him as representing the trust will bind it in the hands of his successor, unless the decree was obtained by the collusion or fraud of the manager. (4) The binding nature of the decree in such cases is not affected by the fact that it is based on a compromise.

1980. So again since the manager has the possessory title, adverse possession against him is adverse possession against the trust (5) and possession adverse against one co-shebaite is equally adverse against all (6) including their successors. (7) So where on the death of a Mahant his two chelas struggled for that office, but compromised their dispute by an agreement by which each chela was allotted a *muth* separately, it was held that the possession of one was adverse to the other and to the idol to which the two *muths* belonged. (8) In another case it was contended that where successive managers succeed to the trust, independently of each other and not by any right derived from the founder, possession adverse against one could not be adverse against his successor. (9) Such was the grant made to one Balobha and his descendants. His estate including this grant was divided by his sons, and the share of Vithoba, one of them was illegally seized and sold in execution in 1870. The sons of another son of Balobha by some process became possessed of this share. Vithoba died in 1876 and in 1879 his son sued the other descendants of Balobha for a third share of the management. The defence was that under the Limitation Act, a suit to set aside an execution sale must have been brought within a year from the conclusion of the sale. The court held that where the founder of an endowment had vested in a certain family, the management of it, "each member of such family succeeds to the management, to use technical language, *per formam doni*" and that therefore on Vithoba's death the plaintiff's right to succeed to the management was quite unaffected by any proceedings against Vithoba during his life. (10) But this view was overruled by the Privy Council

(1) *Rajahvurmah v. Ravi Vurmah*, 1 M. 285 P. C.; *Narasimha v. Anantha*, 4 M. 891; *Kuppa v. Dorasami*, 6 M. 76; *Phatmabi v. Haji Musa*, 88 M. 491 (497); *Sundarambal v. Yagavanagurukkol*, 88 M. 850 (854).

(2) *Rajahvurmah v. Ravi Vurmah*, 1 M. 285 P. C.

(3) *Venkataraya v. Srinivasa*, 7 M. H. C. R. 82.

(4) *Kumari v. Golab*, 14 B. L. R. 450 P. C.; *Ranjit Singh v. Basanta*, 12 C. W. N. 789; 9 C. L. J. 597; *Sudindra v. Budan*, 9 M. 80; *Vidyapurna v. Vidyaniidhi*, 27 M. 485.

(5) *Chintaman v. Chintaman*, 22 B. 475; *Manika v. Balagopala*, 29 M. 558.

(6) *Juananjan v. Adoremoney*, 18 C. W.

N. 805; S. 2. (4) Limitation Act.

(7) *Gnanasambanda v. Velu*, 28 M. 271 P. C. overruling *Velu v. Gnanasambanda*, 19 M. 248; *Radhabai v. Anantrav*, 9 B. 198; *Mahomed v. Ganapati*, 13 M. 277; *Nilmoney v. Jagabandhu*, 28 C. 586; *Ram Kanai v. Narayan*, 2 C. L. J. 546; *Pramada v. Poorna*, 35 C. 691 (699, 700).

(8) *Damodar v. Lakhan*, 87 C. 885 P. C.; *Juananjan v. Adoremoney*, 18 C. W. N. 805.

(9) *Chidambaran v. Minammal*, 28 M. 489.

(10) *Trimbak v. Narayan*, 7 B. 188 overruled in *Gnanasambanda v. Velu*, 28 M. 271 (280) P. C.; *Madhusudan v. Radhika*, 17 C. W. N. 878; 16 I. C. 927; *Kunjamani v. Nilkunia*, 20 C. W. N. 314; 32 I. C. 828.

who held that the creation of successive life-estates was inconsistent with the Hindu Law of inheritance and therefore void. (1)

1981. Muths: Their origin and history.—A considerable portion of endowed property is held by the institutions—called *muths* or monasteries, a term which in its original and narrow sense signified the abode of an ascetic or Sanyasi or Paradesi. (2) In ancient India religious learning was imparted by a teacher drawing to himself a number of disciples who lived and learnt with his *guru* who gave them shelter. These congregations of tutor and students lived the life of a religious family. At times a number of Rishis foregathered in an improvised shelter where they taught their students. These were the prototypes of colleges and monasteries. With the rise of Buddhism these institutions received a considerable stimulus born of a new faith with its levelling doctrines and proselytizing vigour. Congregations of monks were formed to preach and practise its sublime philosophy. These monasteries offered welcome refuge to those who desired to escape the turmoils and troubles of worldly life. They were the rendezvous alike of the elite of the faith as of the bereaved and distressed souls from all claim. Whatever tempest may rage without, within their walls was peace. The rising power of the doctrine of Nirvan aroused the Brahman hierophants from their accustomed lethargy. In the eighth century Shankar, an orthodox Hindu scholar rose to re-establish the ancient faith. Shankar was an ascetic and inculcated asceticism as the best antidote to the new fangled creed. Like the Buddhists he too established monasteries and founded the order of Sanyasis called Aranyas, Asramas, Banas, Bhartis, Parbatas, Puris, Sagaras, Saraswatis, and Tirthas who lived in *muths* where they took and taught disciples. The head of these *muths* was called the Mahant or Acharya.

1982. In the internal administration of the *muth* the Mahant was paramount. In course of time these *muths* became the favoured objects of pious gifts and bequests, till their growing opulence emulated other teachers who started other *muths* which began to be quickly multiplied. "A preceptor of religious doctrine gathers around him a number of disciples whom he initiates into the particular mysteries of the order and instructs in its religious tenets. Such of these disciples as intend to become religious teachers renounce their connection with their family and all claims to the family wealth, and as it were, affiliate themselves to the spiritual teacher whose schools they have entered. Pious persons endow the schools with property which is vested in the preceptor for the time being and a home for the school is erected and *mattam* constituted. The property of the *mattam* does not descend to the disciples or elders in common; the preceptor, the head of the institution, selects among the affiliated disciples him whom he deems most competent and in his own life-time installs the disciple so selected as his successor, not uncommonly with some ceremonies. After the death of the preceptor the disciple so chosen is installed in the gaddi and takes by succession the property which has been held by his predecessor. The property is in fact attached to the office and passes by inheritance to no one who does not fill the office. It is in a certain sense trust property; it is devoted to the maintenance of the establishment but the superior has large dominion over it and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution." (3)

(1) *Gnanasambanda v Velu*, 28 M. 271 (281) P. C. following *Tagore v. Tagore*, 9 B. L. R. 877 P. C.

(2) *Giyana v. Kandasami*, 10 M. 375.

(3) *Saminatha v. Sellappa*, 2 M. 175 (179); *Giyana v. Kandasami*, 10 M. 375; *Vidyapurna v. Vidyamidhi*, 27 M. 485; *Kattasam v. Natarajan*, 33 M. 265 F. E.

1983. Though all Hindu *muths* contain idols, still the worship of idols is quite a secondary matter, its primary object being the maintenance, in circumstances likely to command due respect and estimation, of a line of competent religious teachers, who as already shown, are given for the welfare of the foundation itself, a real and, so to speak, beneficial interest in the usufruct, the restrictions governing the disposition whereof by them being of the nature of a mere moral obligation." (1) But in so far as the *muths* were treated as a departure from the normal rule applicable to all religious endowments (2) the view of the Madras Court has been overruled by the Privy Council in a case decided on the following facts. The Mahant of a *muth* of Astal Patepur in the Mozufferpur district who had been its Mahant from 1866 to 1897 resigned appointing his brother's son Rampertab in his place. The plaintiff who was his senior *chela* disputed the legality of his appointment contending that by the usage of the *muth* the senior *chela* had the right of succession. The defendant supported his nomination on the strength of the decided cases (3) which recognized the right of the Mahant to nominate his successor but the Privy Council held such statement to be too general, adding, "Such questions in India are not settled by an appeal to general customary law; the usage of the particular *muth* stands as the law therefor." (4) In other words, the question is one of fact and not of law. As to Rampertab, their Lordships held that being married and having had a son born to him after he became the Mahant, he was wholly ineligible in that it was inconsistent with the holding of an important sacred office. A married man might be selected to that office but "initiation of a married man must be preceded by the entire and permanent separation from his wife and by the giving up of all worldly ties." (5) And as to his brother Bhagwat, since he was appointed by Rampertab who was himself incompetent, he was equally ineligible. There remained the ex-mahant Anand Das himself. He was aged 80, had abdicated all his functions and he admitted that his position was no more than that of any worshipper. "The Mahant in their Lordships' opinion is not only a spiritual preceptor but also a trustee in respect of the *asthal* over which he presides." There remained the plaintiff whose claim by reason of his being the senior *chela* remained and had not been denied, failing an appointment by the late Mahant. He was accordingly declared as the rightful Mahant in succession to Anand Das. (6)

1984. The position of the Mahant must then be now settled to be as follows: "The whole assets (of the *muth*) are vested in him as the owner thereof in trust for the institution itself." (7) "The nature of the ownership is...an ownership in trust for the *muth* or institution itself, and it must not be forgotten that although large administrative powers are undoubtedly vested in the reigning Mahant, the trust does exist and must be respected." (8) "The Mahant in their Lordships' opinion is not only a spiritual preceptor, but also a trustee in respect of

(1) *Vidyapurna v. Vidyamidhi*, 27 M. 485 (442).

(2) In *Vidyapurna v. Vidyamidhi*, 27 M. 485 (437) Bhashyam Ayyangar, J., compared the position of the head of a *muth* to a corporation sole, adding that "as in the case of a bishopric, perpetual succession in a *muth* is secured by the provision for nomination of a successor." But in view of the latest pronouncement of the Privy Council, this view must stand modified.

(3) *Saminatha v. Sellappa*, 2 M. 175; *Giyana v. Kandasami*, 10 M. 375 (386):

Vidyapurna v. Vidyamidhi, 27 M. 485; *Kailash, v. Narayan*, 38 M. 265 F. B.

(4) *Ram Parkash v. Anand Das*, 43 C. 707 (714) P. C. following *Greedhore v. Nund-kishore* 11 M. L. A. 405 (428); *Muttu v. Peria-nayagum* L. R. 11 A. 209; *Rajahurmah v. Raj Vurmah*, 1 M. 235 P. C.

(5) *Ram Parkash v. Anand Das*, 43 C. 707 (719) P. C.

(6) *Ram Parkash v. Anand Das*, 43 C. 707 (792, 793) P. C.

(7) *Ib.*, p. 713.

(8) *Ib.*, p. 714.

the *muth* over which he presides." (1) Adverting to this case a Madras Bench held it to be a "considered pronouncement as to the position of the head of a *muth*, as to his functions and his legal position with regard to the endowments." (2) In the absence of custom, a Mahant of a *muth* cannot transfer the right of management vested in him, though coupled with the obligation to manage in conformity with the trust annexed thereto. (3)

1985. There is no fixed rule which regulates the relation between a superior and a subordinate *muth*; even if a *muth* is subordinate to another, it must be governed by its own rules of management. (4)

1986. But though a Mahant does not as a matter of common law and apart from special usage, possess the power of appointment, he is entitled to appoint a deputy who may in due course succeed to him. (5) It has already been stated that a *muth* like an idol is a juridical person capable of acquiring, holding and vindicating legal rights though of necessity it can only act in relation to those rights through the medium of some human agency. In connection with the property of a *muth* there are two distinct classes of suits, those in which the manager seeks to enforce his private and personal rights and those in which he seeks to vindicate the rights of the *muth*. The rights of the *muth* cannot ordinarily be prejudiced by the result of a suit of the former class. (6) The head of a *muth* may contract debts for the purpose of the *muth*, and debts so contracted may be recovered from the *muth* property, and will devolve as a liability on his successor to the extent of the assets received by him. But the head of a *muth* cannot pledge its credit for debts contracted for its purposes without necessity and without reference to the question whether they should have been met from current income. In this respect the head of a *muth* does not possess larger powers than the heads of other religious institutions whose powers are, as previously stated, analogous to those of the manager for an infant heir. (7)

1987. Succession to mahantship.—It is now settled that the position of a mahant in relation to the *muth* over which he presides is that of a trustee and not of an owner (8) though he possesses larger powers of internal management. But being the trustee, he has no right to appoint a successor and the question of succession to him must be governed by the particular usage of the institution and in fact, the general law. If, by the practice and usage of an institution, the mahant is entitled to nominate a successor, the courts will give effect to it. (9) The mahant cannot appoint a successor by a will (10) though he may be authorised by usage to appoint a successor (11) but that "usage forms the controlling rule with regard to the right to the office of mahant may now be considered as

(1) *Ib.*, p. 782.

(2) *Baluswamy v. Venkataswamy*, 40 M. 745 (749).

(3) *Rajahnurmah v. Ravi Vurmah*, 1 M. 235 P.C.; *Gnanasambanda v. Velu*, 28 M. 271 P.C. explained in *Prayad v. Kripparam*, 8 C. L. J. 499 (504).

(4) *Prayad v. Kripparam*, 8 C. L. J. 499 (505) following *Kashi v. Chidambarnath*, 20 W. P. 217; *Giyana v. Kandasami*, 10 M. 875.

(5) *Tiruvambala v. Pandaram*, 40 M. 177 (197).

(6) *Babai Rao v. Luxman Das*, 28 B. 215.

(7) *Nataraja v. Karutha*, 9 I. C. (M) 150.

(8) *Ram Parkash v. Anand Das*, 48 C. 707 (718, 714, 79-) P. C. explained in *Balasawmy v. Venkatasawmy*, 40 M. 745 (749) followed in *Palaniappa v. Sreenath*, 40 M. 709 P. C.

(9) *Kamini v. Asuioth*, 16 C. 108 P. C.

(10) *Ram Parkash v. Anand Das*, 48 C. 707 (728) P. C.

(11) *Saminatha v. Sellappa*, 2 M. 175 (179) explained per Lord Shaw in *Ram Parkash v. Anand Das*, 48 C. 707 (715) P. C.

having been conclusively settled by authority." (1) But while it is so, usage generally leans towards the succession of the senior *chela* as the rightful successor and where there is no evidence of any usage to the contrary, the court will be justified in presuming such usage to govern the succession. (2) In many *muths* the mahant is elected by the Sanyasis of the *muths* of his order and in the absence of custom and the power of appointment, this should be presumed to be the rule of election. (3)

It has been held as proved that the mahant of the *muths* of the Nanak Shahi Udasi sect possesses the power to nominate his own successor. (4)

1988. Gossains and Sanyasis.—The orthodox Hindu *muths* are tenanted by Gossains, Sanyasis, Bairagis or ascetics of other sects who are drawn from the Hindu society without distinction of caste, every Hindu being competent to enter a religious order. In the case of Dasnami Gossavis or Sanyasis, the initiation is performed as follows:—When a person intends to enter the sect, some ordinary ceremonies are performed such as the shaving of the head, bathing of the body, wearing of new clothes and the assumption of a new name upon which he becomes a *novitiate* Gossavi in which state he continues for a year or two during which he is expected to make himself familiar with the rights, customs and usages of the order. Often during this period of probation the novice is initiated into the ceremony of *Biraj Home* which consists in whispering into his ears the *mulmantra* or the mystic formula which converts the novice into a *chela*. During the period of probation it is open to the novice to renounce the life of the monastery and return to secular life but after the performance of *Biraj Home* he cannot return to it. This ceremony is not performed till the probationer attains the age of discretion so as to be able to realize for himself the full significance of the final act of renunciation of the world. The ceremony of *Biraj Home* is performed on an auspicious day and its performance completes the affiliation of the *chela* to his *guru*. (5) *Biraj Home* ceremony requires that the novice should have attained the years of discretion which according to Hindu Law implies the completion of the 16th year. (6)

218. The manager of an endowment is charged with the following duties:—

Manager's duties.

(1) He must carry out the founder's directions, if any, as to the management of the property.

(2) He must maintain the customary usages of the institution.

(3) He is entitled to the possession of all endowed property; and as shebait, he is entitled to the custody of the idol and all its paraphernalia.

(1) *Ram Parkash v. Anand Das*, 43 C. 707 (716) P. C.; *Janaki v. Gopal*, 9 C. 766 P. C; *Ganda v. Chatar Puri*, 9 A. 1 P. C.; *Gruadharee v. Nandokishore*, 2 Hay 683; *Prayad v. Kriparam*, 8 C. L. J. 499; *Basdeo v. Gharib Das*, 13 A. 256; contra *Sellappaswamy v. Manikaswamy*, (1911) M. W. N. 869; 11 I. C. 886.

(2) *Raja Ram v. Bhatta*, 98 I. C. 221.

(3) *Prayad v. Kriparam*, 8 C. L. J. 499 (505) following *Madho v. Kamta*, 1 A. 589; *Ramji v. Lachhu*, 7 C. W. N. 145.

(4) *Dharam Dass v. Sadho*, 40 I. C. (A). 177.

(5) *Ramadhan v. Dalmir*, 14 C. W. N. 191; 2 I. C. 386.

(6) *Ramji v. Lachhu*, 7 C. W. N. 145.

(4) He must maintain accounts of the trust and is entitled to an indemnity for anything of his own spent thereon.

(5) He may retain or apply the surplus as may be usual or customary.

(6) He may improve the property out of its surplus.

(7) He is accountable to the founder and in his absence, his legal representatives.

(8) He is entitled to sue and is liable to be sued on behalf of the trust.

Synopsis.

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| (1) <i>Duties of manager</i> (1989). | <i>to beneficiaries</i> (1993). |
| (2) <i>Founder's directions to be carried out</i> (1990). | (9) <i>Manager's authority over servants</i> (2000-2001). |
| (3) <i>Manager's general powers</i> (1991). | (10) <i>Duty of manager to keep accounts</i> (2002-2003). |
| (4) <i>Management by rotation of co-trustees</i> (1992). | (11) <i>Duty of manager to receive votive offerings</i> (2004). |
| (5) <i>Right of worshippers</i> (1995). | (12) <i>Manager's right of suit</i> (2005). |
| (6) <i>Duty of manager to observe customary usages of the institution</i> (1996-1998). | (13) <i>Effect of a compromise</i> (2007). |
| (7) <i>Possession of the endowment to be with manager</i> (1999). | (14) <i>Manager's right of reimbursement for out of pocket expenses</i> (2008). |
| (8) <i>Possession of manager not adverse</i> | |

1989. Analogous Law.—All the clauses of this section are drawn from the decided cases. (1) The duties of manager must depend upon the nature of the endowment. If it is charitable without being religious, the manager has merely to administer the fund in accordance with the wishes of the founder or the general purpose of the foundation. Where, however, the trust is religious the manager's duties are more artificial and must conform to the forms and rituals if any, prescribed or usual in such cases. For the rest, his duties are in conformity with the general law (2) and will now be considered.

1990. Founder's directions.—This clause is in consonance with the general rule enacted in S. 11 of the Trusts Act which requires the trustee to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation except as modified by the beneficiaries being competent to contract, provided that where the beneficiaries are incompetent to contract, the directions of the District Judge should be taken, and the trustee is not bound to obey any direction which is impracticable, illegal or manifestly injurious to the beneficiaries. Under S. 43 of the Religious Endowment Act (3) and S. 34 of the Trusts Act it is open to the manager to take the advice of the court on any

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| (1) Cl. (1) Cf. S. 11 Trusts Act. | 21 B. 24 (251, 252) affirmed O. A. |
| Cl. (2) <i>Vidyapurna v. Vidyamidhi</i> , 27 M. 435 (455); <i>Sankaralinga v. Rajeswara</i> , 12 C. W. N. 940 (951) P. C. | <i>Chotalal v. Manohar</i> , 28 B. 659; <i>Jugul v. Lakshman</i> , 23 B. Kishor 659; <i>Rajeshwar v. Gopeshwar</i> , 35. O. 226. |
| Cl. (3) <i>Seshadri v. Ranga</i> 35 M. 681 (684) | Cl. (8) <i>Jodhiram v. Basdeo</i> , 735 (787) F.B. |
| Cl. (4) 8-8 <i>Thackersay v. Harbhoom</i> , 8 B. 432 (457). | (2) XXVII of 1867, similar provision exists in 22 and 23 Vict. C. 35. S. 22 Madras. <i>Doveton Trust Fund (In re)</i> , 18 M. 448. |
| Cl. (5) <i>Gajapati v. Bhagawan</i> 15 M. 44; <i>Manohar v. Lakshmi Raw</i> , | (8) XX of 1868 |

question respecting the management or administration of the trust property. The trustee is not bound to carry out the details of his instructions, since his position as trustee arms him with a certain discretion in the interest of the trust property. Where therefore, he has acted erroneously but honestly according to his best judgment in the interest of the trust, the court will not too narrowly canvass the matter in which he has overborne his instructions.

1991. Manager's general powers.—In the first place, a manager must be distinguished from a superintendent ⁽¹⁾ or other officer in whom the trust does not vest, but who is merely to supervise the work of the manager. ⁽²⁾ Such officer performs his prescribed duties but has neither the rights nor is liable to perform the duties of manager. Then again the manager of the trust properties as such, must be distinguished from the manager of the temple-service and ceremonies which he performs according to the customary ritual. As manager of the properties he is trustee for the endowment and his general rights and duties are those of a trustee. Where the management vests in more than one person jointly, they must all act jointly.

1992. It is competent for co-trustees to settle a scheme of management by each of the co-trustees in rotation, at any rate, where no emoluments are attached and the office is an hereditary one. Where emoluments are attached and the office is hereditary, the emoluments will be subject to partition in the strict sense of the term, like any other family property. But whatever may be the number of co-trustees, the office is a joint one and the co-trustees all form, as it were, but one collective trustee, and therefore must execute the duties of the office in their joint capacity. ⁽³⁾ The manager of a temple fills a double role. "As regards the property, the manager is in the position of a trustee. But as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office or dignity which may have been originally conferred on a single individual, but which, in course of time has become vested by descent in more than one person. In such a case, in order to avoid confusion or an unseemly scramble, it is not unusual and it is certainly not improper, for the parties interested to arrange among themselves for the due execution of the functions belonging to the office in turn or in some settled order and sequence. There is no breach of trust in such arrangement nor any improper delegation of the duties of a trustee."⁽⁴⁾

1993. Such arrangement however creates no right, but is supported on the ground of convenience and may be at any time revoked by all the co-trustees ⁽⁵⁾ though it could not be varied or revoked by any one of them as inconvenient to himself. Any co-trustee may enforce the agreement against any one obstructing him in his right. ⁽⁶⁾ A decision by the majority is binding on the minority when it is arrived at after full opportunity given for mutual discussion by all the members in which the minority had an opportunity to record their dissent. ⁽⁷⁾

In the case of private or family idols which have no local habitation, such as a temple, it is open to the co-trustee to remove them to another house for the period of his turn ⁽⁸⁾ but he must return them at his own expense to the next turn owner.

(1) *Ramcharan v. Rakhal*, 41 C. 19.

(2) *Ramcnathan v. Murugappa*, 29 M. 283 (289) P. C.

(3) *Ramanathan v. Murugappa*, 27 M. 192 (199).

(4) *Ramanathan v. Murugappa*, 29 M. 283 (289) P. C.

(5) *Narayansawmi v. Kumarsawmi*, 7 M. H. C. R. 267 (270).

(6) *Ramessur v. Ishan Chunder*, 10 W. R. 457; *Gaur Mohan v. Madan Mohan*, 15 W. R. 29 (80).

(7) *Teramath v. Lakshmi*, 6 M. 270; *Thattai v. Mangalath*, 84 M. 406.

(8) *Dwarkanath v. Janabee*, 4 W. R. 79 (80); *Ram Sundar v. Taruck Chunder*, 19 W. R. 28.

1994. The general duty of the manager is to take that reasonable care in the management of the trust which a prudent person under similar circumstances would take of his own property. (1)

But though this is the ideal, mismanagement of Hindu endowments by their managers is a byword of reproach. In a majority of cases the terms of the grant are extremely vague—in other cases, they are not even traceable, while in most cases they follow a traditional practice. As remarked by West and Buhler: "The idol, deity or the religious object is looked on as a kind of human entity and the successive officiators in worship as a corporation with rights of enjoyment but not generally of partition or alienation, except so far as this may be necessary to prevent greater injury. Such endowments are frequently founded by gifts and bequests simply to the institution. No rules have, in a majority of these cases, been formally prescribed. The intention of the foundation has to be gathered from the traditional practice and the succession is thus determined by the custom of each particular institution, though this may have become embraced in some more extensive custom. And as to the management of an endowment, it is not competent for the holders in one generation to impose rules on those of another. The endowment once made cannot be resumed, but performance of the duties may be enforced." (2)

1995. Worshippers' right.—In the case of a public religious trust, it is the right of every worshipper and devotee of the temple to enter the shrine for the purpose of worship. They cannot be refused admission without just cause. (3)

1996. Must observe customary usages—He must observe the customary usages of the foundation. As observed by the Privy Council: "It is the duty of the trustee or manager to maintain the customary usages of the institution and if he fails to do so he is . . . guilty of a breach of trust and still more so, if he deliberately attempts to effect a vital change of usage and make it binding on the worshippers by obtaining a decree of the court to establish it." (4) In the case of temples, the endowments, whether in the shape of landed property or *tasdik* allowances, have to be devoted to the carrying out of the specific purposes connected with the temples, *i.e.*, the daily worship and the periodical ceremonies and festivals, purposes defined and settled by usage and custom and generally recorded in what is known as the 'dittam' and the dharmkartas are mere trustees for the carrying out or the executing of such trusts. In the case of *muths*, however, such defined and specific purposes immediately connected with the maintenance of the *muth* as an institution, are in the nature of things very limited and a large part of the income derived from the endowments of the *muth* as well as from the money offerings of its disciples and followers—which offerings as a rule are very considerable—is at the disposal of the head of the *muth* for the time being which he is expected to spend at his will and pleasure, on objects of religious charity and in the encouragement and promotion of religious learning. His obligation to devote the surplus income to such religious and charitable objects is one in the nature only of an imperfect or moral obligation resting in his conscience, regulated only by the force of public opinion and he is in no way, whether as a trustee or otherwise, accountable for it in law. (5)

(1) § 161. Contract Act; *Speight v. Gaunt*, L. R. 9 A.C. 1 (100).

(2) W and B.F. L. 201, 202 cited in *Vidyapurna v. Vaidyanidhi*, 27 M. 435 (449).

(3) *Dooleerani v. Luckee Kant*, 12 W.

R. 425.

(4) *Sankaralinga v. Rajeswara*, 12 C. W. N. 940 (951) P. C.

(5) *Vidyapurna v. Vaidyanidhi*, 27 M. 435 (455).

1997. The customary usages must necessarily differ according to the nature and purpose of the foundation. If it is a temple, the ordinary usage consists in preparing food (called *bhog*) for the deity, celebrate certain festivals, arrange for fairs ⁽¹⁾ and collect votive offerings. If he neglects to perform his usual and customary duties or is guilty of malversation or misconduct in the performance of them the court will restrain him. Such would be the case where the manager refused to perform the usual festivals though he was in funds. *A fortiori* would he be guilty of such misconduct if it was usual to celebrate them with the aid of voluntary contributions. "And of course, the courts are bound to restrain a trustee from injuring the institution under his charge by corruptly, arbitrarily or wantonly departing from the ordinary course of procedure in regard to essential or important matters connected with the institution. That such departure on the part of a trustee amounts to a breach of legal duty incumbent on him is the ground on which the court exercises jurisdiction over him." ⁽²⁾ The manager must conform to the usage. He cannot alter it. He cannot alter the form of worship ⁽³⁾ or the ceremonies and processions in connection with idols. ⁽⁴⁾ But of course, in this as in all other matters, they must be guided by public opinion.

1998. The manager of a public temple cannot make rules preventing free admission of every worshipper thereto for the purposes of worship. Nor can he levy an admission fee though he may regulate admission to a particular part owing to the value of the idol and its ornaments. ⁽⁵⁾ In this and other matters of detail, the manager doubtless possesses a power which must be exercised not capriciously but only in good faith on necessary occasions and for necessary and legal purposes as for preserving orderliness and decency of worship.

1999. Possession of the endowment.—The manager has the sole right to be in possession of the endowment, the idols, its jewels and other paraphernalia. Where there are several trustees, they are allowed to partition the endowment for convenience of management. And where they have equal right of worship, they are permitted to exercise it by rotation. They may even remove the idol if it has no local habitation for the period of their turn, but on condition that they deliver it at their own expense to the owner of the next turn. But this is an exception and not the rule, since idols ordinarily gain in sanctity by the reason of their locality and where they have for long remained in a place it becomes their abode from which they cannot be removed.

2000. The right of the manager to superintend the work of all servants employed on the foundation arises from the very nature of his office as manager. He is entitled to punish and dismiss all servants including the hereditary priest for misconduct ⁽⁶⁾ and unless the dismissal is malicious or *mala fide* the civil court has no jurisdiction to review his decision ⁽⁷⁾ unless he can shew that there was a trust in his favour. ⁽⁸⁾ In any case the fact that the servant was dismissed

(1) *Eyyahwar v. Namberumal*, 28 M. 293 (304).

(2) *Ib.* p. 304; *Krishnasami v. Samar*, 80 M. 158.

(3) *Venkatrayar v. Srinivasa*, 7 M. H. C. R. 83 (86).

(4) *Subharaya v. Chellapa*, 4 M. 315 (316).

(5) *Kalidas v. Gor Parjaram*, 15 B. 809 (816, 317).

(6) *Seshadri v. Ranga*, 85 M. 681.

(7) *Bhavani v. Timmanna*, 30 B. 508; contra *Krishnaswamy v. Gomatuni*, 4 M. H. C. R. 63; *Seshadri v. Ranga*, 85 M. 681 (682).

(8) *Rann Charan v. Rakhol*, 41 C. 19 (84).

without notice given or explanation taken is no ground for interference. "The nature of the office may be such that instant suspension from the functions of the office would be necessary in the interests of the institution and to hold that the officer could not be suspended without notice and without explanation received from him, might be seriously detrimental to the interests of the temple" (1).

2001. The possession of the manager being *qua* trustee, cannot be adverse to the beneficiaries. In determining what right adverse possession would confer on the holder, the *animus possidendi* is the decisive factor. The character in which possession is held must determine the right which the possession would confer. The fact that the trustee was misappropriating the rents would not make his possession adverse, though it would make him liable to account for the rents so misappropriated. The plaintiff's father as trustee had let certain temple lands to the defendant. The plaintiff sued to recover them. It was proved that the trust had vested in another. The plaintiff had, however, received rents of the land and appropriated them to his own use. He claimed the lands by adverse possession. But the court dismissed his suit holding that the land belonged to a trust and could not be recovered by the plaintiff who was the trustee, however wrongfully he may have used its rents. (2)

2002. Must keep accounts.—The manager must maintain accounts even if he be himself the founder. (3) His failure to keep accounts is a grave misconduct justifying his removal. (4) It is the manager's duty to protect and preserve the endowment, to manage it prudently and to conserve its resources with scrupulous care. It is his duty to take stock of all the dedicated property, realize bud securites before they are lost. (5) If his predecessor has wrongly alienated any of the properties it is his duty to recover them before they become irrecoverable and if by his fraud or negligence any of the properties are lost he is liable for it. (6) All surplus must be promptly invested in sound securities, otherwise he will be liable for interest. (7) He may invest in any securities provided they are of a permanent and not perishable or terminable nature. (8)

2003. The manager must not mix the trust accounts with his own since it leads to confusion. If he contravenes this rule and mixes trust money with his own and the two cannot be separated, the trust will be entitled to the whole. (9)

The manager's salary is sometimes fixed, but in many cases he is left to make what he can out of it. In such case it is difficult to call him to account, for he is accountable to no one. Such is ordinarily the position of the Mahant of a *muth*. (10) Wherever he is accountable at all, his liability will be determined by the rules here stated.

(1) *Seshadri v. Ranga*, 85 M. 631 (634). (465).

(2) *Thuppan v. Hichiri*, 37 M. 873 (877).

(3) *Thackersey v. Hurbhum*, 8 B. 432 (467).

(4) *Manohar v. Lakhmiram*, 21 B. 247 (261, 262) affirmed *O. A. Chotalal v. Manohar*, 24 B. 50 P. C.; *Jugal Kishore v. Lakshman Das*, 23 B. 659; *Rajeswar v. Gopeshwar*, 35 C. 226.

(5) *Thackersey v. Harbhum*, 8 B. 432

(6) *Ib.*

(7) *Rajaram v. Lakshmi*, 13 M. L. J. 206.

(8) *Desousa v. Desousa*, 12 B. H. C. R. 184; *Thackersey v. Hurbhum*, 8 B. 432 (466).

(9) *Oatway Hertlet v. Oatway*, (1908) 2 Ch. 356.

(10) *Saminatha v. Sellappa*, 2 M. 175 (179); *Vidyapurna v. Vidyamidhi*, 27 M. 435 (432)

2004. The manager is entitled to receive votive offerings which he must credit in his accounts. "Where an idol is set up temporarily for worship or where the offerings are of a perishable nature, such as articles of food, the priest in attendance, as the nearest Brahmin available, generally appropriates the offerings; and the same is the case where the idol itself is the private property of the priest. But where, the idol is an ancient one permanently established for public worship, and the offerings are generally of a more or less permanent character, being coins and other metallic articles, in the absence of any custom or express declaration by the donor to the contrary, they are as they ought to be, taken to be intended to contribute to the maintenance of the shrine with all its rites, ceremonies and charities and not to become the personal property of the priest. However much a Hindu votary may wish that his offerings to public shrines should ultimately go to the use of meritorious Brahmins, he can never be supposed to intend, nor does the Hindu Law, anywhere allow, that they should become the property of the priest, to be squandered by him or devoted to purposes foreign to the endowment." (1)

A Mahant of a *muth* is however entitled to retain all votive offerings subject only to the burden of maintaining the *muth*. (2)

2005. His right of suit.—The manager is entitled to sue on behalf of the endowment as its guardian or next friend, and he may be sued as such. (3) In some cases the manager is held entitled to sue and be sued in his own name without the idol being joined as the party interested. (4) This procedure is at variance with the general principles said to be supported by practice. But there seems nothing to commend it.

Since an idol is a juristic person in minority, the manager suing for an idol is entitled to the extension allowed by S. 6 (old S. 7) of the Limitation Act. (5)

2006. Persons interested as worshippers in a public religious endowment may be added as parties to a suit instituted by a trustee on behalf of the endowment against third parties if such joinder is considered by the court as desirable in the interests of the trust. (6) Such an occasion was held to arise where the worshippers complained of a breach of trust by the manager who had colluded with the other side to the prejudice of their right of worship. (7) As S. 145 of the Code of Criminal Procedure deals only with immoveable property, the court may declare the possession of a temple, but can pass no order as to the offerings (8) or of the right to act as priest. (9)

(1) Banerjee, J., in *Girijanund v. Sailajanund* 28 O. 645 (655, 656) following *Manohar v. Tambkar*, 12 B. 247. To the same effect *Ganpatrao v. Ramadhin Das*, (1874) B. P. J. 258; *Ganpatrao v. Anopram*, (1879) B. P. J. 861; *Chotalal v. Manohar*, 24 B. 50 P. C.

(2) *Vidyapurna v. Vidyaniidhi*, 27 M. 485; *Kalliam v. Nataraja*, 38 M. 265.

(3) *Jodhi Ram v. Basdeo*, 33 A. 785 (787) F. B. overruling contra in *Ragunathji v. Shah Lal*, 19 A. 580.

(4) *Juggodumba v. Puddomoney*, 15 B. L. R. 313 (380) followed in *Babajirao v. Laxman Das*, 28 B. 215 (223); *Pramada v.*

Poorna Chandra, 35 C. 691 (698); *Dinabhandu v. Chamiruddi*, 34 I C (A) 548.

(5) *Jagadindra v. Hemania*, 32 C 129 P. C. *Sankamurti v. Chidambara* 17 M. 143.

(6) *Jeyangarulavaru v. Sri Hatu*, 4 M. H. C. R. 9; *Narayanasami v. Irulappa*, 12 M. L. J. 355; *Chidambaram v. Rangachariar*, 29 M. 106 (110).

(7) *Sankaralinga v. Rajeswara*, 31 M. 286 (250) P. C.

(8) *Ram Saran v. Raghu Nandan*, 38 C. 387; *Kader v. Kader*, 29 M. 237.

(9) *Gurram v. Lal Behari*, 37 C. 578.

2007. The manager cannot enter into a valid compromise binding upon his successor unless it is shown to have been entered into for the benefit of the endowment. ⁽¹⁾ The manager cannot settle the right to his office by compromise, since, while a party may settle by compromise a matter of a private individual right, he cannot so settle a right which is not purely of a private civil character. A right in which the public are interested will not be permitted to be adjusted by arbitration or compromise. "The court itself has certain duties in connection with a case in which a judgment *in rem* has to be pronounced or in a case which involves the right of the public or the right to a religious and charitable office or the right of a minor or other incapacitated person." ⁽²⁾ An agreement or compromise affecting such right is not a lawful agreement or compromise. ⁽³⁾ A decree even if passed on such compromise will not bind the public whose rights are affected only by decrees passed upon their merits. ⁽⁴⁾ But the rule has no application to cases in which the public rights are not infringed.

For instance it is competent to the shebait to compromise a suit in respect of the debutter property and such compromise will bind his successor in office if made in the interest of the endowment. ⁽⁵⁾

2008. The manager is entitled to be reimbursed the expense which he has incurred in carrying out the directions of the testator, or otherwise on objects of necessity. The right of indemnity is incident to the position of a trustee. The liability in respect of that indemnity is the first charge on the trust estate. So where one Bejay succeeded his father as shebait of a religious trust and his right was contested by one Peary who obstructed Bejay's possession with the result that its income calculated at Rs. 10,000 a year fell to less than a moiety. Bejay defended his title and spent Rs. 71,572 and out of his private funds in protecting the debutter estate and performing his obligations as shebait. It was held that the estate was liable to indemnify Bejay for the amount spent by him in defending his own title as shebait and in protecting the estate and carrying out the directions of the founder's will. ⁽⁶⁾

Removal of manager.

219. A manager may be removed from his office for such misconduct as is incompatible with the interest of the endowment.

Synopsis.

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| (1) <i>Removal of manager from office</i> (2009). | (5) <i>Omission to keep accounts</i> (2009). |
| (2) <i>Grounds for removal</i> (2009-2013). | (6) <i>Lunacy</i> (2011). |
| (3) <i>Dismissal when justified</i> (2010). | (7) <i>Immorality</i> (2012). |
| (4) <i>Fraud or dishonest misappropriation</i> (2009). | (8) <i>Assertion of private ownership</i> (2013). |
| | (9) <i>Procedure for removal</i> (2014). |

(1) *Girijanund v. Sailajanund*, 28 C. 645

(2) *Sundarambal v. Yogavnanagurukkal*, 38 M. 850 (862).

(3) *Jb*, p. 862

(4) *Jenkins v. Robertson*, L. R. 1 H. L. Sc. 117; followed in *Sundarambal v. Yogavnanagurukkal*, 38 M. (860, 863); *Bhaskara v Nara-*

yanasamy, 12 M. L. J. 860; *Gyanananda*, v. *Kristo*, 8 C. W. N. 404.

(5) *Hossein Ali v. Bhagwan Das*, 31 C. 249 (255).

(6) *Peary v. Narendra*, 87 C. 229 (234, 235) P.C.

2009. Analogous Law.—The removal of the manager from his office depends upon the terms and condition of the foundation and the nature of the manager's misconduct. Where the foundation is a family temple, members of the family arrange among themselves for its management. Where the foundation is a public trust the court wields sufficient jurisdiction and control over its management. In such case it has to examine the principles which should guide it in sanctioning the dismissal of the manager. It has been held that a mere non-feasance is wholly insufficient to justify his removal. The fact that he took no interest in the welfare of the temple or had mistaken the scope of his duties and sanctioned expenditure in payment of fines and costs of trustees of his own sect, or had taken part in faction fights are not such non-feasances for which he can be removed ⁽¹⁾ unless his neglect has led the buildings of the institution to fall into decay. ⁽²⁾ A manager cannot be punished with dismissal for his mistake or error of judgment though the court will give directions for better management in future. ⁽³⁾ Nothing short of fraud or dishonesty will move the court to remove him ⁽⁴⁾ even though his office be hereditary. ⁽⁵⁾ Failure on the part of the manager to keep or submit accounts to the committee is a breach of one of the most important duties cast upon him by law and is sufficient to justify his dismissal. ⁽⁶⁾

2010. So is the fact that the manager had continuously misused the income of the endowment. ⁽⁷⁾ A manager wrongly dismissed from his office is entitled to damages for his wrongful dismissal. When a temple trustee had been given notice by the temple committee of some or all of the charges against him and one of them drew up a report suggesting the trustee's suspension pending further orders and the other members except one agreed, it was held that the action of the committee was *ultra vires* and that the trustee was entitled to damages against his corporators who were parties to his wrongful removal from office. ⁽⁸⁾

2011. The lunacy of the Mahant of a *muth* does not, it is said, disqualify him to continue as its head though it would be a ground for appointing a substitute to carry on his duties during the continuance of his disability. ⁽⁹⁾ But immorality, marriage ⁽¹⁰⁾ and incontinence is quite another matter. It is a misconduct for which the head of any religious foundation will be thrown out.

2012. So Lord Shaw referring to the qualifications essential to the Mahant of a *muth* said: "The nomination must fall upon one who is competent to hold his important sacred office. For instance, the person chosen may be disqualified by reason of bodily deformity, or bodily disease such as leprosy, or disease of the mind, or of the leading of a life which is immoral or is inconsistent with the religious vows of the brotherhood. In all such cases the nomination would be void. Among these disqualifications stands the contracting of a marriage and the begetting of children. As already mentioned, initiation of a married man must be preceded by the entire and permanent separation from his wife and by the giving up of all worldly ties." But their Lordships were considering the

(1) *Tiruvengodath v. Srinivasa*, 22 M. 861.

(2) *Ganapati v. Savithri*, 21 M. 10 (11, 15).

(3) *Annaji v. Narayan*, 21 B. 556 (559).

(4) *A. G. v. Abdul Kadir*, 18 B. 401; *A. G. v. Punjabai*, 18 B. 551.

(5) *Pakuruddin v. Ackeni*, 2 M. 197 (199).

(6) *Ananthanarayana v. Kuttalam*, 22 M. 481; *Pakuruddin v. Ackeni*, 2 M. 197 (199).

(7) *Sathappayyar v. Periasami*, 14 M. 1.

(8) *Venkata v. Ponnusami*, 33 M.L. J. 660; 43 I. C. 205.

(9) *Vidyapurna v. Vidyonidhi*, 27 M. 485 (443) contra *Ram Parkash v. Anand Das*, 48 C. 707 (719) P. C.

(10) *Ram Parkash v. Anand Das*, 48 C. 707 (719) P. C.

case of appointment and not one of removal; and the two do not stand on a par. But that immorality would disqualify the manager of a religious endowment from holding office cannot for a moment be doubted. And it has been so held. (1) But immorality has not the effect of causing forfeiture. The manager must be removed. (2) Of course a manager cannot be called to account, if he is not by the terms of his appointment, liable to maintain or render any account. (3)

2013. Nor again, can the manager be removed from office because he had, following in the wake of his predecessors, considered himself as owner of the estate. This is a case in which the court should overlook the past and provide against the future by settling a scheme of management. (4) So again a party holding land assigned for the support of an idol subject to the performance of the ceremonies or worship of the idol, who fails to perform the required service cannot be summarily removed without being given the option to continue the worship. (5) A deposition of the shebait by a foreign state, *i.e.*, the Maharaja of Odaipur has no effect upon his management of properties situate in British India. (6)

2014. Procedure for removal.—The procedure for the removal of the manager must depend upon the terms and nature of his appointment. If he was appointed by the brotherhood, those who possess the power of appointment presumably possess also the power of dismissal. But then both the appointment and the dismissal must be in consonance with fair play and justice decided upon in a meeting convoked for the purpose in which all members are consulted and the decision arrived at according to the opinions of the majority. Where therefore the brotherhood of Samub Bhakts removed their high priest by convening a meeting in which only those favouring his dismissal were present, it was held that the dismissal was improper in that there had been no convocation of all of the brotherhood after sufficient notice and proclamation in which the opinion of the assembly was taken or considered. To validate the removal of a high priest from his office by a majority of a religious brotherhood, it is necessary, *first* to ascertain the voters and their qualifications, *secondly* to determine whether steps have been taken to enable the brotherhood to express their decision and *thirdly* to determine whether a majority have expressed their wish in favour of removal. The qualifications of voters may depend upon membership of the brotherhood, age, sex and residence. A question may also arise whether a member or family is the unit for this purpose. The decision of the majority must be determined by reference to votes given at the meeting and cannot be made to depend upon views indicated subsequently in the course of a suit brought to contest the validity of the removal. Whether a *quorum* is necessary to legalize the decision of the meeting must depend upon the custom of the brotherhood in the absence of statutory provision or express direction in that behalf by the founder. (7)

220. (1) Beneficiaries are persons for whose spiritual or temporal advancement an endowment is created. It includes an idol to whom property is dedicated.

(1) *Asaram v. Hari Singh*, (1904) P R. 58; *Tiruvambala v. Pandaram*, 40 M 177.

(2) *Tiruvambala v. Pandaram*, 40 M. 177.

(3) *Gajapati v. Bhagavan*, 15 M. 44.

(4) *Damodar v. Rhat*, (1896) B. P. J. 697.

(5) *Mohesh v. Maylash*, 11 W R. 448.

(6) *Girdharji v. Madhowadass*, 17 B. 600

(7) *Juro Ram v. Gobind*, 12 O. L. J. 497; 81. C. 124.

(2) The beneficiaries are interested in seeing that the endowment is maintained and its legitimate functions preserved.

(3) Worshippers and devotees of an idol or other sacred object or institution are entitled to resort to it at all reasonable hours for the purpose of worship and devotion.

(4) The manager is bound to afford them reasonable facilities for that purpose.

(5) Beneficiaries are jointly and severally, as the case may be, entitled to participate in the benefit of the endowment created and maintained for their benefit.

Exception.—Nothing contained in this section applies to private endowments.

Synopsis.

- (1) *Rights of beneficiaries* (2015). (3) *Private endowments* (2017-2019).
 (2) *Who are beneficiaries* (2016).

2015. Analogous Law.—Generally speaking the beneficiaries to an endowment may be an idol, a *muth* or other juristic person or a body of men. In either case they are the direct beneficiaries. But in the former case, worshippers and devotees are equally regarded as beneficiaries if they have the right of offering their devotion and worship to the deity. (1) As such they are interested in its preservation and maintenance, and for that purpose they are entitled to complain of any improper alienation of property. (2) Again since the founder and his family are primarily interested in the maintenance of their endowment, they have the same right of worship and protection of the endowed property. (3) The term "founder" comprises not only the sole founder but also a joint contributor to the endowment. (4)

2016. The nature of the benefit accruing from an endowment must depend upon its nature and character. Persons who are residents of the locality in which a choultry is situated and are members of the community for whose benefit the choultry was founded are sufficiently interested to be able to maintain a suit under S. 92 of the Code of Civil Procedure. (5) Any person to be benefited by the execution of a trust is a beneficiary entitled to sue for its protection. So where a *choultry* was founded for the feeding of people, especially Brahmins, a suit by a resident Brahmin was held to be maintainable though the Brahmins to be fed were ordinarily *Japtas* or travellers. (6)

(1) *Mohiuddin v Sayyududdin*, 20 C. 810 (816); *Kazi Hassan v. Sagun*, 24 B. 170 (181).

(2) *Krishnaswami v. Shamaram*, 30 M. 158 (155); *Lakshmi v. Murari*, 56 L. J. 97; 45 I. C. 218; *Radhabai v. Chinmaji*, 8 B. 27; *Chintaman v. Dhondo*, 15 B. 512; *Chottalal v. Mandhar*, 24 B. 50 (54) P. O. affirming O. A. 12 B. 247; *Jawahra v. Akbar Hussain*, 7 A. 178 F. B.; *Kaleswara v. Nataraja*, 19 M. L. J. 772; 8 I. C. 255; *Oseri v. Bawa*, 7 S. L. R. 129; 24 T. C. 712.

(3) *Prosunno v. Koonjo*, (1864) W. R. 157; *Brojo Mohun v. Hurro Lal*, 5 C. 700 (705); *Greedharjee v. Ramanlaljee*, 17 C. 8 (20) P. C.

(4) *Thackersey v. Hurbhun*, 8 B. 482 (461, 462); *Luchmee v. Rookmanee*, (1857) M. S. D. A. 152; *Endowed Schools Act, (In re)* L. R. 10 A. C. 804 (808, 809).

(5) *Garuda v. Narella*, 35 M. L. J. 361.

(6) *Ganapati v. Savitri*, 21 M. 10 (18).

2017. If it is an endowment created for the worship of an idol, the question whether the public are entitled to free access for worship depends again upon the nature and character of the idol. If it is the idol of a particular sect or caste, only persons belonging to that sect or caste are entitled to free access ⁽¹⁾ and others have no such right. Even a person ordinarily entitled to access may forfeit his right if he offends against the rules of the caste entailing his suspension or excommunication. ⁽²⁾ So it is a question of usage whether a dancing girl or a man who has married a widow, should be admitted into a temple. ⁽³⁾

2018. It has already been stated before, that the manager has no right to levy a fee for admission. All he is entitled to is to make such rules as to the time and order of worship for the sake of orderliness and decency of worship. ⁽⁴⁾

The right of access is possessed by each person separately though it may be possessed by a class of persons conjointly. Such for instance would be the right of a sect to proceed to a temple in procession for worship.

2019. Private endowments excepted.—The public have naturally no right of access to worship private deities. Nor can they complain of any malversation or misconduct on the part of their manager.

Statutory control. **221.** Public, religious and charitable endowments are subject to the following statutory control.

(1) Any two or more persons interested therein may maintain a suit in accordance with the procedure prescribed in S. 92 of the Code of Civil Procedure, 1908.

(2) And any person so interested may sue alone in a case arising under the Religious Endowments Act, 1863.

(3) Such suit does not affect a suit otherwise maintainable.

Synopsis.

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| (1) <i>Statutory control of public religious and charitable endowments</i> (2020). | (2032-2033). |
| (2) <i>History of the legislation</i> (2020-2024). | (6) <i>Scope of suits under the Religious Endowments Act</i> (2034-2036). |
| (3) <i>Scheme of the Religious Endowments Act</i> (2025). | (7) <i>Misfeasance, breach of trust and neglect of duty</i> (2037-2038). |
| (4) <i>Provisions of the Civil Procedure Code</i> (2026-2030). | (8) <i>Scope of suits under S. 92 of the Code of Civil Procedure</i> (2039). |
| (5) <i>Suits under the common law</i> | (9) <i>Breach of trust not necessary</i> (2041). |

(1) *Vengamuthu v. Pandaveswara*, 6 M. 151.

(2) *Venkatachalapati v. Subharayadu*, 18 M. 298 (199).

(3) *Vengamuthu v. Pandaveswara*, 6 M.

151; *Venkatachalapati v. Subharayadu*, 18 M. 298 (199); *Nathu v. Keshawaji*, 26 B. 174 (188); *Anandrar v. Shankar*, 7 B. 828

(4) *Kalidas v. Gor*, 15 B. 809.

Synopsis.

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| (10) <i>Sanction when necessary</i> (2042). | (15) <i>Appointment of new trustees</i> |
| (11) <i>Sanction when unnecessary</i> | (2050). |
| (2044). | (16) <i>Vesting in a trustee</i> (2051). |
| (12) <i>Necessary parties to the suit</i> | (17) <i>Accounts and enquiries</i> (2052). |
| (2045). | (18) <i>Settling a scheme</i> (2053). |
| (13) <i>Removal of trustee</i> (2047). | (19) <i>Other reliefs</i> (2054-2057). |
| (14) <i>Principles guiding courts in re-</i> | (20) <i>The Charitable Endowments Act</i> |
| <i>moving trustees</i> (2047-2049). | (2058). |

2020. Analogous Law.—The two acts of the Indian Legislature dealing with religious and charitable endowments are the Religious Endowments Act, 1863 ⁽¹⁾ and the Code of Civil Procedure.

The Bengal Regulation XIX of 1810 vested in the Board of Revenue and commissioners, the general superintendence of all lands granted for the support of mosques, temples, colleges, and for other pious and beneficial purposes, and of all public buildings, such as bridges, *serais*, *Katras* (market places) and other edifices.

2021. The Madras Regulation VII of 1817 similarly vested in the Madras Board of Revenue all endowments granted for the support of colleges, or for other beneficial purposes and of all public buildings, such as bridges, *choultries* ⁽²⁾ or *chuttrums*. ⁽³⁾

2022. In the presidency towns the same power was possessed by the Supreme Courts which passed to their successors, the High Courts. So far as the Regulations referred to religious endowments, they were repealed and replaced by the Religious Endowments Act, 1863 ⁽⁴⁾ which is in force throughout British India, outside the Presidency towns, ⁽⁵⁾ and the Bombay Presidency except North Canara ⁽⁶⁾ and the Central Provinces. ⁽⁷⁾ The Regulations still continue to apply to charitable endowments.

The Bombay endowments are dealt with by separate local Acts ⁽⁸⁾ but S. 22 of the Religious Endowments Act, 1863 appears to extend equally to Bombay, ⁽⁹⁾ the Central Provinces ⁽¹⁰⁾ and elsewhere. ⁽¹¹⁾

2023. This Act nowhere applies to private endowments ⁽¹²⁾ and it only applies to public endowments in which "the nomination of the trustee, manager or superintendent thereof, at the time of the passing of the Act is vested in, or may be exercised by the Government or any public officer, or in which the nomination of such trustee, manager or superintendent" is subject to the confirmation of Government or any public officer. ⁽¹³⁾

(1) S. 14; Act XX of 1868.

(2) Same as *Serai*-a shelter for travellers.

(3) Same as *Dharamsala* where free food is distributed. As to the two regulations see preamble to Act XX of 1868.

(4) XX of 1868.

(5) *Panchowrie v. Chumroo*, 8 C. 568; *Kalee Churn v. Golabi*, 2 C. L. R. 128.

(6) *Husseinmian v. Collector*, 21 B. 48

(7) *Jaiwanti v. Nagridass*, 8 C. P. L. R. 11.

(8) Act XI of 1852; Act II of 1868; Act VII of 1868.

(9) *Husseinmian v. Collector*, 21 B. 48.

(10) *Jaiwanti v. Nagridass*, 8 C. P. L. R. 11.

(11) *Darshaf v. Collector*, 16 A. L. J. 742; 47 I. C. 350

(12) *Kaneez v. Saheta*, 8 W. R. 818; *Delroos v. Asghar*, 11 B. L. R. 167 affirmed O. A 8 C. 824 (830) P. C.; *Sathappayyan v. Periasami*, 14 M. 1.

(13) S. 8

2024. The express object of the Act as stated in the preamble was to relieve the Boards of Revenue from the duty of superintending religious endowments ⁽¹⁾ and vest their management in the trustee or manager rendering their management by Government unlawful. ⁽²⁾

The Act was enacted in pursuance of the policy of religious neutrality. ⁽³⁾

2025. The scheme of the Act is as follows :—

(1) Charitable endowments remain unaffected by it.

(2) As regards religious endowments, only those as had previously been under the control of the Boards of Revenue are brought under its scheme.

(3) These were hitherto under the direct control of the Board of Revenue which has been transferred by the Act to a committee of 3 or more persons to be appointed by the Local Government ⁽⁴⁾ for life ⁽⁵⁾ unless removed for misconduct or unfitness. They must of course belong to the creed of the founder and be selected in accordance with the general wishes of those interested in the endowment. ⁽⁶⁾

(4) The endowment will be in charge of the trustee, manager, or superintendent acting under the committee. ⁽⁷⁾

(5) Any person interested in the endowment may, on previously obtaining leave of the court, ⁽⁸⁾ sue the manager or any member of the committee "for any misfeasance, breach of trust or neglect of duty" in respect of the trusts vested in or confided to them respectively ⁽⁹⁾ and the Civil Court may decree specific performance of any act and direct the removal of such manager or member and award damages or costs.

"Any person having a right of attendance or having been in the habit of attending at the performance of the worship or service of any mosque, temple or religious establishment, or of partaking of the benefit of the distribution of any alms, shall be deemed to be a person interested" ⁽¹⁰⁾ for the purpose of maintaining a suit. The founder's heir has a direct interest and may, of course, institute such suit. ⁽¹¹⁾

2026. Civil Procedure Code.—S. 92 of the Code of Civil Procedure runs as follows :—

2027. In the case of any alleged breach of any express or constructive trust, created for public purposes of a charitable or religious nature or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other court empowered in that behalf by the Local

(1) *Chinna v. Subharaya*, 8 M.H.C.R. 334; *Kunez v. Saheba*, 8 W. R. 318; *Laul Mahomed v. Brijji Kishore*, 17 W. R. 430; *Jan Ali v. Ram Nath*, 8 C. 32; *Gnana v. Velu*, 23 M. 271 P. C.

(2) Religious Endowments Act, 1868 S. 22

(3) *Ramiengar v. Gnana*, 5 M. H. C. R. 53; *Kalianasundaram v. Umamba*, 20 M. 421.

(4) S. 7, Religious Endowments Act, 1868.

(5) *Ib.* S. 9.

(6) *Ib.* S. 8.

(7) *Ib.* Ss. 4, 18.

(8) *Ib.* S. 18.

(9) *Ib.* S. 15.

(10) *Sheoratan v. Ram Pargash*, 18 A. 227.

(11) *Sathappayar v. Periasami*, 14 M. 1.

Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—

- (a) removing any trustee
- (b) appointing a new trustee
- (c) vesting any property in a trustee
- (d) directing account and inquiries
- (e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust
- (f) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged
- (g) settling a scheme or
- (h) granting such further or other relief as the nature of the case may require.

2028. It will be seen that a suit in respect of a religious endowment is possible both under the Religious Endowments Act as under the Code of Civil Procedure as also independently of them. ⁽¹⁾ As this last has been already considered, the question here to consider is what is the difference between the two suits.

2029. A comparison of the language of the enactments shows that—

(1) Since the Act of 1863 does not apply to charitable endowments, a suit relating to it can only be brought under S. 92 of the Civil Procedure Code.

(2) But since neither statute deals with *private* religious endowments, no suit in respect thereto can be brought under the authority of either statute. Such a suit when maintainable is independent of any statutory sanction; and is founded on the right of suit of a subject to vindicate his ordinary civil rights.

(3) Since both the Act and the Code deal with public religious endowments, so far as the suits instituted under the Code, its provisions partially cover suits for “any misfeasance, breach of trust, or neglect of duty” committed by the manager ⁽²⁾ so far as it is comprised in the clause “directing accounts and enquiries”—otherwise the two Acts deal with suits of a wholly different character as will be seen from the reliefs possible in the two cases.

2030. The only reliefs claimable under the Endowment Act are removal of the manager only for “misfeasance, breach of trust or neglect of duty,” whereas under the Code he may be removed on any other ground, such as incompetence or for forsaking the sect of which the idol is the deity, or introducing a new form of ritual or worship.

(4) That is, while the Religious Endowments Act deals with specific suits for a specific remedy, the Code deals with other suits and though on a point or two it covers the same ground as the Religious Endowments Act, the purpose and object of the two suits is different. This is implied in the saving clause in the Civil Procedure Code which saves the procedure prescribed by the Religious Endowments Act for the institution of a suit thereunder. ⁽³⁾

(1) *Radhabai v. Chimm ji*, 8 B. 27; *Chintaman v. Dhondo*, 15 B 612 (628); *Jan Ali v. Ram Nath*, 8 C. 82

(2) *Ib.* S. 14.

(3) S. 92 (2), Civil Procedure Code.

2031. It is thus clear that suits relating to religious endowments fall into three classes, namely :—

(1) Those supported by common law and independently of any statutory support.

(2) Those maintainable under the Religious Endowments Act.

(3) Those provided by S. 92 of the Civil Procedure Code.

2032. Suits under common law.—The first class of suits, that is to say, suits unsupported by the statute law have been entertained by the courts for a claim to a specific share out of the dedicated property for the benefit of the founder (1) or for recovery of the entire property by him on the ground that the trust has not been acted upon (2) or for recovery of possession of the dedicated property from the manager who was claiming it as his private property without praying for any of the three reliefs contemplated in S. 14 of the Act, *i.e.*, for removal of the manager, specific performance of an act by him, or for damages (3) or a suit by a trustee for recovery of property from an ex-trustee who had been dismissed from his office by a temple committee, (4) or a suit for recovery of property or damages against the heirs of the deceased manager for property lost by his breach of trust or for negligence, (5) or a suit against the alienee for the declaration of the invalidity of an alienation made by the manager of trust property, (6) or a suit to establish a right to share in the management (7) or a suit by the trustee dismissed from office for a declaration that the dismissal is wrongful or for restoration to office, (8) or a suit by a manager for a declaration of his title as the rightful manager and for recovery of possession as such, (9) or for the appointment of himself or some other person as manager. (10)

2033. Such is the right of a worshipper complaining of obstruction in the performance of his devotion to an idol or temple (11) or of the founder to enforce the trusts, (12) or a suit by a trustee, (13) or by a committee appointed under the Act for damages for misappropriation or for an injunction. (14)

Such and similar suits are opposed to no provision of law and being in violation of one's civil rights, are clearly maintainable.

2034. Suits under the Religious Endowment Act.—It has been held in Madras that the Act is not controlled by its preamble and applies equally to all endowments subject only to S. 3 (15) but it has already been stated that the better view is that the Act is only limited to public religious endowments. (16) Now suits under this Act are of a limited character, being limited both as to

(1) *Kalub Hossein v. Meherum*, 4 N. W. P. H. C. R. 155.

(2) *Hideit v. Afzul*, 2 N. W. P. H. C. R. 420.

(3) *Mahalinga v. Vencoba*, 4 M. 157.

(4) *Virasami v. Subba Ram*, 6 M. 54.

(5) *Jeyangarulavaru v. Durma*, 4 M. H. C. R. 2; *Manolly v. Vaidalinga*, 1 M. 343; *Virasami v. Subba Ram*, 6 M. 54; *Nellaiyappa v. Thangama*, 21 M. 406.

(6) *Sivayya v. Rami*, 22 M. 228.

(7) *Agri v. Vishnu*, 8 M. H. C. R. 118.

(8) *Amin v. Ibram*, 4 M. H. C. R. 112; *Virasami v. Subba Ram*, 6 M. 54.

(9) *Agri v. Vishnu*, 8 M. H. C. R. 198; *Mahalinga v. Vencoba*, 4 M. 157; *Aihavulla v. Gouse*, 11 M. 288.

(10) *Nellaiyappa v. Thangama*, 21 M. 406.

(11) *Abdul Rahman v. Yar Mahamma*, 8 A. 386; *Quere in Radabai v. Chinnai*, 8 B. 27 28.

(12) *Hideit v. Afzul*, 4 N. W. P. H. C. R. 420; *Satappayyar v. Periasami*, 14 M. 1. (14).

(13) *Singarachari v. Krishnaswami*, 19 M. L. J. 513; 4 I. C. 874 (judgment gives no reason for its view).

(14) *Puddolab v. Ram Gopal*, 9 C. 138.

(15) *Fukrudin v. Ackeni*, 2 M. 197; *Sivayya v. Rami*, 22 W. R. 228 (226, 227); *Jan Ali v. Ramnath*, 8 C. 82.

(16) *Delross v. Ashgar*, 28 W. R. 458 affirmed O. A. 8. 824 P. O.; *Protap v. Brojo-nath*, 19 C. 275 (285); *Saihappayyar v. Periasami*, 15 M. 1 (14); *Nathu v. Gangothara*, 17 M. 95.

their nature and to the extent of the relief admissible. Since a suit under the code is equally possible for removal of the trustee or for "accounts and inquiries" and consequential damages, the plaintiff has to that extent the choice of procedure. He may proceed under the Act or under the Code (1) But the Act has clearly no application where the plaintiff sues not only for the removal of the trustee but also the settling of a scheme (2) or the appointment of a new trustee.(3) Again even where the suit is for the relief mentioned in S. 14 sanction is only necessary when the trustee is sued as such. (4)

2035. A sanction granted to two or more persons under the Act cannot be availed of by any one of them, without getting the sanction amended. (5)

A sanction obtained under S. 18 is not revisable by the High Court. (6) It is competent to the court to make independent enquiry into the allegations made before according sanction. (7) One refusal to sanction suit does not bar another application and it is open to the court to entertain it if supported by sufficient grounds. (8)

The petitioner should be awarded his costs out of the trust funds unless his application was frivolous or vexatious. (9)

2036. As regards the nature of the suits contemplated by S. 14 it has been held that that section merely provides for suits of the specific nature mentioned in the section. A suit for recovery of immoveable property on behalf of a *mutt* on the ground of misfeasance by the manager without a prayer for removal of the manager or for damages or for the specific performance of any act by the manager does not fall under S. 14. (10)

2037. Misfeasance: breach of trust: neglect of duty.—The terms "misfeasance," "breach of trust" and "neglect of duty" calling in aid the provisions of S. 14 are used in the ordinary sense as implying such misconduct or negligence of the manager as amounts to a breach of legal duty incumbent on him.(11) For example the refusal of the manager to celebrate a festival, though funds were available for the purpose, or if from corrupt or improper motives he refuses to allow voluntary contributions offered for purposes not inconsistent with the principles, rules or usages of the institution to be applied to those purposes. No doubt the manager is allowed a certain discretion in the matter of his management, if in the exercise of that discretion he acts with an absence of indirect motives, with honesty of intention and with a fair consideration of the subject. Where 'in a temple in which two rival sects following rival *gurus* had interest and worship, the trustees introduced a new metal idol in addition to the existing stone idol of one of the rival *gurus*, such introduction when not effected at the expense of the temple and when it did not interfere with the worship of the rival sect, was not inconsistent with the usage of the institution and could not be restrained by an injunction. (12)

(1) *Venkataranga v. Krishnamu*, 37 M. L. J. 184.

(2) *Ajaba v. Ramalingam*, 24 M. L. J. 658; 20 I. C. 767.

(3) *Ghulam v. Shah Mahomed*, 21 M. L. J. 450; 9 I. C. 168; *Kishore v. Kalee*, 22 W. R. 864.

(4) *Amin v. Medan*, 5 M. L. T. 209; 4 I. C. 1118.

(5) *Venkatesha v. Bannampalli*, 88 M. L. J. 1192.

(6) *Ramanathan v. Ananthanarayana*, 7

M. L. T. 126; 6 I. C. 291.

(7) *Ib.*

(8) *Mandappaya (In re)* (1911) 2 M. W. N. 167; 12 I. C. 128.

(9) *Shanmuga v. Veeraraghava*, (1915) M. W. N. 274; 28 I. C. 637; *Sookram v. Nund Kishore*, 22 W. R. 21.

(10) *Mahalinga v. Vencoba*, 4 M. L. J. 157.

(11) *Elayahcar v. Namberumal*, 28 M. L. J. 803.

(12) *Krishnasami v. Samaram*, 30 M. L. J. 158.

2038. The right of a worshipper to worship at a given temple is a civil right enforceable by suit. ⁽¹⁾ The court will protect such right by restraining persons of inferior caste from being admitted into a temple reserved for worshippers of a higher caste, ⁽²⁾ or by preventing the object of worship being removed so as to frustrate the right of worshippers ⁽³⁾ or introduction of idols or other objects which interfere with the form of worship for which the temple is dedicated. ⁽⁴⁾ The section is inapplicable except where the suit is against a trustee, manager or superintendent as such. ⁽⁵⁾

2039. Suit under S. 92, C. P. C.—A suit under S. 92 of the Code of Civil Procedure must conform to the requirements of that section, which vests the court with jurisdiction only in case of breach of a public trust. The section does not apply where the existence of the trust is itself in dispute ⁽⁶⁾ or the trust being admitted, its public character is disputed. The question whether an institution is a public endowment falling within its scope must, in the absence of express evidence of the terms of the original foundation, be determined by user. The entries in the Inam Register as to the nature of the endowment are good evidence of its public or private character. ⁽⁷⁾ The persons entitled to sue in respect of such breach are (i) the Advocate-General; (ii) or two or more persons interested in such trust who have previously obtained his written permission to sue. In either case, the suit must be confined to any of the 8 reliefs therein specified. If any other relief is claimed or possible, it will be given or refused without reference to the section. The restriction as to parties is intended to prevent the launching of frivolous or vexatious suits, the intention of the legislature being to place public rights under statutory protection. The section is not mandatory but enabling and permissive, cumulative and not restrictive in its effect, and does not affect any right of suit, which may exist independently of it. If, therefore, a suit is one, which would have been maintainable prior to the enactment of the section or its equivalent in the previous codes, it may be instituted independently of the provisions of it, even though it be upon such a cause of action and for such relief as is mentioned in it. ⁽⁸⁾

2040. The section only applies if there is an express or constructive trust. An express trust is created by contract, a constructive trust arising not by act of the parties but by operation of law. A trustee *de son tort* may be a constructive trustee and as such subject to the section. ⁽⁹⁾

2041. It is not necessary that the plaintiffs should allege any breach of trust or misconduct on the part of the manager. All that is necessary is that the plaintiffs should make out a *prima facie* case for the direction of the court as necessary for the administration of the trust. Any act or omission which endangers the trust property or shows a want of honesty or want of a proper capacity to execute the duties or want of reasonable facility, is sufficient to

(1) *Venkatachalapathi v. Subharayudu*, 13 M. 298; *Krishnasami v. Samaram*, 30 M. 158 (165).

(2) *Narayanadasami v. Irulappa*, 12 M. L. J. 855.

(3) *Dhurrum Singh v. Kissen Singh*, 7 C. 767.

(4) *Nagalingam v. Chinnummal*, (1858) S. D. A. M. 142; *Krishnasami v. Samaram*, 30 M. 158 (165).

(5) *Amam v. Medon*, 5 M. L. T. 209.

(6) *Jamauddin v. Muftaba*, 25 A. 681; *Gopal v. Shiva*, 8 A. L. J. 1120; 11 I. C. 308.

Raghubar v. Kesho, 11 A. 18 F.B.

(7) *Mahomed Yusuf v. Sathar*, 36 M. L. J. 262.

(8) *Sathappayyar v. Periasami*, 14 M. 1 (15); *Subbappa v. Krishna*, 14 M. 186 (221, 222); *Nallaiyappa v. Thangama*, 21 M. 406; *Sajedav v. (our Mohan)*, 24 C. 415; *Budree v. Choonilal*, 33 C. 789 (801); *Thackersey v. Harbhun*, 8 B. 482 (451, 452); *contra Tricum v. Khemji*, 16 B. 626 (628); *Sayad Hussain v. Collector*, 21 B. 48; *Lairfunissa v. Navram*, 11 C. 88 (86); *Sajedav v. Baidyanath*, 20 C. 397 (408, 409).

(9) *Budree v. Choonilal*, 33 C. 789 (806, 808).

justify the intervention of the court. (1) A hereditary trustee may be removed if his continuance is likely to endanger the interests of the institution. (2)

2042. Case for sanction.—As already stated, sanction of the Advocate-General or of his substitute provided in S. 93 is necessary to maintain a suit. It is a condition imposed to prevent frivolous and vexatious suits. (3) The suit under the Code is a representative suit in which the plaintiffs represent the interest of the body of beneficiaries. The fact that the plaintiffs are two out of the five trustees, does not entitle them to sue the remaining three without sanction. (4) Where two persons start a suit with due sanction, the addition of a third person as co-plaintiff does not necessitate fresh sanction. (5) Where two persons obtained sanction and one of them afterwards dies, a fresh sanction is required to institute a suit. When it is once properly instituted by the authorized plaintiffs, the death of one of them does not determine the suit which may be continued by the surviving plaintiff. (6) But where more than two persons have obtained sanction they must all sue. It is not sufficient that two of them sue without the rest. (7)

2043. "Having an interest in the trust."—The fact that two or more persons have obtained sanction of the Advocate-General does not confer upon them an incontestable right to maintain the suit, it being open to the defendant to show that the plaintiffs had in fact no interest in the trust. The interest requisite to sustain the suit must be direct and not distant, substantial and not sentimental. So where two persons sued with sanction for the removal of the trustees at Tellicherry and it appeared that one of them was a pleader resident and practising in Madras, and his sole interest in the temple at Tellicherry lay in the fact that he was the Vice-President of a Religious Protection Society, and had visited the temple only once or twice when on a professional visit to Tellicherry, it was held that he did not possess the "interest" required to maintain a suit under S. 92 of the Code of Civil Procedure which was accordingly dismissed. (8) In this case it was pointed out that the description of interest in S. 15 of the Religious Endowments Act could not be called in aid to construe S. 92 of the Civil Procedure Code.

2044. When no sanction required.—No sanction is required where the suit is instituted by the whole body of persons who are legally authorized to administer the trust to which it relates. As observed in a case: "Persons interested in any trust were, if they could all join, always competent to maintain a suit against any trustee for his removal for breach of trust; but where the joining of all of them was inconvenient or impracticable, it was considered desirable that some of them might sue without joining the others, provided they obtained the consent of the Advocate-General or of the Collector of the District and this condition was imposed to prevent an indefinite number of reckless and harassing suits being brought against trustees by different persons interested in the trust. Where this condition is fulfilled and the risk of harassing suits being brought against trustees is thus guarded against, there is no reason why suits brought under the section should be restricted in any other way." (9) No

(1) *Raja of Kalahasti v. Ganapathi*, (1918) M. W. N. 555.

(2) *Fakruddin v. Acken*, 2 M. 197 (199); *Raja of Kalahasti v. Ganapathi*, (1918) M. W. N. 555.

(3) *Sajedur v. Gour Mohan*, 24 C. 418.

(4) *Tivumdas v. Khimji*, 16 B. 626.

(5) *Ram Churn v. Protop*, 2 C. L. J. 448; *Varadappa v. Munusamy*, 10 M.L.T. 504; 13.

I. C. 292.

(6) *Paramesari v. Girdhari*, 80 I. C. 240.

(7) *Maddala v. Vadapalli*, 29 M. L. J. 281; 30 I. C. 296.

(8) *Ramchandra v. Parameswaran* 42 M. 360.

(9) *Sajedur v. Gour Mohan*, 24 C. 418, (425); *Ram Das v. Badri Narain*, 29 A. 27.

sanction is required to maintain a suit instituted by the whole body of persons who are legally authorized to administer the trust to which it relates. (1)

2045. Necessary parties.—Not only the manager but any person interested in the trust property may be made a party. A person who denies the trust and claims the property as his private property is a necessary party. (2) But the section only contemplates a suit against a trustee and not against a trespasser against whom persons interested have an independent cause of action. (3) No relief can be granted in a suit under the section against alienees of trust property. (4) But a trustee whether *de jure* or *de facto* or *de son tort* may be sued under this section and are necessary parties, when any relief is claimed against them. (5)

2046. Reliefs claimed.—A suit under the section must relate only to the reliefs enumerated in the section, the last clause of which refers to “such further or other relief as the nature of the case may require” and the question has arisen whether it is to be read *ejusdem generis* with those mentioned in the previous clauses or is intended to enlarge their scope by reducing them to mere illustrations of the more general relief possible under the section. (6) It has been held that the further relief must be *ejusdem generis* with the preceding clauses. (7)

2047. Removal of any trustee.—This clause was for the first time inserted by the Code of 1908, in accordance with the previously decided cases, (8) overruling however, the two cases of the Madras Court in which the contrary was laid down. (9) The courts, before the present clause, let in the right as a “further relief” which, strictly speaking, his removal could not be when it was the only relief claimed, though where the court was moved to settle a scheme the removal of the trustee might be provided for as a part of the new scheme and it is said that in every such case it is advisable to the court to provide for the removal of the trustee for breach of trust which might then be done in execution instead of a suit of its own (10). The causes which justify the removal of a trustee have already been set out in S. 218. The general principle there enunciated accords with the principle of law enunciated by Story: “But in cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust: it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or want of proper capacity to execute the duties, or a want of a reasonable fidelity.” (11) Citing this

(1) *Ram Das v. Badri Narain*, 29 A. 27.

(2) *Jafer Khan v. Dandshah*, 18 Bom. L. R. 49; 9 I. C. 358.

(3) *Mahdhar v. Mhd. Ismail*, 83 A. 752. *Arunachella v. Muthu*, 28 M. L. T. 847; 17 I. C. 586. *Imami v. Mhd. Yusaf*, 14 O. C. 65; 10 I. C. 712.

(4) *Asam v. Pellati* 27 M. L. J. 266. 25 I. C. 794; *Augad Das v. Ghasiti*, 26 I. C. (O) 108; *Rongasamy v. Chinmasamy*, 28 M. L. J. 326; 28 I. C. 398.

(5) *Munisawmy v. Murrugappa*, 7 M. L. T. 45; 5 I. C. 515; *Nasim v. Ahmad*, 18 O. C. 38; 27 I. C. 339.

(6) *Budhsingh v. Niradharan*, 2 C. L. J.

431 (433). *Budree v. Chaoni*, 83 C. 789.

(7) *Budree v. Chocnie*, 83 C. 789 (810).

(8) *Sayed v. Gour Mohan*, 24 C. 418; *Sayud v. Collector*, 21 B. 43; *Hussain v. Collector*, 20 A. 46; *Girdhari v. Ram Lal*, 21 A. 200; *Saiyad Ali v. Ali Khan*, 85 A. 98; *Subhazya v. Krishna*, 14 M. 186.

(9) *Rengasami v. Veradarpo*, 17 M. 462; *Narayana v. Kumarasami*, 28 M. 587.

(10) *Damodar v. Bhogilal*, 24 B. 45 (49); *Prayag v. Tirumala*, 28 M. 819.

(11) Eq. Juris § 1239 followed by P. C., per Lord Blackburn in *Le Herstedt v. Broers*, 9 App. Cas. 871 (885, 886); *Raja of Kalahasti v. Ganpathi*. (1918) M. W. N. 555.

passage with approval, Lord Blackburn said: "It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of the original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustees were justified in resisting them, and the court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate." (1)

2048. If the beneficiaries or those who act for them are unable to work in harmony with the trustee, and if there is no reason to the contrary from the intentions of the founder of the trust to give the trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign and he does so. If, without any reasonable ground, he refused to do so the court will remove him. (2) "In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down a general rule beyond the very broad principle above enunciated and the main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details, often of great nicety." (3) "It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded." (4)

2049. Where the defendant and his ancestors, though not the lawful trustees, yet had been in office for many years, the court would be disinclined to disturb the defendant's possession and to depose him at the instance of strangers unconnected with the family of former trustees, except on proof of misconduct or for the clear benefit of the trust. Where the association of strangers along with the existing trustee in the management was likely to lead to friction, the existing trustee was allowed to manage the trust as the sole trustee subject to an arrangement for exhibiting the accounts for the examination of the worshippers. (5)

* **2050. Appointment of new trustees.**—The appointment of a new trustee may be consequent upon the removal of an existing trustee for misconduct or want of title (6) or the appointment of an additional trustee (7) or otherwise on a vacancy occurring or on a vacancy otherwise caused by his death or disability. (8) Though the clause empowers the court to appoint a trustee, a suit instituted for the appointment of a certain person as trustee is not within its scope. (9) But the plaintiff may sue for a

(1) *Le Herstedt v. Broers*, 9 App. Cas. 871 (1886) P. C; *Takshmi v. Murari*, 5 O. L. J. 97; 46 I. C. 212.

Ib. P. 386.

Ib. P. 387.

(4) *Per Lord Blackburn in Le Herstedt v. Broers*, 9 App. Cas. 871 (1886).

(5) *Subbaraya v. Subrahmanya*, (1918) M.

W. N. 786.

(6) *Neti Rama v. Venkatacharlu*, 26 M. 450.

(7) *Prayag v. Tirumala*, 25 M. 313.

(8) *Budree v. Choonilal*, 38 C. 789.

(9) *Ramrup v. Sujaram*, 14 C W. N. 982; 7 I. C. 92.

scheme and his own appointment (1) and not merely a declaration (2) as the preferential trustee.

2051. Vesting in a trustee.—The vesting of any property in a trustee

may become necessary by the removal or appointment of a trustee (3) to whom it is competent to the court to deliver possession of the trust property by ejecting the outgoing trustee, or it is said, a stranger, in wrongful possession of the trust property. (4) But it is submitted and has been held, that this section does not empower ejectment of strangers such as trespassers and transferees from the trustee. (5)

2052. Accounts and inquiries.—This clause enables the court to order

the manager to render account of the trust property in his charge (6), and to decree any sum which may be found due from him or for which he may be liable. (7) Such sum may include mesne profits. (8)

2053. Settling a scheme.—Clauses (e) to (g) relate to the settling of a

scheme of management. In so doing due consideration should be given to the established practice of the institution and to the position of the persons connected with it. (9) Where the founder's intention cannot be ascertained, effect must be given to it *cypres*. (10) Before a scheme can be settled, an account of the trust property must be taken and until the trust funds are ascertained it is impossible to settle the scheme. (11) A scheme framed by the court is liable to variation on good cause being shown and if found injurious to the institution, may be set aside. (12)

2054. The settlement of the scheme must depend upon the nature and character of the institution. In framing its scheme the court may consult leading members of the caste or sect to which the institution belongs. But it must not decide any question vitally affecting the trust by compromise, though, of course compromise on matters of details and management are not only permissible but may in some circumstances be inevitable.

2055. It is competent to the court to declare what proportion of the

corpus or of the interest therein shall be allocated to any particular object of the trust. In this matter the court has ample power to give directions towards application of the trust income, even though the trustee may not himself be competent similarly to apply it. (13)

(1) *Almannessa v. Abdul*, 43 C. 467.

(2) *Abdul v. Altaf*, 20 C. W. N. 606.

(3) *Budree v. Chomalal*, 83 C. 789 (810, 811); *Ghazaffar v. Yawar*, 28 A. 112.

(4) *Sajedur v. Gour Mohan*, 24 C. 418; *Ali Haffis v. Abdur Rahman*, 42 C. 1135;

Ghazaffar v. Yawar, 28 A. 112 (116); *Makhilachor v. Faisur*, 85 I. C. (C) 880.

(5) *Gholam v. Mollah*, 23 C. L. J. 4; 47 I. C. 111; *Hansraj v. Anant*, 20 Bom. L. R. 954; 48 I. C. 514; *Ayatannessa v. Kuiper*, 41 C. 747.

(6) *Mahamad v. Ahmadhbai*, 25 B. 327.

(7) *Naihu v. Kishori*, 28 I. C. (A) 886.

(8) *Sai Narhin v. Bankeylal*, 41 I. C. (A) 89.

(9) *Chotalal v. Manahar*, 12 B. 247 O.A. 24 B. 50 (54) P. C.

(10) *Mayor of Lyons, v. A. G.*, 1 C. 808 P. C. *Muthukrishna v. Ramachandra*, 47 I. C. (M) 611.

(11) *Prayag v. Tirumala*, 28 M. 819 (825) *Ramados v. Hanumantha*, 86 M. 364.

(12) *Ramanatham v. Murugappa*, 18 M. L. J. 841; *Saduphadyaya v. Ravanenwar*, 48 I. C. 772.

(13) *Muthukrishna v. Ramachandra*, 47 I. C. (M) 611.

2056. The power of the court to authorize the alienation for value of all or any portion of the trust property must be exercised with due advertance to the existing necessity for such alienation.

2057. Further relief.—It has already been stated that the further or other relief must be *ejusdem generis* and subsidiary or ancillary to those possible under the preceding clauses. (1)

2058. Charitable endowments.—By the common law the Supreme Courts of Judicature were entitled to control public charities. S. 41 of the East India Company Act 1813⁽²⁾ conferred powers on the Advocate-General similar to those of the Attorney-General in England. Similarly, Ss. 8-11 of the Official Trustees Act ⁽³⁾ enables any person to appoint the official trustee with his consent to be the trustee of any property for a charitable purpose or otherwise, whereupon the property so granted shall vest in him. The official trustee may be paid such remuneration as he shall by the deed of settlement be declared to be entitled to receive. ⁽⁴⁾ The official trustee may be appointed in place of the other trustees refusing to act as provided in S. 10 in which case he is entitled to receive the remuneration as fixed by S. 11. The jurisdiction of the Official Trustees is limited to the three Presidencies. While these two Acts made some provision for the administration of charities within the jurisdiction of the High Courts, similar charities in the Mofussil remained unprovided for. These are now dealt with by the Charitable Endowments Act, 1890 ⁽⁵⁾ which enables the author of the trust, or the trustees, if already appointed, ⁽⁶⁾ to apply to the Local Government which may settle a scheme for the administration of any property ⁽⁷⁾ and vest the property in a trustee called the Treasurer of Charitable Endowments ⁽⁸⁾ on such terms as to the application of the property or the income thereof, as may be agreed on between the Local Government and the person or persons making the application and the property, shall thereupon so vest accordingly. ⁽⁹⁾ The scheme so settled may in a similar manner be modified or substituted. The Local Government is, in the exercise of its powers under the Act, subject to the control of the Governor-General in Council. ⁽¹⁰⁾

(1) *Dharam Das v. Dharam Das*, 40 T. C. (A) 182.

(2) 53 Geo. 3 c 155.

(3) XVII of 1864.

(4) *Ib.* S. 9.

(5) VI of 1890.

(6) *Ib.* S. 6.

(7) *Ib.* Ss. 4, 5.

(8) *Ib.* S. 8.

(9) *Ib.* S. 11.

(10) *Ib.* S. 16.

CHAPTER XX.

SUCCESSION BY SURVIVORSHIP.

222. (1) When a person dies possessed of co-parcenary property his interest therein passes to the other co-parceners then living by right of survivorship, who take it in their own right and not in trust for the heirs of the deceased.

Provided that where he has left sons or grandsons in the male line his interest survives to them to the exclusion of his other co-parceners.

(3) Where such property passes to the surviving co-parceners, they take *per stirpes* and not *per capita*.

(4) Nothing herein applies to members of a Dayabhag family who take by inheritance and not by survivorship.

Synopsis.

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|--|---|
| (1) <i>Succession by survivorship</i> (2061). | (2061). |
| (2) <i>Rule applicable to co-parcenary property</i> (2059-2063). | (6) <i>Impartible estate</i> (2063). |
| (3) <i>Unobstructed heritage</i> (2061). | (7) <i>Right of representation</i> (2064). |
| (4) <i>Property acquired with its aid</i> (2061). | (8) <i>Acquisition per stirpes</i> (2065). |
| (5) <i>Property of re-united co-parceners</i> | (9) <i>Dayabhaga family different</i> (2066). |

2059. Analogous Law.—From what has been said before it is clear that co-parcenary property held by the joint family is in the nature of property held by a co-parcener with perpetual existence, the members whereof vary but the death of a member has no greater effect beyond causing a lapse of his share. As the Privy Council said: "According to the principles of Hindu Law, there is co-parcenership between the different members of a united family, and survivorship follows upon it; there is community of interest and unity of possession between all the members of the family and upon the death of any one of them, the others may well take by survivorship that in which they had during the deceased's life-time a common interest and a common possession. But the law of partition shows that as to the separately-acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation therefore, of a right to take such property fails." (1)

2060. So Sir Barnes Peacock said in another case: "According to the Mitakshara law, if a member of a joint undivided family dies without a son and leaving a brother, his widow does not take his share by descent. If he leaves

(1) *Katama Nachiar v. Raja of Sivagunga*, 9 M. I. A. 589 (611).

a son, the son takes by descent ; but if he leaves only a widow, the survivors take by survivorship and they hold the property, which they take by survivorship legally and equitably for themselves, and not in trust for the heirs of the deceased. The deceased sheirs have no interest either legally or equitably in the share which passes by survivorship to the surviving co-sharers. That the estate survives and does not pass to the widow by inheritance, has been held by the Privy Council to be the law. They held that, in the absence of a son, the share of a deceased member of a joint family, under the Mitakshara law does not go to the widow or to the person who would be next heir of the deceased, if the widow were not in existence" (1) "While the joint property endures, there is strictly speaking no question as to succession to the property. The joint family is a corporation in the sense of having a continuous existence, notwithstanding the death of individual members, and it is now settled that, under the Mitakshara law, no individual member of the family has any specific interest in the property, or the power of creating any for himself independently of the other members: he has only a right to insist upon a partition being effected if at all. But by the nature of the case, the joint family must commence and also must end, when it *does* end, in an individual who holds the property in a separate condition. This individual dies without becoming the root of a joint family, and the Mitakshara law gives an *interim* enjoyment of the property to his female representatives, when there are any, and then transfers it to a collateral heir as the origin of a new joint family. Thus the Mitakshara law does nothing to keep property in the condition of being the separate property of an individual throughout a series of takers, and indeed is hostile to such a state of things. If however, in any given case, property is so situated that it does pass from one taker to another taker just in the same condition as if it were the separate or self-acquired property of each of them personally, independently of the family element, then this result, I conceive, can only be brought about, if at all, by the operation of some established custom or authority controlling the general Mitakshara law." (2) This view has been echoed in several cases (3) in which it is now settled that "while the joint family endures, there is, strictly speaking no question as to succession to the property."

Those who are born into the family and those who go out of it do not affect the joint property beyond varying the shares of the rest. Consequently when a co-parcener dies, his interest survives and passes to his other co-parceners who "hold the property, which they take by survivorship legally and equitably for themselves and not in trust for the heirs of the deceased." (4)

2061. Succession by Survivorship.—Succession by survivorship is limited to two descriptions of property, namely: (1) what is taken as unobstructed heritage (§ 1048) and property acquired by means of it and (2) what forms the joint property of re-united co-parceners. (5) There is a radical difference between survivorship and inheritance since, survivorship is an incident of co-parcenary right and arises on birth while a right of inheritance is only acquired on death. (6) One is the incident of a vested right,

(1) *Sadabart v. Foolbush*, 14 W. R. 340 F. B.

(2) *Ram Narain v. Pertum Singh*, 20 W. R. 189.

(3) *Appovier v. Rama Subbaiyan*, 11 M. I. A. 75; *Phoolbas v. Jogeshur*, 1 C. 226 P. C. *Bhimul Doss v. Choonsee Lall*, 2 C. 879; *Rai*

Narain v. Heeralal, 5 C. 142; *Debi Pershad v. Thakur Dial*, 1 A. 105. *Sudarsanam v. Norasinhulu*, 25 M. 149.

(4) *Sadabart v. Foolbush*, 14 W. R. 340 F. B.

(5) *Jesoda v. Sheo Pershad*, 17 C. 38

(6) *Ghosal v. Ghosal*, 31 B. 25.

the other is a mere contingency. A right by survivorship must necessarily vary with the number of co-parceners at any time and with every increase by birth or adoption the *quantum* of undivided interest of each of the co-parceners is correspondingly reduced. If on the other hand, any of them dies his share passes to the rest whose interest is correspondingly increased. As explained before, co-parcenership is a joint right which the co-parcener cannot devise or alien except in the limited circumstances permitted by law.

The right of survivorship has, therefore, nothing in common with the law of inheritance. As however it is a right affected by death, all it needs is a passing reference to its leading principles by way of comparison with the doctrine of inheritance.

2062. The acquisition of a right by survivorship on the death of co-parcener depends upon the community of interest and unity of possession between all the members of a united family having common property. On the death of any one of them, the others take by survivorship that in which they had during the deceased's life-time a common interest and common possession. But as the law of partition shows, as to the separately acquired and separate property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation therefore of a right to take such property by survivorship fails. ⁽¹⁾ Strictly speaking a co-parcenary right must on death of a co-parcener pass to all the surviving co-parceners. And though this is the theory, practice and usage have sanctioned deviations the nature and extent of which varies, with the result that in certain cases as for example in the case of co-parcenership under the Dayabhag law the members hold their property in *quasi* severalty so that on the death of a co-parcener his interest devolves on his own heirs. This is a case of real inheritance. But between it and strict co-parcenership there are various grades. For instance the share of a co-parcener on his demise does not pass equally to all his other co-parceners but only to his own sons grandsons and great grandsons to the exclusion of his brothers. In this respect rules of survivorship and inheritance agree. But the analogy ceases these. In the case of other relations if the property was joint, the persons taking by survivorship would be different to those who take by inheritance; since survivorship is founded on the theory of joint ownership, while inheritance is founded on that of exclusive ownership.

2063. As co-parcenership is only possible within the circle of one's family, the question of co-parcenership is one of family law. A person cannot create co-parcenary rights by contract (§ 1106). It must arise by law. Women cannot be co-parceners. ⁽²⁾ Hence on the death of the owner his co-parcenary rights may pass to one set of persons and his separate property to another. Where for instance, the owner has left a brother and wife, his co-parcenary interest will survive to his brother, while his separate property will devolve on his wife. ⁽³⁾

Again if the property be impartible, it devolves not on the co-parcener nearest in blood but on the nearest co-parcener in the senior line. ⁽⁴⁾ The succession to an impartible estate follows the rule of survivorship according to the personal law of the owners. ⁽⁵⁾ This has already been explained.

(1) *Katama Nachiar v Raja of Shivgunga*, 9 M. I. A. 589

(2) *Ananda v. Nowvit*, 9 C. 815.

(3) *Varadaperumal v. Ardaneri*, 1 M. H. C. R. 412

(4) *Raveneshwar v. Chandi Prasad*, 88 C. 721

(5) *Gur Pershad v. Dhcri*, 88 C. 182; *contra Nachiappa v. Sivasubramania*, 29 M. 458

- CL. (2). **2064.** This is the general rule but it is subject to one exception stated in clause (2) and supported by the following text :—

Mitakshara :—Although grandsons have by birth a right in the grandfather's estate, equally with sons, still the distribution of the grandfather's property must be adjusted through their father, and not with reference to themselves. The meaning here expressed is this: if undivided brothers die leaving male issue, and the number of sons be unequal, one having two sons, another three, and a third four, the two receive a single share in right of their father, the other three take one share appertaining to their father, and the remaining four similarly obtain one share due to their father. So if some of the sons be living, and some have died leaving male issue, the same method should be observed, the surviving sons take their own allotments, and the sons of their deceased brothers receive the shares of their own father's respectively. Such is the adjustment prescribed by the text. (1)

This is the right of representation of a person by his sons and grandsons or as it is explained, the father together with his son and grandson forms a single individual and on the death of the former the latter take his share to the exclusion of his undivided brothers. The rule then that the interest of a co-parcener on his death passes to the other co-parceners is subject to the exception that where he has left male issue it passes to them and not to the general body of survivors. (2) The case is the same where the widow of a deceased co-parcener takes a son in adoption.

2065. Acquisition per stirpes.—For the same reason the rights of other co-parceners are enlarged *per stirpes* and not *per capita*;

- CL. (3) since the rule of representation is equally applicable to all co-parceners. As observed by the Full Bench, "The consequence of the doctrine that a right in the paternal ancestral estate is acquired by birth is that there is in fact no devolution of the property from one owner to another, but that as each son comes into being he forthwith acquires a right which would, on partition, reduce the shares of the other sons, and which should he not survive partition and have issue, his son or grandson would take by substitution and which, if he dies issueless before that period, will simply lapse. There being no devolution of the property, the laws of descent are inapplicable. An ascertainment of the rights or the several members of the family is effected by partition and consequently the rules regulating partition in every Hindu work on inheritance take the place regulating the descent of property from an owner leaving issue. Unless there is a plain direction to the contrary, rules of partition from their very nature operate at the time when the partition is made. Seeing that a son in the undivided family is a co-owner, having acquired his right by birth, there is no more reason for fixing the date of the death of the father as the period at which shares should be ascertained than in fixing the date of a son's death as that period; and if shares are not ascertained until the period of distribution, if until the time no one can declare he has any share in the common property, it accounts for the circumstance that in none of the treatises on Hindu Law which have been brought to our notice is there any rule as what is to be done with the interest (it can hardly be called a share) in the common property which has been acquired by a member of the family who has not survived the period of distribution. On the other hand, there are express rules declaring that the partition is to be an equal partition subject to the qualification that those who take by representation take only the share which he whom they represent would have taken, had he survived partition. (8)

(1) Mit. 1-V-2; Daya Kram Sangrah (115) F. B.
1-1-8; (3) *Debi Prasad v Thakur Dial*, 1 A. 105
(2) *Debi Pershad v. Thakur Dial*, 1 A. 105 (118) F. B.

2066. Dayabhag family different.—This is, however, the view of the orthodox school, the survival of an ancient institution in which individual, as distinguished from the corporate rights are totally ignored. The Dayabhag admits the right of widows and the daughter, the mother and the paternal grandmother "under express texts." (1) And as will be seen in the sequel, although the Dayabhag places in the forefront the doctrine of spiritual efficacy, it does not subscribe to the orthodox rules of survivorship but rather treats the co-parcener in a joint family as holding his interest in *quasi* severalty which on his death passes to his heirs by descent and not by survivorship. "In most cases propinquity, spiritual efficacy and natural love and affection run in the same lines and no difficulty arises, but whenever they run in different lines Jimut Vahan was compelled to ignore spiritual efficacy and had recourse to other principles or express texts." (2) This is a subject for examination under another head. (3) For the present all that need be stated is that the Dayabhag does not recognize succession by survivorship which is a doctrine peculiar to the Mitakshara

223. Where the deceased was at his death the sole co-parcener, his estate devolves upon his heirs in the same manner as if it were his separate property.

When Co-parcenary property devolves on heirs.

2067 Analogous Law.—The right of survivorship postulates the existence of co-parceners. If therefore, the deceased was the sole surviving co-parcener, the co-parcenary ceases with his death and the persons who take his estate are his natural heirs. "By the nature of the case the joint family must commence and also must end, when it does end, in an individual who holds the property in a separate condition. If this individual dies without becoming the root of a joint family, the Mitakshara law gives an interim enjoyment of the property to his female representatives, when there are any, and then transfers it to a collateral heir as the origin of a new joint family." (4)

(1) Dayabhag XI VI-11.

(2) *Akshoy v. Haridas*, 35 C. 721 (726)

(3) See Chapter on "Dayabhag Inheritance" post.

(4) *Ram Narain v. Pertum Singh*, 20 W. R. 189 (192); *Nallatambi v. Mukunda*, 8. M. H. C. R. 455; *Saminadha v. Thangakani*, 19 M. 70 (72).

CHAPTER XXI.

MITAKSHARA INHERITANCE.

2068. Topical Introduction.—The devolution of property of a Hindu dying intestate may be by inheritance, succession, or survivorship, according to the nature of his property. If the property was his separate or self-acquired property then it passes to his heirs by inheritance—a term derived from the Roman *heres*. The distinction between inheritance and co-parcenership is that in the case of inheritance property devolves on death, while it survives in the case of co-parcenership; on inheritance, new rights are acquired, on survivorship the enjoyment of existing rights is increased by the removal of one from the body of co-sharers. (1) As Vignyaneshwar says, “The term ‘heritage’ signifies that wealth which becomes the property of another solely by relation to the owner. The wealth of the father or of the paternal grandfather becomes the property of his sons or grandsons, by the right of their being sons or grandsons. The property devolves on parents (or uncles), brothers, and the rest, upon the demise of the owner, if there be no male issue in the right of their being his uncles or brothers. The same holds good in respect of their sons or other (descendants).” (2)

“Therefore it is a settled point that property in the paternal or ancestral estate is by birth and not by demise of the last owner” (3) But under the Dayabhag family with the father as the head, the other co-parceners have no vested rights. Their rights do indeed arise on birth, and they are alienable and devisable but they lack the cardinal incident of forcing a partition. While then under the Mitakshara system the rights of all co-parceners are co-ordinate, those of the members under the Dayabhag are contingent and in the nature of *spes successionis* though they are alienable.

2069. The two systems differ radically on the subject of inheritance though the difference here lies in the process of reasoning rather than in the result. The Mitakshara selects the heirs upon the rational basis of propinquity, but the Dayabhag selects them not so much upon their propinquity as upon the efficacy of their obsequial offerings to the manes of the deceased. But when the Mitakshara professes to consult propinquity it dissembles, since its conception of heirship is equally tinged with an under-current of religious thought; and while the Dayabhag places it in the forefront, it equally dissembles for its idea of heirship is equally tinged with the under-current of affinity and its consequent natural affection. In both systems women enter with apologies. But their number and rights are limited, though curiously the Dayabhag with the more conservative ideal of spiritual benefit admits the nearest females which the Mitakshara excludes. But both systems are equally defective and the courts had to struggle for a more rational construction in order to rectify their glaring defects. Take for instance the case of the daughter and the sister. The

(1) *Ghosal v. Ghosal*, 31 B. 25 (80); *Devi Prasad v. Thakur Dayal*, 1 A. 105 F. B.

(2) Mit. 1.1 2, 8.

(3) Mit. 1.1 27.

former is directly admitted by the Dayabhag in the list of heirs but the latter has no place in the system. In Bombay the court had however to assign her a place in response to insistent usage. But usage is naturally of slow growth and it still keeps out the sister outside the Mayukh law. There are other inequalities and differences far too numerous to be noticed here. They will be found set out in the sequel.

2070. Both the Mitakshara and the Dayabhag start with designating certain nearest relations as heirs of the deceased. They constitute what the Mitakshara calls the compact series of heirs and are given below.

Mitakshara.

Dayabhag.

- | | |
|---------------------|---------------------------------|
| (1) Son. | (1) — (6) As in the Mitakshara. |
| (2) Grandson. | |
| (3) Great-grandson. | |
| (4) Widow. | |
| (5) Daughter. | |
| (6) Daughter's son. | |
| (7) The father. | (7) The mother. |
| (8) The mother. | (8) The father. |

2071. After these heirs both systems generally declare that the inheritance shall fall on the nearest *Sapinda*. The whole Hindu Law of inheritance may be said to be centred in this single word. What is then a Sapinda? Unfortunately it is the one word upon the import of which the two systems differ. The word sapinda comes from two Sanskrit words, *Sah* meaning 'with', and *Pinda*, 'a ball or body.'

2072. The Dayabhag accepts the first and the Mitakshara, the second as the real meaning. According to the latter a *Sapinda* is a relation who is of the same body or between whom and the deceased there are the largest number of common particles of the same body. As such the son, possessing as he does the largest number of particles of his father's body, is therefore his next heir. But the Dayabhag admits the conclusion, though not the reason. According to it, the son is such an heir because he and his father are allied by the funeral ceremony of "*Pinda Kram*." This is not clear to the unsophisticated student of law unversed in the religious law of the Hindus.

2073. As has been pointed out in the General Introduction (§ 5) the Hindu law of inheritance is an offshoot of those mysterious religious rites and dogmas with which the ancient scripture of all patriarchal people teem. They begin with an assumption that life is permanent and outlives the body after decay and as life requires for its sustenance material pabulum, its continuance must depend upon its constant supply even after life to all appearances has vanished. In other words when a man dies his body decays but his spirit survives the body with all its earthly longings and cravings. After death the spirit yearns for the food and drink to which it had become accustomed in its earthly sojourn. Some provision had to be made for its nutrition after death. What is more natural than that he who inherits worldly wealth must also provide for the nutrition of the departed soul. The priests who are the vice-regents of god know what it wants. What more natural than that the rice and roots upon which the man lived while in life should be dedicated to his soul after his death. He who provides them to the vanished soul must take his heritage. And as the son is tied to him by the bond of affection, he is most likely continue to perform

these *post obit* offices to prevent the departed soul wandering about in the vacant void restless from hunger. As fire is the mouth of the gods these ethereal bodies require their food to be conveyed through that channel. It is the genesis of sacrifice.

2074. The sacrifice ordained for the dead was called a *Shradh*. It was to be performed in the dark half of every lunar month. The heir must roll boiled rice with butter and consign them to the fire in the name of the person whom he desires it to reach. It will go to him. This rolled rice of the size of a billiard ball—miscalled a cake, is the offering of the living to the dead. If the son is alive he must offer it. If he is dead some other relation, must perform that pious office. In the remote patriarchal age its order became soon settled. It is needless to add that all agreed who were the nearest heirs. Hence so far the two systems agree. But as the line of heirs became in time enlarged, other rules had to be invented to regulate succession. The one kept up the fiction of the spiritual repast, the other boldly addressed itself to the natural law of affinity. But as stated before neither affinity nor the religious thought was wholly eliminated from the two systems. They acted and re-acted upon each other till they became crystallized by a declaration of the Mahomedan conquerors and afterwards by the British that the personal law of the Hindu shall regulate their succession. At the time neither system had been fully developed. New ideas were creeping in and leavening the inert mass of Shastric ritual. But the decadence of religion brought about by the levelling influence of the western culture left the religion in a state of neglect while the law which was dependent upon it had to be developed and adopted to the rapidly changing social environment. The very unsatisfactory system of having to find the new law in the old age is responsible for the conflicting decisions of the Courts on almost every point. What is now required is a secularization of Hindu Law which alone will ensure its development.

2075. As it is, the tests by which the true heir are known are rapidly vanishing from the daily observance of the people. Mr. Sarkar observes that there is scarcely a Hindu nowadays who performs the Parvan Shradh and that "hence the conferring of spiritual benefit on ancestors by presenting *pindas* to them in the Parvan Shradh is a myth in the majority of instances." (1) And yet this is the *raison d'être* of inheritance.

2076. Apart from the different standpoints from which the two systems view the claims of heirs, the material differences between them may be thus summarized:—

(1) Both the systems recognize the claims of the nearest heirs which they designate as entitled to the heritage as such.

(2) In default of these heirs, the order of succession in the two systems differs, though they both quote and profess to follow Manu's aphorism that to the nearest Sapinda the inheritance next belongs. They, however, differ on the meaning of the word *Sapinda*. The Mitakshara takes it to comprise only agnation up to the sixth degree, while the Dayabhag limits it to relations up to the 3rd degree but includes therein both the agnates and cognates, the result being that cognatic relations whom the Mitakshara relegates after all agnates, take with the sapindas—otherwise the Sakulyas and Samanodaks being agnatic relations from the fourth to the 14th degree exclude the cognates in both

(1) Sarkar's H. L. (8rd Ed.) 801.

systems. After the Samanodaks, the Bandhus of the Mitakshara walk in, but the Dayablag is silent as to the claims of its cognate sapindas from the fourth to the sixth degree. But it is apprehended that in this respect the Dayablag being silent, the Mitakshara rule would apply.

2077. The law of inheritance of all nations is intended to ensure passage of the soul of a deceased to those nearest and dearest to him. Both the Christian and the Mahomedan laws of succession recognize the claims of wife and children but the Hindu Law of succession placed the male issue before the wife and as a sharer she has no place except at a partition when she is assigned a share in lieu of her right to maintenance. In the matter of women's rights Bombay stands ahead of Madras and Bengal, while the orthodox schools are very sparing of their claim.

2078. Even as regards the succession of males there is a sharp cleavage between the Dayablag and the Mitakshara schools. Under the former all property whether co-parcenary or separate is heritable, while under the Mitakshara inheritance is not possible in respect of joint property which on the death of a member survives to the other members. This incident it continues to retain even on partition which merely alters the mode of its enjoyment but does not destroy its essential incident.

In the ensuing chapters this is made apparent by treating of the succession of joint property in a separate chapter.

2079. The conflicting claims of remote heirs have not been all yet settled by judicial decisions but the leading principles regulating their precedence have become well settled; and the courts recognize the force of *stare decisis* as essentially applicable to the law of property.

2080. Succession is a generic term and includes devolution of a person's property whether by survivorship, devise or inheritance. Strictly speaking, succession should be confined only to the latter modes of devolution, since the right by survivorship arises on birth and not upon the death of any of the co-parceners. Thus if *A, B* and *C* be three co-parceners, they all have a third share in the joint property. If *A* dies, the interest of *B* and *C* is enlarged by reason of their survivorship; but it would not be correct to say that *B* and *C* have succeeded to *A*, though in popular parlance that is how the enlargement of their interest is described. (1)

2081. Inheritance, is however a term of more certain import and is used only to denote devolution of the separate or self-acquired property of one on another as his heir. Such devolution may be by will, or by law. In either case the successor is the heir of the deceased to whom he has succeeded. But if the devise was to a person who was not his legal heir, the devisee is not in strictness even his heir, which term is limited to designate a person who takes by reason of his relationship to the deceased recognized by law.

2082. Using the terms succession and heir in their loose sense there are three modes in which the property of one passes to another on his death. *First* by survivorship; *secondly*, by will; and *thirdly* by the direction of law.

2083. The subject of co-parcenary rights and their devolution has already been examined in the previous chapter. (2) So is also the subject of wills. (3) This

(1) *Ghosal v. Ghosal*, 81 B. 25.

(2) Ch. VIII.

(3) Ch. XIII.

chapter deals only with the devolution of property by inheritance, that is to say the succession to self-acquired or separate property by the direction of law.

224. (1) "Propositus" means the person from whom a descent is traced.

(2) "Last full owner" means one who held the property absolutely at the time of his death.

2084. Analogous Law.—The last full owner has reference not merely to the nature of the property possessed by a person at the time of his death but also to the rights possessed by him. For instance, the Bengal father possesses absolute powers of disposal over co-parcenary property during his life-time. He is the "last full owner" within the meaning of this clause. But since under the Mitakshara full ownership is only possible in respect of property (i) which is the self-acquisition of a member of a co-parcenary; or (ii) which belonged to the sole surviving co-parcener; or (iii) which was possessed by a separated member of his family, the term must be limited to designate such property.

225. "Sapindas" means blood-relations of the propositus to the seventh degree on the father's side and fifth on the side of the mother reckoned from and inclusive of the deceased. Sapindas may be Gotraj or Bhinna gotras.

Synopsis.

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| (1) <i>Definition of Sapinda</i> (2088). | (4) <i>Mitakshara definition</i> (2089, 2092-2096). |
| (2) <i>Texts on the subject</i> (2085-2086). | |
| (3) <i>Twofold interpretation of Sapinda</i> (2088). | (5) <i>Classification of Sapindas</i> (2091). |
| | (6) <i>Mode of computation</i> (2097). |

2085. Analogous Law.—The following texts bear on the subject of *Sapinda* relationship:—

Manu:—(After specifying the nearer relations as heirs continues) 7. To the nearest Sapinda the inheritance next belongs ⁽¹⁾ The relation of the Sapinda ceases with the seventh person. ⁽²⁾

Yajnavalkya.—Let him marry an auspicious woman, one not previously married or deflowered; beautiful; unrelated to him as a Sapinda; . . . and who is beyond the fifth and seventh degree on the mother's side and the father's side respectively. ⁽³⁾

Mitakshara : (commenting on the last) See quotation § 480 ante.

2086. According to the Mitakshara definition, a 'sapinda' means and includes:—

(1) Any descendant within the 7th degree reckoned from and inclusive of himself, that is, any of his first six descendants.

(2) Any ascendant within the 7th degree reckoned from and inclusive of himself in the paternal line, that is, any of his first six ascendants in his paternal line.

(3) Any collateral descendant within the seventh degree reckoned from and inclusive of the six paternal ascendants, that is, any of the first descendants of any of the first six ascendants in the paternal line.

(4) Any ascendant within the fifth degree reckoned from and inclusive of himself in the maternal line, that is, any of the four maternal ancestors, namely the mother, the father, her grandfather and the rest: and

(1) Manu IX.187.

(2) *Ib.* V.60.

(3) Yaj. 1.58.

(5) Any collateral descendants within the fifth degree reckoned from and inclusive of any of the three maternal ancestors, beginning with the mother's father that is, any of the first four descendants of any of the three maternal ancestors beginning with the mother's father. (1)

2087. The whole Hindu Law of Inheritance is centred in a single word—Sapindas—who are a man's heirs. That word has varied in meaning as the law of inheritance developed. In the earlier stages of society when religion was all in all, religious efficacy was, it is said, the sole test and preferred to propinquity, only those persons being selected as heirs who were most capable of exercising those religious rites which were considered to be beneficial to the deceased. (2) But though this is how the ancient Hindu scriptures treat the question of heirship, it is probable that propinquity was even then the real test and though religion made the offering of oblations as an antecedent prelude to succession to insure their due performance, the two must have at first merely denoted the sequence, though in time they developed into *post hoc ergo propter hoc*. The other view that in early times the right of inheritance was dependent on the right to participate in the offerings of funeral oblations (3) must be referred to an intermediate stage when that test did not conflict with propinquity and when an undue emphasis laid on the performance of obsequies, could not divert succession from the nearest natural heirs. And in fact in the case of near succession the right depends upon consanguinity under both the systems. It is only in the case of remoter relations that the Dayabhag falls back on the principle of spiritual benefit (4) while Mitakshara consistently follows throughout the rule of propinquity. (5)

At any rate the question of moment to the practical student of law is not to trace the genesis of the rule through its mazes of conflicting and contradictory texts but to examine its present operation on the law of inheritance.

2088. Sapinda. The word "Sapinda" (6) has already been explained before. (§§ 484—489) It is there pointed out that the word is used in a dual sense as signifying one relationship for marriage and another for the purpose of inheritance. The word denotes consanguinity. The term often occurs both in Apastamb and Gautam. But Jimut Vahan gives it a different turn holding that the term means those relations who are connected by funeral oblations (7) in accordance with the following text of Manu.

Manu:—The divine manes are always pleased with an oblation in empty glades on the banks of rivers and in solitary spots.

Having walked in order from east to south and thrown into the fire all the ingredients of his oblation let the sacrificer sprinkle water on the ground with his right hand. From the remainder of the clarified butter, after having formed three balls of rice, let him offer them with fixed attention in the same manner as the water, his face being turned to the south.

Then having offered these balls after due ceremonies and with an attentive mind (to the manes of his father, his paternal grandfather and great grandfather) let him wipe the same hand with the roots of the *kus grass* which he had before used, for the sake of his paternal

(1) *Babu Lal v. Nanku Ram*, 22 C. 399 (342) approved in *Ramchandra v. Vinayak*, 42 C. 384 (420) P. C. To the same effect *Umaid v. Udoi*, 6 C. 119 89 F. B.

(2) *Tagore v. Tagore*, 9 B. L. R. 377 (394) P. C.

(3) *Ramachandra v. Vinayek*, 42 C. 384 (405) P. C.

(4) *Nagendra v. Bonoy*, 80 C. 521

(5) *Suba Singh v. Saruforaz*, 19 A. 215 F. B.

(6) As to its meaning See § 484 *ante* and *Ramachandra v. Vinayek*, 42 C. 384 (404) P. C. The word may mean—*Sa* with, and *Pinda* 'body' or 'ball' i. e., related to the same body or through the funeral ball.

(7) *Omrit v. Luckhee*, 10 W. R. (F. B.) 76 (77).

ancestors in the 4th, 5th and 6th degrees, who are the partakers of the rice and clarified butter thus wiped off.

If his father be alive, let him offer the Shradh to his ancestors in three higher degrees. Should his father be dead, and his grandfather living, let him, in celebrating the name of his father (that is, in performing obsequies to him) celebrate also his paternal great great grandfather.

Before the obsequies to ancestors as far as the 6th degree, they must be performed to a Brahmin recently deceased; but the performer of them must in that case give the shradh without the ceremony to the gods, and offer only one round cake (and these obsequies for a single ancestor should be annually performed on the day of his death).

When afterwards the obsequies to ancestors as far as the 6th degree, including him, are performed according to law, then must the offering of cakes be made by the descendants in the manner before ordained for monthly ceremonies.

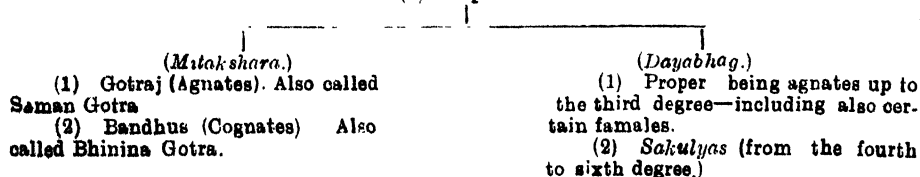
2089. It will be thus seen that Manu requires the offering of the funeral oblations by one to his six immediate ancestors in the male line, but he draws a line at the third ancestor. That is to say, while these are entitled to the honour of complete rice balls being offered to them, and their Shradh performed, the next three ascendants, that is the ancestor 4 to 6 degrees remote is only entitled to the offals, that is *lep* or the leavings collected after service to the first three. These three ancestors are also called the Sakulyas. But it is a distinction which is not kept up in the Mitakshara where the term Sapinda is used to denote both classes. Now since the Hindu rule of counting is to include the propositus it follows that the term Sapinda according to Manu means a male relation related up to the seventh degree. As Manu himself says:

Now the relation of the Sapindas, or men connected by the funeral cake, ceases with the seventh person, or in the sixth degree of ascent or descent, and that of the Samanodakas or those connected by an equal oblation of water, ends only, when their births and family names are no longer known. ⁽¹⁾

2090. It will be seen that Manu does not mention any *Sapinda* to the deceased through females. They however make their appearance first in Yajnavalkya's enunciations ⁽²⁾ commenting on which the Mitakshara limits that relationship to the fifth on the mother's and the 7th on the father's side. ⁽³⁾ The Privy Council have held that this definition though occurring in Acharkand (or the chapter on Rituals) and primarily intended to define the degree of prohibited consanguinity for marriage, applies equally to inheritance. ⁽⁴⁾

2091. Now sapindas may be either *Gotrajs* or *Bhinna gotra i. e.*, those who belong to the same *gotra* or those whose *gotras* are different. The first are called *Gotraj Sapindas* and the latter *Bhinna Gotra Sapindas*—otherwise called Bandhus. The former are agnatic while the latter cognatic kinsmen. Now since a sapinda beyond the third degree is also called a Sakulya, the various terms are thus related :—

(1) Sapinda.



(1) V—60.

(2) *Ramchandra v. Vinayak*, 42 C. 384 (406) P. C.; *Lalubhai v. Mankuverbai*, 2 B. 88 O. A 5 B. 110 F. C.

(3) 58 Achar Kand cited in *Ramchandra v. Vinayak* 42 C. 384 (408) P. C.

(4) *Ramchandra v. Vinayak*, 42 C. 384 (409) P. C.

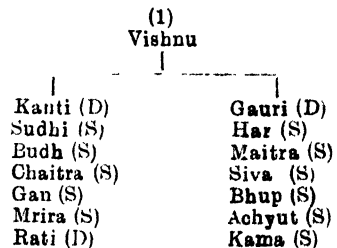
2092. The Hindu Law of inheritance is subdivided into two main systems, the Dayabhag and the Mitakshara. "By the general Hindu Law of inheritance, where the Mitakshara does not prevail, the heirs are generally selected because of their capability to exercise certain religious rites for the benefit of the deceased. Where, however, the Mitakshara governs each son immediately on his birth takes a share equal to his father in the ancestral immoveable estate." (1) In other words, while inheritance under the Mitakshara depends upon consanguinity that under the Dayabhag, in the case of remoter relations (2) depends upon spiritual efficacy.

2093. But both deduce these diametrically opposite conclusions from the same texts, ascribing to the term "Sapinda" the meaning which accords with their conclusions. That term, as already remarked is somewhat of a doubtful import since the word "pinda" has a dual meaning and fits in with either deduction. (3) In either view the material question is not what the word means, but rather what relations it comprises.

2094. After mentioning the nearest relations as heirs of a person by name, such as sons, grandsons, great-grandsons, father, brother and others (4) Manu adds "To the nearest Sapinda the inheritance next belongs," (5) or more literally translated, "Whoever is near to a sapinda, his property shall belong to him;" or in other words, the property of a person must be inherited by his nearest *Sapinda*, from which it follows that the deceased proprietor and his heir must be nearly related to each other as *Sapindas* that is to say (i) the two must be related to each other as sapindas, and (ii) the heir must be his nearest sapinda.

2095. This raises the question, what is a sapinda. The earliest law giver Manu defines it thus: "Now the relationship of the sapindas ceases with the seventh person." (6) This definition is meagre and does not state whether the seven degrees are to be counted both in the line of ascent or descent and whether it includes also collaterals. Vigyaneshwar's definition is more comprehensive, while its explanation in the Mitakshara lets in the following relations who are all sapindas: Son's son's son, the wife, nephew, and brother's wife. But this is by no means an exhaustive list, since Dharm Sindhu of Kashi-nath, the latest writer of the Benares school, gives the following illustrations:—

(1) Suppose Kanti and Gauri are two daughters of Vishnu. Kanti has a son Sudhi, Gauri has a son Har. Budh, Chaitra, Gan, Mrira are the son, grandson, great-grandson, great-great-grandson of Sudhi; and Maitra, Siva, Bhup and Achyut are the son, grandson, great-grandson, and great-great-grandson of Har. Rati is a daughter of Mrira and Kama is a son of Achyut. Both



(1) *Kali Pershed v Anand Roy*, 15 C. 471 (480) P.C.; *Umaid v. Uday*, 6 C. 119; *Babu Lal v Nanku Ram*, 22 C. 389.

(2) *Nagendra v. Beney*, 80 C. 521.

(3) *Lit. Skr. Sah.* with and *Pinda*-body or ball. According to the Dayabhag, Sapinda means persons allied by the funeral-ball, according to the Mitakshara, those possessing particles of the same body: See *Lallubhai*

v. Mankuwarbai, 2 B. 888 (429,480).

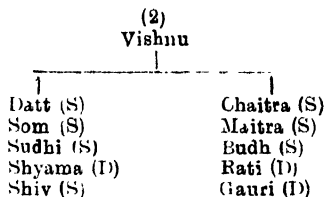
(4) *Manu IX-153,156*.

(5) *Ib.* 187; Sir W. Jones' paraphrase is inaccurate. He translates the passage thus: "To the nearest *Sapinda*, male or female, after him in the third degree, the inheritance next belongs..."

(6) *Manu V.60*.

of them are eighth in descent from the common paternal ancestor Vishnu ; Rati, and Kama, therefore, can marry each other.

(2) Suppose again, Datt, Som and Sudhi are the son, grandson and great-grandson, of a common ancestor Vishnu. Shyama and Rati are the daughters of Sudhi, and Budh respectively. Shiv is Shyama's son and Gauri is the daughter of Rati. Shiv and Gauri being both of them sixth in descent from the common maternal ancestor Vishnu are not within the prohibited degree of marriage, and may therefore, marry each other. In the mother's line, it should be remembered that the Sapinda relationship ceases after the fifth degree.



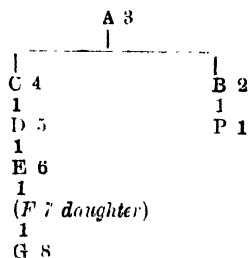
2096. Taking the Mitakshara view of Sapinda relationship, its limits would include 7 degrees, six in ascent and the same number in descent from the propositus in the male line and four degrees in the female line while as regards collaterals it extends to 6 degrees in descent from a common ancestor. Taking first the male line the following table gives a graphic enumeration of such relationship. Here *A-F* are the ascendants of *P* up to the seventh degree counting from himself. And similarly *A-F* are his descendants similarly counted. They are all his Sapindas. And so are 2-7 in each collateral line *i. e.*, 36 in all, are equally *P*'s sapindas.

	2	3	4	5	6	7
6— <i>F</i>	W	|	|	|	|	|
5— <i>E</i>	W					
4— <i>D</i>	W					
3— <i>C</i>	W					
2— <i>B</i>	W					
1— <i>A</i>	W	|	|	|	|	|
<i>P</i>		2	3	4	5	6
1— <i>a</i>						
2— <i>b</i>						
3— <i>c</i>						
4— <i>d</i>						
5— <i>e</i>						
6— <i>f</i>						

To ascertain the degree of relationship in each case it must be counted downwards from a common ancestor allowing a degree to each person.

Sapinda in the female line being called *bandhus*, will be set out under that head.

2097. Mode of Computation.—The correct mode of counting degrees is now settled to be from the propositus up to the common ancestor, and then down to the person whose relationship is to be determined (1) and not from the common ancestor from whom the lines separated, though it appears to be the mode of calculation adopted in the Mitakshara. Take for instance the following pedigree: According to the first mode of calculation *G* being more than five degrees from the common ancestor is not a bandhu of *P*, whereas if the degrees were counted from the common ancestor *A*, *G* being within 7 degrees of *A* would be his bandhu. Some writers (2) favoured this mode of computation which the Privy Council have now held to be erroneous.



226. "Gotraj Sapindas" are all agnates, that is, persons "Gotraj Sapinda" connected with the propositus by an unbroken line of male descent, up to the sixth degree. They are also called "Saman Gotra Sapindas."

(1) *Ramohandra v. Vinayak*, 42 C. 884 P. C. *Shib Sahai v. Saranwati*, 37 A. 583.

(2) *Ghose H. L.* (8rd Ed.) 147; *Sarcar H. L.* 74; *Mandlik* 410, 418.

2098. Analogous Law.—*Gotraj Sapindas* are contradistinguished from *Bhinna Gotra Sapindas* defined in the next section. In the catena of succession, the one must be exhausted before the other can come in. *Gotraj Sapindas* are only a species of *Sapindas* and as such cannot extend beyond the sixth degree of the *propositus*. In the Bombay presidency the wife is by usage accorded the *status* of becoming the *Gotraj Sapinda* of her husband. (1)

227. (1) “*Bhinna Gotra Sapindas*” are those related to the *propositus* through a female. They are also known as *bandhus*.

Bandhus defined

(2) *Bandhus* may be

(a) “*Atma Bandhus*,” that is relations of one’s own.

(b) “*Pitri Bandhus*” that is, the father’s *Bandhu*.

(c) “*Matri Bandhus*” that is the mother’s *Bandhu*.

Synopsis.

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| (1) <i>Who are Bhandhus</i> (2099) | (4) <i>Mutual sapindaship essential</i> |
| (2) <i>Historical retrospect</i> (210+, 2105) | (2109). |
| (3) <i>Mode of ascertaining relation-ship</i> (2109-2110). | (5) <i>What is a Bandhu</i> (2111 2112). |

2099. Analogous Law.—The following texts bear on the subject of this section.

Mitakshara :—1. On failure of gentiles the cognates are heirs. Cognates are of three kinds: related to the person himself, to his father or to his mother as is declared by the following text: “The sons of his own father’s sister, the sons of his own mother’s sister and the sons of his own maternal uncle must be considered as his own cognate kindred. The sons of his father’s paternal aunt and the sons of his father’s maternal uncle, must be deemed his father’s cognate kindred. The sons of his mother’s paternal aunt and the sons of his mother’s maternal uncle must be reckoned his mother’s cognate kindred.”

2 Here by reason of near affinity, the cognate kindred of the deceased himself are his successors in the first instance. On failure of them, his father’s cognate kindred or if there is none, his mother’s cognate kindred. This must be understood to be the order of succession here intended. (2)

2100. In this translation Colebrooke rendered “*Gotraj*” into “gentiles” and “*Bandhus*” into “cognates.” He also paraphrases the three classes under which *Vigyaneshwar* groups the technical *bandhus*; viz., the *Atma bandhus*, the *Pitri bandhus* and the *Matri bandhus* as “cognates related to the person himself, to his father, or to his mother.” (3) The Privy Council held that *Vijyaneshwar* was using the term “*Bandhu*” in a restricted and technical sense, as implying a relation belonging to a different family but united by the *Sapinda* relationship. In fact he expressly says so. (4)

This enumeration was held to be exhaustive. (5)

2101. The introduction of *Bandhus* in the *catena* of heirs is comparatively modern. *Manu* does not mention any oblations to the maternal ancestors and does not expressly mention *Bandhus* among the heirs. *Yajnavalkya* was the

(1) *Lallubhai v. Mankuvarbai*, 2 B 388 110 P C affirmed O A.; *Lallubhai v. Cassi Bai*, 5 B

(2) Mit. II-VI 1, 2.

(3) *Ramchandra v. Vinayek*, 42 C. 884 (416)

P. C.

(4) Ib p 416; *Yaj Ch.* II-V-3.

(5) *Ramchandra v. Vinayek* 42 C. 884 (417) P.C. explaining *Girdhari Lal v. Government*, 12 M. I. A. 448.

first to introduce Bandhus or distant kinsmen related to the deceased through females as heirs and he was also the first to mention the offering of a cake to maternal ancestors. Consequently it became necessary to allow those who could offer *Pinda* to inherit and thus let the Bandhus in. The cake offered to maternal ancestors was offered to three ascendants of the mother and no *lepa* was offered to higher ascendants and no water offerings. The right of inheritance was thus confined to five degrees counting the offerer, which is the limit allowed to persons claiming relationship through the mother. (1)

2102. In the course of time the affinity recognized by virtue of spiritual efficacy gave place to the rule of consanguinity but nevertheless the old theory still lingered and was still used to recognize remote connections.

2103. The text of this section is supported by a decision of the Privy Council (2) who have confirmed the view that the Sapinda relationship ceases in the male line after the 6th and in the female line after the 5th degree from the propositus.

The tripartite division of Bandhus as given in clause (2) is supported by the authority of Yajnavalkya and cannot be added to or extended. (3)

2104. The term "*Bandhu* or *Bandhava*" (4) connotes persons bound together by ties of affection. In the *Smritis* it is a term of uncertain import being used by Manu (5) Vas'ishth (6) Vishnu (7) and Yajnavalkya to mean agnatic relations. Of these Yajnavalkya uses it in no less than 17 places indiscriminately for relatives in general, for agnates, for cognates, and also as a synonym for friends. (8) He reserved the word "*Yoni Sam Bandha*" (9) for cognatic kinsmen. The term *Bandhu* was for the first time used in the Mitakshara to connote only cognate relations inferior both to the agnatic Sapindas and Samanodaks. (10) The term is now so used in legal treatises as meaning a cognate sapinda or a sapinda related through a female. The Mitakshara only mentions nine bandhus as such. Adding to them the daughter's son, as provided by a special text, the number of heritable bandhus according to the Mitakshara did not exceed 10 relations. The sister's son remained outside this list and he asserted his claim which, though at first rejected even by the Privy Council, (11) could not long be ignored.

2105. A new principle of exposition was discovered. It was held that the list of bandhus in the Mitakshara was merely illustrative and not exhaustive (12) and the sister's son found a place as a heritable bandhu. (13) This opened the way to a brother's daughter's son (14) a son of the sister's daughter, (15) a maternal uncle. (16) "The term Bandhu applies not only to the maternal kinsmen

(1) *Ramchandra v. Vinayak*, 42 C. 384 P.C.; *Umashankar v. Naqeswari*, (1919) Pat. 162 (180, 181).

(2) *Ramchandra v. Vinayak*, 42 C. 384 P.C.

(3) *Ib.*

(4) From *Sk-bandh*, to bind

(5) Manu, IX-158.

(6) Vishnu, XV.

(7) Vas'ishth, XVII.

(8) Yaj. I.82, 108, 113, 116, 141, 157, 158, 220, 340, II 188, 147, 152, 267, 288; III-11, 289, 294.

(9) *Lit Yoni* women and *Sambandha* related through.

(10) Mit. II VI 1.

(11) *Jawahir v. Kallassoo*, 1 W. R. 74; *Thakooram v. Mohunlall* 7 W. R. 25 P. C.

(12) *Gardharee Lal v. Government*, 12 M. I. A. 448 *Amrit v. Lukhee Narain*, 10 W. R. 764 F. B. *Muthusami v. Simambedu*, 19 M. 405 P. C.

(13) *Amrit v. Lukhee Narain*, 10 W. R. 76 F. B.

(14) *Durga v. Janaki*, 13 W. R. 381.

(15) *Umed Bahadur v. Udichand*, 6 C. 119 F. B.

(16) *Muthusami v. Simambedu*, 19 M. 405 P. C.

mentioned above, but also to those kinsmen who are related through females either of the paternal or the maternal line. The daughter's son, the sister's son, the father's sister's son, the brother's daughter's son, or the uncle's daughter's son, are all Bandhus of the paternal line. So in the maternal line, the mother's sister's son, maternal uncle's daughter's son and maternal grandfather's daughter's son are cognate sapindas of the deceased. All these persons belong to a different Gotra and are related by blood to the deceased. They are therefore his *bhinnu* Gotra Sapindas, or Sapindas bearing a different family name". (1)

2106. Professor Sarvadhikari deduces the following rules from the texts :—

(1) A Bandhu is a cognate Sapinda within four degrees counting (i) from the deceased himself in ascent or descent ; (ii) from any one of the four immediate ancestors of the deceased.

(2) The right of inheritance accrues to the bandhu if the late owner and the person claiming the heritable right were related as Sapindas to each other, either directly through themselves or through their mothers or fathers. In other words, a heritable bandhu is a cognate Sapinda within four degrees counting from

(1) The deceased in ascent or descent.

(2) Deceased's paternal ancestor within four degrees.

(3) Deceased's maternal ancestor within four degrees.

(4) Deceased's father's maternal ancestors within four degrees.

(5) Deceased's mother's maternal ancestor within four degrees.

Note.—The word "five" is to be substituted for "four" in the case of father's bandhus. If the deceased or his ancestor be related through the father's mother, then five degrees should be counted in both directions. Thus a daughter's daughter's grandson is related to the deceased or his paternal ancestor through the father's mother.

2107. Rule of Exclusion.—(1) The cognate descendant of each of these classes is excluded from inheritance when (i) the deceased, or (ii) the deceased's ancestor does not belong to

(a) His maternal grandfather's line.

(b) His father's line.

(c) His mother's line.

(2) The cognate ascendant of the deceased is excluded from inheritance when he does not belong to.

(a) The deceased's maternal grandfather's line.

(b) The deceased's father's line.

(c) The deceased's mother's line.

2108. But it has been held that these rules of exclusion are not warranted by the text. (2) One test formerly favoured (8) but now definitely abandoned (4)

(1) *Sar v. Inh* 686.

(2) *Uma Shankar v. Nageswari*, (1919) Pat. 162 (178) F. B.

(8) *Colebrooke's Mit.* 11-11-2, 4: *Amrit v. Lulhee Narain*, 10 W. R. 76 F. B.; *Ganesh v. Nil Kamal*, 22 W. R. 264; *Janki v. Nand Ram*, 11 A. 194 (202) F. B.; *Suba Singh v. Sarafraz*,

19 A. 215 F. B.; *Mohan Das v. Krishna Bai*, 5 B. 597; *Adilnaraia v. Mahabir*, (1918) 1 Pat. L. J. 324; *Harihar v. Jung Bahadur*, 84 I. C. 188.

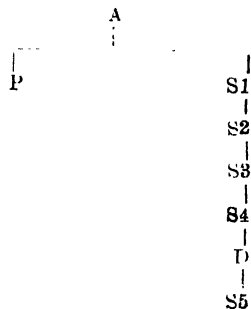
(4) *Lallubhai v. Mankutharhai*, 2 B. 212 (284) affirmed O. A. *Lallubhai v. Cassibai*, 5 B. 110 P. C.

was the application of the doctrine of religious efficacy though some courts still cling to the test as a ground of preference.

2109. Mutual Sapindaship.—It has already been pointed out before,

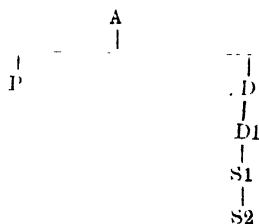
Cl (1)

that in order that one person should inherit to another by reason of his Sapinda relationship, it is not only necessary to show that he was the Sapinda of the deceased, but that the deceased was also his Sapinda. In other words, mutual Sapindaship is essential to create a heritable right. The fact that one person is the sapinda of another does not necessarily imply that the two are Sapindas of each other. Take for instance, the following tree. *P* is the propositus. *A* is his father; *S1*, *S4*, *S5* are his male descendants and *D* a female descendant. Now since the Sapinda relationship reaches to the 6th degree in the father's line and 4th degree in the mother's line it follows that *P* who is related to *S5* through his father *A*, and being in the 6th degree of *A* (the common ancestor of both) is the Sapinda of *S5*. But *S5* being related to *P* through his mother *D* is not his Sapinda because Sapinda relationship in the maternal line does not extend beyond the 4th degree i.e., *S2*; and in order to be *P*'s Sapinda *S5* should have been within 4 degrees of *A* the common ancestor of both *A* and *S5*.

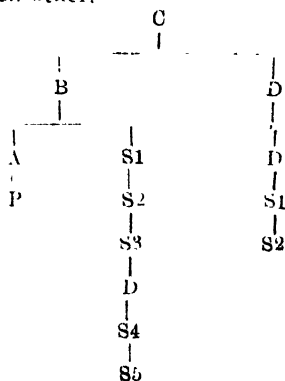


2110. Now two persons may be related as

Sapindas to each other either through themselves or through their mother and father. (1) Take for instance the following table for illustration. *P* is the propositus, *A* his father, *D* the daughter of *A*, *D1* the daughter of *D* whose son is *S1* whose son is *S2*. Now *P* and *S1* are Sapindas to each other, but not *P* and *S2* although *S2* is within six degrees from the common ancestor, yet *S2* not being the descendant of the line of maternal grandfather, either of *S2* or of his father *S1* or his mother, they are not Sapindas to each other; but *P* being a Sapinda of *S1*, through his mother, they are Sapindas of each other.



Now take another table. Here *A*, *B*, & *C*, are the paternal ancestors of the deceased *S1* and *S2* are the male descendants of *A*, *B*, and *C*. *D* represents the female descendants. *S4* & *S5* are Sapindas of *P* being both within 6 degrees of *A* the paternal ancestor of *P*. But *P* and *S4* are not Sapindas of each other because *A* a maternal ancestor of *S4* is not within 4 degrees from him. Similarly *P* and *S5* are not heritable Sapindas of each other, though *P* is said to be a Sapinda of *S5* "by frog's leap." This theory of the frog's leap is thus explained. *P* and *S4* of the third agnate descendant who is related through the mother



(1) *Umaid Bahadur v. Udichand*, 6 C. *Ramchandra v. Vinayek*, 42 C. 384 (120) P.C. 119 (128) F. B.; *Babulal v. Nanuk*, 22 C. 339.

D are not Sapindas, since the former is beyond the 5th degree. But *P* and *S5* are Sapindas of each other because *P* is within 6 degrees. Thus of two kinsmen who are descended in two different lines from the same ancestor, the fathers are not Sapindas of each other, while their sons are Sapindas of each other (1).

2111 What is a Bandhu.—A Bandhu has been elsewhere defined as a *Bhinna Gotra* Sapinda. It has already been seen what is connoted by the term "Sapinda" (§223) and Gotraj (§225). Those who are not Gotraj Sapindas are *Bhinna Gotraj* Sapindas or Bandhus. The question is who they are. It has been seen that the key word to all these relations is Sapinda and it is now settled to mean both for the purpose of marriage as for inheritance, all kinsmen related to a person up to the seventh degree in the father's side and the fifth degree in the mother's line. (2) As the latter must be necessarily Bandhus it follows that a Bandhu is a cognate relation of a person not more than five degrees remote. But this defines only the *genus* bandhu and not a heritable Bandhu who must be the nearest Sapinda, the nearness being established by connection by particles of one body (3) which implies mutuality in the Sapinda relationship or to put differently, since the property of a near Sapinda shall be that of a near Sapinda it is clear in order to be a heritable Bandhu of the propositus, a man must be so related to him that they are both Sapindas of each other. (4) This is the test of a heritable Bandhu. As the Privy Council observed. "The general conclusion to which a close examination of the authorities leads their lordships may be briefly stated as follows:—(a) that the sapinda relationship, on which the heritable right of collaterals is founded ceases in the case of the *Bhinna Gotra Sapindas* with the fifth degree from the common ancestor; (b) that in order to entitle a man to succeed to the inheritance of another, he must be so related to the latter that they are *Sapindas* of each other. (5)

2112. These two rules being settled, we have first to see what persons are related within five degrees of the propositus in the ascending or descending line.

Taking only the descendants it will be seen that there are 123 such relations as shown in the chart.

Similarly, there are 64 bandhus *ex parte paterna*; 51 bandhus *ex parte materna* in addition to which there are 36 father's bandhus and 17 mother's bandhus or altogether 168 bandhus. Taking the two together there are no less than 391 such cognate relations conforming to the first rule; but a great many of them are ineligible by virtue of the second rule as to mutuality already explained. (§§2103-2103).

Those that remain are heritable bandhus who are eligible as heirs but to whom the nearest bandhu will succeed. This is the subject of another rule.

228. "Samanodaks" are relations from the seventh degree to the fourteenth degree and even beyond, if agnatic relationship be clearly established.

(1) *Nirnai Sindhu* 286; *Dharm Sindhu* III—506.

(2) *Umaid Bahadur v. Udaichand*, 6 C. 119 (125) F. B. followed in *Babulal v. Nanhi*, 22 C. 399 (846); approved in *Ramchandra v. Vinayek*, 42 C. 884 (420) P. C. To the same effect *Lallubhai v. Manikvarbai*, 2 B. 888 affirmed O.A. *Lallubhai v. Cassibhai*,

5 B. 110 P. C.

(3) *Ib. Umaid Bahadur v. Udaichand*, 6 C. 119 (127) F. B.

(4) *Serv. Inh. P.* 698 followed in *Ramchandra v. Vinayek*, 42 C. 884 (420) P. C.

(5) *Ramchandra v. Vinayek*, 42 C. 884 (420) P. C.

Synopsis.

(1) *Texts on Samanodaka relationship* (2113).(2) *Bombay view* (2113).

2113. Analogous Law.—The following texts define the Samanodak (1) relationship :

Manu :—(The relation of) Samanodak or those connected by an equal libation of water ends only when their births and family names are no longer known. (2)

Mitakshara :—If there be none such *i. e.* (Sapindas) the succession devolves on kindred connected by libations of water ; and they must be understood to reach to the seventh degree beyond the kindred connected by funeral oblations of food, or as far as the limits of knowledge as to birth and name extend. Accordingly Vrihat Manu says “ The relation of the Sapindas, or kindred connected by the funeral oblation ceases with the seventh person (3) and that of Samanodaks or those connected by a common libation of water extends to the fourteenth degree : or as some affirm, it reaches, as far as the memory of birth and name extends. This is signified by *Gotra* or the relation of family name (4)

Following these texts, the Bombay High Court held the Samanodak relationship to extend even beyond the 14th degree if it can be clearly established. (5) It will be seen in the sequel that Samanodak take their place in the line of heirs though their place is perhaps uncertain.

229. (1) “Stridhan”, unless otherwise stated, means the woman’s property acquired by her otherwise than by inheritance or partition over which she possesses full power of disposal.

(2) But in Bombay property inherited by a woman otherwise than from her husband becomes her stridhan.

(3) For the purpose of succession, the Mayukh sub-divides stridhan into (a) technical or proper and (b) non-technical or improper.

(4) Technical or proper stridhan, means and includes (a) a woman’s marriage presents and (b) gifts and bequests made to her by the blood relations.

(5) Non-technical or improper stridhan means and includes (a) properties inherited by her from a male, (b) or received from a stranger, (c) her own earnings and (d) her maintenance grant.

The Mayukh lays down special rules of succession to stridhan technical and non-technical.

(1) Lit—*Saman* alike or common and *Udak* water—those allied by water—that is those participating in the same oblation of water. *Devkore v. Amritram*, 10 B. 379 (372).

(2) Manu, V—60.

(3) This is incorrect. The word is “पुरुष

Man

(4) Mit. II—VI—6 ; cited in *Devkore v. Amritram*, 10 B. 372 379, 380).

(5) *Devkore v. Amritram*, 10 B. 372 (380) contra *Mathura v. Kalka*, 9 O. C. 239.

Synopsis.

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|--|---|
| (1) <i>Texts on stridhanam</i> (2114). | (4) <i>Definition of stridhanam in modern Hindu Law</i> (2115). |
| (2) <i>Property given to a woman</i> (2115). | (5) <i>What is stridhanam</i> (2116-2118). |
| (3) <i>Mitakshara definition of stridhanam</i> (2115). | (6) <i>Law in Bombay</i> (2119). |

2114. Analogous Law.—The following texts support the rules stated in the Section.

Manu :—What was given before the nuptial fire, what was given on the bridal procession, what was given in token of love, and what was received from a brother, a mother, or a father, are considered as the six-fold separate property of a married woman. (1)

Katyayan :—What is given to a woman at the time of her marriage, near the nuptial fire, is celebrated by the wise as woman's property bestowed before the nuptial fire. That again which a woman receives while she is conducted from her father's house (to her husband's dwelling) is instanced as the property of a woman, under the name of gift presented in the bridal procession. Whatever has been given to her through affection by her mother-in-law or by her father-in-law or has been offered to her as a token of respect is denominated an affectionate present. That which is received by a married woman or by a maiden, in the house of her husband or of her father from her brother or from her parents is termed a kind gift. (2)

Yajnavalkya :—What was given to a woman by the father, the mother, the husband or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other separate acquisition is denominated a woman's property. (3)

Mitakshara :—(citing Manu) The enumeration of six sorts of woman's property by Manu is intended not as a restriction of a greater number, but as a denial of a less.

Ib—That which was given by the father, by the mother, by the husband, or by a brother; and that which was presented (to the bride) by the maternal uncles and the rest (as paternal uncles, maternal uncles etc.), at the time of the wedding before the nuptial fire, and a gift on a second marriage, or gratuity on account of supersession as will be subsequently explained ("To a woman whose husband married a second wife, let him give an equal sum as a compensation for the supersession. s. 84) and also property which she may have acquired by inheritance, purchase, partition, seizure or finding are denominated by Manu and the rest "woman's property" (4)

Dayabhag :—Over that which has been received by her from any other "but the family of her father, mother or husband or has been earned by her in the practice of a mechanical art (as spinning or weaving) her husband has dominion and full control. He has a right to take it, even though no distress exists. Hence though the goods be hers, they do not constitute woman's property; because she has not independent power over them. But in other descriptions of property excepting these two, the woman has the sole power of gift, sale or other alienation. (5).

Mayukh :—(6) (abstracted) Stridhan is of two kinds (i) technical and (ii) non-technical. Technical stridhan is the property expressly recognized as stridhan by the older sages, such as Katyayan, Manu and Yajnavalkya, that is (a) gifts from strangers at marriage called Yautak (7) and (b) gifts from relations made at any time called Ayautak. (8).

Non-technical *stridhan* comprises every other kind of property belonging to a woman and more particularly that mentioned in clause 4.

(1) Manu IX-164 cited in Mit. II-XI-4.

(2) Cited in Mit. II-XI-5.

(3) Yaj II-144.

(4) Mit. II-XI-4.

(5) Dayabhag IV-1-20, 21. IV-11-26 contains a long disquisition on the woman's stridhan explanatory of texts of Manu and

Katyayan .

(6) Contains an extended disquisition citing all texts, Mandlik pp 91-99.

(7) From Yuta—Yoked or joined together; Lat. Jugum a yoke. Dayabhag I-II-18, 14; Mayukh IV-X-17; Smṛiti Chandrika IX-III.

(8) That not "Yautak", [81.

2115. Property given to a woman.—Strictly speaking *stridhan* is that property of the woman over which she possesses absolute power of disposal. (1) As is stated in the *Dayabhag* "That alone is the *stridhan*, which she has power to give, sell or use independently of her husband's control." (2) The term was used in this sense by the Privy Council (3) who said: "There can be no distinction between different portions of a woman's *stridhan* or separate property. If she can dispose of part of it, she may dispose of the whole." (4) They then cited the following passage from Sir William Macnaghten's *Hindu Law* with evident approval: "In the *Mitakshara* whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure or finding, is denominated woman's property, but it does not constitute her *peculium*," (5) which alone, their Lordships held to deserve the name of *stridhan*. (6) But they recognize the distinction between *stridhan* in its wider sense as described in the texts and *stridhan* "in the narrow sense of that word indicating her separate property or *peculium* which passes on her death to her own heirs" as distinguished from "*Stridhan*" in the wider sense in which the word is sometimes used as indicating any property in which she may have some right of proprietorship." (7) "The six-fold enumeration of the sources of a woman's property as given by *Yajnavalkya* and *Manu*, corresponds with the technical or narrow signification of *stridhan* indicating property which is under her absolute control during life and on her death is descendible to her heirs. Do the same characteristics attach to a woman's property derived from the additional sources specified by *Vijñaneshwar*, viz., inheritance, partition, etc.? The words 'any other' with which *Yajnavalkya* concluded his enumeration are a translation of the word '*adi*' or '*adya*' which according to Mr. Mayne (*Hindu Law*, 7th Ed. p. 823) means 'and the like.' In that view, *Yajnavalkya* meant to limit his description of 'woman's property' or '*Stridhan*' to property acquired in any of the six modes he had just specified or in any other manner *eiusdem generis* with those modes. *Vijñaneshwar*'s additional enumeration goes beyond that. When read with *Yajnavalkya*'s description, it constitutes a practically complete statement of the means by which a woman can acquire proprietary rights. Dealing with this extended signification of the term "women's property" *Vijñaneshwar* says in paragraph 3 of the same section that it "conforms in its import with its etymology and is not technical." In paragraphs 2, 3 and 4, therefore, he is speaking of *stridhan* in its wider sense. The paragraphs 5, 6 and 7 *Vijñaneshwar* cites the description of 'woman's property' given by *Katyayan*, which does not expressly profess to be exhaustive, but which closely approximates in character to that given by *Yajnavalkya* and *Manu*, and does not include any of the heads (inheritance, partition etc.,) added to the list by *Vijñaneshwar* in paragraph 2. Then comes paragraph 8 which gives rise to the difficulty. It runs thus:

"A woman's property has been described. The author next propounds the distribution of it. 'Her kinsmen take it if she die without issue'."

When *Vijñaneshwar* says "a woman's property has been thus described" he may have been referring to the description given by his author

(1) *Debi Mangal v. Mahadeo*, 84 A. 234 P. C.

(2) *Dayabhag* IV-1-18 cited in *Phukar v. Ranjit*, 1 A. 661 (668).

(3) *Thakoor v. Baluk Ram*, 11 M. I. A. 189 (178, 174).

(4) *Ib.* pp. 178, 174.

(5) 1 *Hindu Law* 88; See Per Sir James

Colville in *Bhugwandeen v. Myna Baes*, 11 M. I. A. 487; and per Lord Robson in *Debi Mangal v. Mahadeo*, 84 A. 234 (241) P. C.

(6) *Thakoor v. Baluk Ram*, 11 M. I. A. 189 (174) to the same effect *Bhagpandeen v. Mynabae*, 11 M. I. A. 487 (510).

(7) *Debi Mangal v. Mahadeo*, 84 A. 234 (228) P. C.

and by Katyayan and have intended to confine Yajnavalkya's rule of devolution to Yajnavalkya's classification. His language, however, in paragraph 8 when read with what he says in paragraphs, 2, 3 and 4 is open to the meaning that a woman's property of whatsoever kind, descends always to her own heirs. It is difficult to adopt the latter construction in view of the undoubted fact that as Sir Arthur Wilson said in delivering the judgment of their Lordships' Board in *Shoo Shankar Lal v. Debi Sahai* ⁽¹⁾ "most of the old commentators recognize with regard to the property of a woman, whether called Stridhan or by any other name, that there may be room for difference in its line of descent according to the mode of its acquisition." ⁽²⁾ This case then settles the following points: (i) that the term stridhan has a dual meaning (ii) as meaning a woman's property generally and (iii) as limited only to such property over which she possesses by law an unfettered power of disposal and (iv) that the Mitakshara deals under the head "Woman's property" with both these classes of *stridhan*; but (v) their mode of devolution must be determined *not* by what they are called but by how they were acquired; (vi) Stridhan property must comprise only that property classified as such by Manu and Katyayan. All other property possessed by a woman is not her *stridhan* or peculium properly so called.

2116. What is stridhan.—This being then the test, in order to determine whether any property is a woman's *stridhan* or *peculium*, the question to inquire is not so much how it was acquired as what power of disposal she possesses over it. It is conceded that the following six kinds of property are undoubtedly her stridhan:

(1) Nuptial gifts (Katyayan 1-2).

(2) Gifts through affection made by the father-in-law, the mother-in-law and by the elders (Katyayan 3).

(3) Gifts by the father, ⁽⁸⁾ mother, brother ⁽⁴⁾ (Katyayan 3-6) the husband ⁽⁵⁾ or his relations. ⁽⁶⁾ It is equally conceded that this list is not exhaustive. Consequently it has been held that whatever a woman acquires by her own exertion ⁽⁷⁾ or by adverse possession ⁽⁸⁾ becomes her stridhan. Property absolutely gifted or devised to the wife becomes her stridhan if it was so intended. ⁽⁹⁾ So are the arrears of maintenance due to her. ⁽¹⁰⁾

2117. Not Stridhan.—But property acquired by inheritance is not her stridhan notwithstanding the contrary laid down by the Mitakshara ¹¹ it being immaterial whether the person to whom she inherits was male or female, her

(1) 25 A. 468 472 P. C.

(2) *Debi Mangal v. Mahadeo*, 34 A. 234 240 242 P. C.

(3) *Guru v. Nasir Das*, 11 W. R. 497; *Muthupudayan v. Ammani*, 21 M. 58.

(4) *Manu* IX 194; *Munira v. Furan*, 5 A. 810 F. B.

(5) *Rodha v. Bisheshur*, 6 N. W. P. H. C. R. 279; *Thakro v. Ganga*, 10 A. 157 P. C.

(6) *Surry Mohun v. Shonaton*, 1 C. 275.

(7) *Narmada v. Bhagwantrao*, 12 B. 505; *Subramanian v. Arunachellam*, 28 M. 1 F. B.

(8) *Kantur v. Ameri*, 32 A. 187; *Mohim Chunder v. Koshi*, 2 C. W. N. 161; *Moghli v. Laddi*, 13 I. C. 614.

(9) *Thakro v. Ganga*, 10 A. 197 P. C.

(10) *Court of Wards v. Mohesur*, 16 W. R. 76.

(11) *Debi Mangal v. Mahadeo*, 34 A. 234 238 P. C.; *Janakisetti v. Miriyala*, 32 M. 521; *Sengamalethammal v. Velayuda*, 8 M. F. C. R. 812; *Panchanand v. Lalshan*, 3 W. R. 140; *Janki Setty v. Miriyala*, 6 M. L. T. 196.

husband or any other relations ⁽¹⁾ or whether the property is moveable ⁽²⁾ or immoveable. A maiden daughter inheriting the stridhan of her mother does not acquire it as her own stridhan. ⁽³⁾

2118. The case is of course, the same when she inherits to her father. ⁽⁴⁾ So again, while nuptial gifts are stridhan, gifts made after marriage, such as ornaments made by the father to his daughter subsequent to her marriage are not her stridhan. ⁽⁵⁾ Savings from the income of a widow's life-estate are not her stridhan and if she has not disposed of them in her life they follow the estate. ⁽⁶⁾

2119. Stridhan in Bombay.—Women subject to the Mayukh are allowed larger rights over property inherited by them from any relation other than the husband. ⁽⁷⁾ Such property is their stridhan. ⁽⁸⁾ The Mayukh sub-divides stridhan property into technical and non-technical or rather stridhan proper and stridhan improper, the course of devolution being dependent upon whether it is stridhan of the one kind or of the other. ⁽⁹⁾

Course of inheritance cannot be altered. **230.** No person can alter the course of inheritance prescribed by law except to the extent permitted by it.

Illustrations.

- (a) The course of inheritance may be altered by will, since law allows it.
 (b) Heirs may waive or vary their shares since law allows it.

Synopsis.

- (1) *Law of inheritance cannot be altered by subject* (2120). (2) *Right to devise property* (2121).
 (3) *Limits of departure* (2122).

2120 Analogous Law.—A man cannot make his own law of inheritance. As Turner, L. J., said: "A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy."⁽¹⁾ Citing this Willes, J. said: "If . . . the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as for instance, if an estate were granted to a man and his eldest nephew and the eldest nephew of such eldest nephew and so forth for ever, to take as his heirs, to the exclusion of all

(1) *Debi Mangul v. Mohadeo*, 34 A 234
 P. C. *Sheo Shankar v. Debi Sahai*, 25 A 468
 P. C.; *Sheo Pertab v. Allahabad Bank*, 5 A. 476 P. C.; *Chotaylall v. Chunoolall*, 4 C. 741 P. C.; *Bhogwandeon v. Myra Bee*, 11 M. I. A. 497; *Sengamalaihammal v. Velapada*, 3 M. H. C. R. 312; *Virasangappa v. Rudrappa*, 19 M. 110; (Madras Law the same, *Sooryudu v. Hanumayya*, 32 M. 521; *Muthu v. Dora*, 8 I. A. 99 (rule applicable to Carnatic) contra *Sri Pal v. Surajbali*, 24 A. 67 (82) overruled by the contrary held by the Privy Council.

(2) *Chandan v. Ishri*, (1884) A.W.N. 67.

(3) *Sooryudu v. Hanumayya*, 32 M. 521; *Jankisetty v. Miriyala*, 6 M. L. T. 196.

(4) *Chotay Lal v. Chunoo*, 22 W. R. 496.

(5) *Gopal v. Ram Chandra*, 28 C 311 following *Jidu Nain v. Busunt*, 19 W. R. 204.

(6) *Ishri v. Hansbutti*, 10 C. 34; *Appa Rao v. Gopala*, 31 M. 321.

(7) *Hunsraj v. Keserbai* 6 Bom. L.R. 17.

(8) *Bhaskar v. Mahadev* 6 B.H.C. (O.C.) 1; *Hari v. Damodar*, 3 B. 17. *Babji v. Balaji*, 5 B. 600; *Gulappa v. Tayanna*, 11 B. 453, contra *Dalpat v. Bhagvan*, 9 B. 301 (303).

(9) *Manilal v. Rewa*, 17 B. 758; *Hunsraj v. Mughibai*, 7 Bom. L. R. 622, *Dayaldas v. Savuri Bai*, 34 B. 385.

(10) *Soorjeemoney v. Denbandoo*, 6 M. I. A. 555; followed in *Tagore v. Tagore*, 9 B.L.R. 377 (395, 396).

other heirs and without any of the persons so taking having the power to dispose of the estate during his life-time ; here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his life-time, because the giver had at least that intention. He could not take more because the language is inconsistent with his having any different inheritance from which that the gift attempts to confer and that estate of inheritance which it confers is void." (1)

2121. It is thus clear that a person cannot direct that his property shall follow a certain course of devolution at variance with his personal law. If he is dissatisfied with that law the only course open to him is to devise his estate or to abandon the law by becoming converted to another faith. So where two brothers entered into an agreement that their estate should only descend in the line of the brother having *auras* issue and should not be alienated from the line by the latter by adoption, the Privy Council held the agreement void as "entirely altering the law of descent." (2) So where the adopted son relinquished his share in his adopted father's estate in consideration of a sum of money his relinquishment was held to make him a separated son but had not the effect of distinguishing him so that when he father died he was entitled to recover the estate from his adoptive mother. As West, J., put it, "The heirship was a legal consequence of Trimbak's status with regard to Gobind casting on him on Gobind's death, the right correlative to his own obligation under the *Varakat* and which could not be got rid of by agreement." (3) The course of devolution prescribed by law cannot be altered by private agreement though no doubt Trimbak like a son by birth, could for adequate reasons have been disinherited. (4)

2122. Limits of departure.—But law only determines the heir. It cannot compel the heir to take what he refuses. He may for instance waive his right of succession in favour of another (5) or agree to take a different share to what he was legally entitled or relinquish it altogether. (6)

**Heir's right
personal.**

231. The heir succeeds in his own right and not in a right derived from another.

(2) On a property descending to a male heir, he becomes a fresh stock of descent and the property passes to his own heir, and not to the heir of any previous owner.

(3) But where property descends to a female heir, her heirs are those of the full owner except in Bombay where the female heir becomes a fresh stock of descent.

(1) *Tagore v. Tagore*, 9 B. L. R. 377 (395, 396.); *Tarakesswar v. Shoshi*, 3 C. 352 (958) P. C.

(2) *Suriya v. Raja of Pittapur*, 9 M. 499 (505) P. C.

(3) *Balkrishna v. Savitribai*, 3 B. 54 (57) following *Ruvee v. Rupshankar*, 2 Borr. 718 (729)

(4) *Id* p. 57

(5) *Balkrishna v. Savitri Bai*, 3 B 54 ;

Venkata v Venkata, 9 M. 499 P. C.; *Meharban v Shree Kowwar*, 1 Agra 105 ; *Daichand v. Soonder*, 2 Agra 178

(6) *Yaj* II 117 (58); *Mit* I II-11, *Dayabhag* XI VI II; *Lallubhai v. Mankuverbhai*, 2 B. 388 (419, 423, 438) affirmed O. A 5 B. 110 (118) P. C.; *Guru Govind v. Anandlal*, 18 W. R. (F. B. R.) 49 ; *Madhumala v. Lakshman*, 20 C. W. N. 627.

Illustrations.

(a) *A* and *B* are father and son. *B* predeceased *A* leaving him surviving his daughter *C*. On *A*'s death *C* does not inherit though her father *B* would have if he were then alive ⁽¹⁾.

(b) *A* has two sons *B* and *C* *B* predeceased leaving his widow *D*. On *A*'s death *C* inherits the whole estate. *D* takes nothing though her husband would have taken a moiety if he were alive at *A*'s death.

Synopsis.

- | | |
|---|---|
| (1) <i>Rights of heir personal</i> (2123) | (3) <i>Heir succeeds to last owner</i> (2125) |
| (2) <i>Rights of issue of disqualified person</i> (2124). | (4) <i>Exception in the case of females</i> (2126). |

2123. Analogous Law.—It is a principle of Hindu Law that the heir must succeed in his own right and not in the right of another person. So a nephew succeeds not as the heir of his father but as the direct heir of his uncle. ⁽²⁾ So the widow must take at once at her husband's death, or not at all. No such right can accrue to her as widow in consequence of the subsequent death of any one to whom her husband would have been heir if he had lived. ⁽³⁾ So while the sister is no heir under the Mitakshara, her son is a heritable Bandhu. The contrary was contended in a case in which Holloway, J., said: "Heritable blood is a foreign importation from a foreign law, and engrafting it upon the Hindu system can only lead to further confusion and inconsistency."⁽⁴⁾

2124. A person is not disqualified because the person through whom he is related was either disqualified or ineligible. So while a person may be himself disqualified by personal defect, such as congenital blindness, impotency and the like, to inherit still his son would not be disqualified to inherit by reason of the disqualification of his father. ⁽⁵⁾ But in that case the son would not inherit as the son of his father but by reason of his own relationship to the deceased. So the widow of the son ⁽⁶⁾ son's son ⁽⁷⁾ daughter's son ⁽⁸⁾ father ⁽⁹⁾ brother ⁽¹⁰⁾ cousin ⁽¹¹⁾ an uncle ⁽¹²⁾ have no right of inheritance though their husbands were in the line of heirs.

2125. From the fact that an heir must succeed in his own right it follows that the same rule must equally apply to his own heir. Cl. (2). He will succeed to the last owner and not to any previous owner; or to put it differently, the heir being the sole owner of the estate by virtue of inheritance his successor must be his own heir and not the heir of any one else.

(1) *Ananda v. Neevit*, 9 C. 815.

(2) *Braro v. Gource*, 15 W. R. 70.

(3) *Balamma v. Pullayya*, 18 M. 168 (170) *Pedamutti v. Appu*, 2 M.H.C.R. 117.

(4) *Rayanagaru v. Vencata*, 6 M. H. C. R. 278 (287).

(5) *Parashanani v. Deriontti*, 1 B. L. R. (A. C.) 117.

(6) *Aya Butti v. Raj Kishan*, 8 B. S. R. 28; *Raisahm v. Prankishen*, 3 B.S.R. 44; *Himulla v. Pudoo*, 4 B. S. R. 25; *Anandu v. Neevit*, 9 C. 815; *Anrit v. Manik*, 12 B. H. C. R. 79.

(7) *Gornee v. Oomruo*, 1 Agra. 149.

(8) *Veerayya v. Gangamma*, 36 M. 570.

(9) *Seethai v. Nachiar*, 31 M. 286 (291); *Ramkrumar v. Ummur*, 1 Borr. 415; *Bhyrobee v. Nublishen*, 6 B. S. R. 61.

(10) *Jymunee v. Ramjey*, 8 B. S. R. 385; *Jagdamba v. Secretary of State*, 16 C. 367; *Choora v. Busuntee*, 1 Agra. 174; *Peddammutti v. Appu*, 2 M. H. C. R. 117; *Thayammal v. Annamalai*, 19 M. 25.

(11) *Soorendramath v. Heeramonnee*, 12 M. I. A. 81.

(12) *Upendra v. Thanda*, 12 W. R. 268; *Gauri v. Bulko*, 3 A. 45.

2126. The only exception to this rule is the case of a female heir, upon whose death succession devolves not upon her own heirs but upon the heir of the last full owner as if he had died simultaneously with her. Until her death it is impossible to say who are the persons who might be entitled to succeed as heirs to her husband. "The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death." (1)

But even this rule is subject to an exception in favour of female heirs other than the widow, the mother and the daughter-in-law or widow of a Gotraj Sapinda in the Bombay Presidency who take by inheritance the same absolute estate as a male which on their death is descendible to the heirs of their *Stridhan*. But the case of women generally is regarded as exceptional.

Time of vesting

232. (1) On the death of the owner the estate vests immediately in the heir then living.

(2) The inheritance cannot be held in abeyance except when the heir is in the womb.

2127. Analogous Law.—Under Hindu Law birth relates back to the moment of conception. Consequently where a son was *in utero matris* at the moment of his father's death, the inheritance awaits his birth. If he is born alive the estate vests in him. If he was still born the estate vests in the last owner. (2) Of course the vesting of an estate may be postponed by the owner by will within the limits allowed by law. (3)

233. On the vesting of the inheritance the heir becomes entitled to all property which was vested in the deceased in title or in possession, though its enjoyment by the deceased may have been postponed.

2128. Analogous Law.—For the purpose of inheritance and representation the heir is the *alter ego* of the deceased being in law the continuation of his personality. All rights of the owner vest in him, as he becomes subject to all his liabilities other than those of a purely personal character which do not survive his death. In an old case a contention was raised that under the Hindu Law a widow could only take such property as had been reduced into possession during her husband's life-time. (4) But this contention was overruled by the Privy Council who said, "We do not think that there is anything in the nature of the disputed property which should except it from a general division." (5) In another case the same contention was dismissed

(1) *Katama Nachiar v. Raja of Shivganga*, 9 M. I. A. 548 (601) cited and followed in *Moniram v. Kerry*, 5 C. 776 (789, 790) P. C.

(2) *Koplasnath v. Gyanone*, (1864) W. R. 314; *Houra v. Chummun*, (1864) W. R. 840 (842).

(3) *Tagore v. Tagore*, 9 B. L. R. 377 (409, 410) P. C.; *Toolseydas v. Premji*, 18 B. 61 (69).

(4) *Hewun Persad v. Radha*, 4 M. I. A. 137 (16) citing for the appellant *Ayabutes v. Raj Krishen*, 1 F. Mac. 1; 2 W. Mac. 104; 8 B. S. D. A. 28; *Ram Koonwar v. Ummur*, 1 Borr. 415; *Pranshunker v. Prankconuar*, 1 Borr. 427.

(5) *Hewun Persad v. Radha*, 4 M. I. A. 187 (178).

with the following remarks "The Judge cites authorities to show that a widow does not represent her husband in respect of succession to an estate which would have devolved upon her husband, had he outlived its owner, but can only take as her husband's heir, such property as he possessed, or was entitled to when he died. The rule as stated cannot affect the present case, in which the interest of the adopted son at the time of his death was not merely the expectant interest of an heir, nor an interest contingent on his outliving the mother (as the Judge supposes) but a vested and absolute interest in the property postponed in enjoyment during the life-time of Wooma Dabea. Whatever may be the precise extent and meaning of the doctrine of the Hindu Law, that a widow succeeding as heir to her husband cannot recover property of which he was not possessed it is inapplicable when the interest is a vested interest under a will or deed, the actual enjoyment being postponed." (1) The question in such cases is not whether the deceased owner died possessed of any property, but rather whether the interest claimed was his "property" within the meaning of law. A mere contingency is not such property. On the other hand a vested interest though not reduced to possession is property and would pass to the heir. (2)

Divesting of Inheritance.

234. An estate once vested cannot be divested except in the following cases.

(a) where the estate has vested in the widow, upon whose adoption of a son her own estate is divested.

(b) by the posthumous son of a father who, if born when the inheritance opened, would have had a preferential claim to the estate.

Synopsis.

- (1) *Inheritance once vested not divested* (2129). (2) *Posthumous son* (2130).
 (3) *Exception in the case of adoption* (2131).

2129. Analogous Law.—It is a principle of Hindu Law that an estate once vested cannot be divested by any subsequent event, such as the birth of a preferential heir or co-heir (3). The rule is a natural corollary of that stated in *S. viz.*, that an inheritance can never be in abeyance. So where the rightful heir was excluded from succession by reason of his insanity his subsequent recovery did not entitle him to resume property from an heir who had succeeded to it in consequence of his disqualification when the succession opened. (4) So while unchastity of the wife is a disqualification for inheritance a widow in whom the estate has once vested on the death of her husband cannot be divested by reason of her subsequent unchastity. (5) On the same ground the subsequent conversion of the heir will not divest his estate even though it might be an effective impediment in the way of his taking it. (6) So where

(1) *Hurrosoondery v. Rajessuree*, 2 W. R. 821 (824).

(2) *Rewun Persad v. Radha*, 4 M. I. A. 187 (176) followed in *Hurrosoondery v. Rajessuree*, 2 W. R. 821 (824).

(3) *Narasimha v. Veerabhadra*, 17 M. 287 (292).

(4) *Viramitrodaya*, VIII-4; *Parashmani v.*

Dinanith, 1 B. L. R. (A. C.) 117; *Deo Kishen v. Budh Prakash*, 5 A. 509 F. B. *Kali Das v. Krishna*, 2 B. L. R. (F. B.) 108

(5) *Dall Singh v. Dini*, 32 A. 155; *Sitaran v. Lazman*, 8 N. L. R. 126.

(6) *Kuloda v. Haripada*, 40 C. 407 (416, 417); *Abraham v. Abraham*, 9 M. I. A. 195.

the heir became a *bairagi* it was held that it did not divest him of his inheritance. If he choose to retain his estate however morally wrong it might be, it created no legal disability which the courts could enforce (1).

2130. Exceptions.—The first exception has already been considered (S. 34), it being pointed out that by the adoption the

Exc. (1). widow does not divest any one's estate but her own which she is fully entitled to. But she cannot divest the interest of another if the inheritance has vested in him before her adoption. (§§ 662-671).

2131. The second exception is scarcely an exception at all, if regard is

Exc. (2) had to the view of law that birth relates back to the moment of conception. (2) (See S. 149).

235. The right of a person to succeed

Spes successionis.

to another is a mere contingency which cannot be transferred or devised or be the subject of a valid contract.

2132. Analogous Law.—The right of a person to succeed to another as his heir is unlike a co-parcenary right (3) a mere *spes successionis* wholly beyond his control, since it might be defeated any moment by a testamentary disposition by the owner (4).

2133. It is a mere chance which is not transferable(5) or devisable or capable of being even the subject of a contract. Three persons claiming to be the reversionary heirs of a Hindu widow and being uncertain as to whether she had an absolute or only a qualified estate agreed that she should hold the estate as an absolute owner, but that on her death they should all succeed to her. The widow alienated the property to the defendant whereupon the three claimants sued for cancellation of the alienation, but the defendant pleaded an estoppel and their agreement against them, but the Privy Council held that there was no estoppel and even assuming that the arrangement pleaded amounted to a contract between the plaintiff's predecessors and the defendant's alienor, such a contract was not binding on them. The plaintiff's predecessors were then but expectant heirs with a *spes successionis*. The plaintiffs claimed in their own right as heirs of the widow when the succession opened and it would be a novel proposition to hold that a person so claiming is bound by a contract made by every person through whom he traced his descent. (6)

Rights of women.

236. Women are excluded from inheritance unless their claim is supported by special texts or local usage.

(1) *Teebuck v. Shamacharan*, 1 W. R. 203.
Jagannath v. Bidyanand, 10 W. R. 172

(2) *Kalidas v. Krishna*, 2 B. L. R. 108
(121) (F. B.)

(3) S. 184: 1 *Gour's Law of Transfer* (4th
Ed. § 204 P. 137.

(4) *Laliteshwar v. Rameshwar*, 80 C. 481
(487).

(5) S. 6 (a) *Transfer of Property Act*.

(6) *Bahadur v. Mohar Singh*, 24 A. 94 (107,
108) P. C.

2134. Analogous Law.—The following texts bear on the subject of this section:—

Baudhayan :—A woman is not entitled to inherit for thus says the Veda—Females and persons deficient in the organ of senses are deemed incompetent to inherit. (1)

Dayabhag :—Accordingly (since they *i. e.*, females are excluded) Baudhayan, after premising "A woman is entitled 'proceeds' not to the heritage, for females and persons deficient in an organ of sense or member, are deemed incompetent to inherit" The construction of this passage is a 'woman is not entitled to heritage'. But the succession of the widow and certain others [*viz.*, the daughter, the mother and the paternal grandmother] takes effect under express texts, without any contradiction to this maxim. (2)

Viramitrodaya also interprets the vedic text to be limited only to those women whose right of inheritance has not been expressly declared. (3)

2135. It has already been seen before that in the patriarchal society women had no place except as chattels. Manu does not recognize the claim of Bandhus to succession. Yajnavalkya was the first to admit women in the line of heirs, and the Mitakshara further enlarged their rights by even making them fresh stocks of descent. But this view was not acceptable to the courts who have held the text as not in conformity with usage. It is now the accepted doctrine of all schools and held by all courts (4) that except when authorized by express texts or local usage women are as a rule incompetent to inherit. But the disqualification is purely personal and does not affect their sons. So while the sister (5) the uncle's daughter, brother's daughter, nephew's daughter, son's daughter (6) or a daughter's daughter (7) are excluded from inheritance, their sons inherit in their own right though not through their mothers.

The exceptional case of express texts and local usage will be considered in the sequel.

237. (1) The following defects disqualify an heir from inheritance.

Disqualified heirs.

- (a) Congenital blindness, deafness and dumbness.
- (b) Congenital want of any limb or organ.
- (c) Lunacy and idiocy though not congenital or incurable.
- (d) Sanious or ulcerous leprosy.

(1) This vedic text. Vidyaranaya (a commentator on the Taitriya Veda) interpreted in a different way, so that it would have no reference to inheritance *Ananda v. Narmit*, 9 C. 815 (823).

(2) *Dayabhag*-XI VI 11.

(3) *Virmitrodaya* (Golap Shastri) 175

(4) *Dayabhag* XI-VI-11: 1 Str. H. L. 146. *Guru Gobind v. Anand Lal*, 18 W. R. (F. B.) 49 (58); *Ananda v. Narmit*, 9 C. 815 (823, 824); *Jagdamba v. Secretary of State*, 16 C. 867. *Madhumala v. Lakshman*, 20 C. W. N. 627; *Lalubhai v. Mankuverbhai*, 2 B. 888 (418, 422, 428); O. A. Lallubhai v. Cassibhai, 5 B. 110 (118) P. C.; *Gauri v. Rukko*, 8 A. 45; *Jagat Narain v. Sheo Das* 5 A. 811 F. B. *Nanhi v. Gauri*, 28 A. 187; *Jagamath v.*

Champo, 1b 307 (contra *Bansidhar v. Ganes* 22 A. 338 dissented from); *Karuppi v. Sankaranarayanan*, 27 M. 800 (805); *Thakuria v. Girdhari*, 2 C. P. L. R. 178; *Lechan v. Babai*, 5 N. L. R. 161; *Ramji v. Nursha*, 7 N. L. R. 116 (112, 119).

(5) *Chelikani v. Venkata*, 6 M. H. C. R. 278 (288); but sisters inherit in Bombay. *Annaji v. Vasudev* 38 B. 438.

(6) *Nanhi v. Gauri Shankar*, 28 A. 187; *Koonul v. Seetakanth W. R.* (F. B.) 75; *Nallana v. Ponnal*, 14 M. 149

(7) *Ramphal v. Panmati*, 32 A. 640; *Ajudhia v. Ramsumer*, 31 A. 454; *Jagamath v. Champa*, 28 A. 307; *Ramappa v. Arumagath*, 17 M. 182.

(e) Impotency or other incurable disease.

(f) Unchastity in a female heir.

(2) No one is entitled to succeed to the property of a person to whose murder he has been an accessory.

(3) A widow re-marrying under the Hindu Widow's Remarriage Act 1856 forfeits her right to the estate of her husband and his lineal descendants.

Synopsis.

- | | |
|---|--|
| (1) <i>Disqualification for inheritance</i> (2136). | (7) <i>Impotency</i> (2143). |
| (2) <i>Texts on the subject</i> (2136). | (8) <i>Unchastity</i> (2145-2147). |
| (3) <i>Blindness, deafness and dumbness</i> (2138). | (9) <i>Remarriage</i> (2154). |
| (4) <i>Want of limb or organ</i> (2139). | (10) <i>Participation in crime</i> (2148-2151). |
| (5) <i>Lunacy or idiocy</i> (2140-2141). | (11) <i>Outcaste</i> (2152). |
| (6) <i>Leprosy</i> (2142). | (12) <i>Ascetics</i> (2153). |
| | (13) <i>Pleadings and proof regarding exclusion from inheritance</i> (2157). |

2136. Analogous Law.—The section is supported by the following texts:

Baudhayan :—See text cited under last section

Manu :—Eunuchs and outcastes, persons born blind or deaf, madmen, idiots, the dumb and such as have lost the use of a limb are excluded from a share of the heritage. (1)

Narad :—An enemy to his father, an outcaste, an impotent person and one who is addicted to vice takes no share of the inheritance even though they be legitimate : much less, if they be sons of the wife by an appointed kinsman. (2)

Yājñavalkya :—An impotent person, an outcaste and his issue, one lame, a madman, an idiot, a blindman, and a person afflicted with an incurable disease as well as others similarly disqualified must be maintained, excluding them however from participation. (3)

S. 2. of the Hindu Widow's Remarriage Act (XV of 1856) enacts as follows :—

All rights and interest which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property with no power of alienating the same, shall upon her re-marriage, cease and determine as if she has then died, and the next heirs of her deceased husband or other persons entitled to the property on her death shall thereupon succeed to the same.

2137. Disqualified heirs.—The several mental and physical defects disqualifying a person from inheritance are based upon the vedic text which declares "Females and persons deficient in the organ of senses are deemed incompetent to inherit." The reason is obvious. They took no hand in fighting and therefore took no hand in the estate (§§ 27-29).

(1) Manu, IX 201.

(2) Narad, XIII 21; cited in Mit. II-X 8.

(3) Mandlik, p. 223; Mitakshara devotes a whole chapter to the exposition of this text.

Mit. II-X 1-15; Mayukh, IV XI-4; Vivad Chintamani, 242; 3 Dig. Bk. V Ch. V. pl. 829.

2138. The old reason has disappeared but the old disability remains, though its propriety is doubted. ⁽¹⁾ *Cessante rationi cessat ipsa lex.*

Of these it has been held that in order to disqualify, the blindness, deafness and dumbness must be both congenital ⁽²⁾ and

Blindness, deafness and dumbness.

incurable. ⁽³⁾ The Mitakshara describes the blind as "destitute of the visual organ" ⁽⁴⁾ i.e. he must be stone

blind.

2139. Want of limb or organ.—This must be such as to amount to serious physical disability. So in the Dayabhag it is said that the disqualifying lameness must be such as "one cannot walk." ⁽⁵⁾ It must be also congenital. ⁽⁶⁾

Cl. (1) (b).

2140. Lunacy and idiocy.—The Mitakshara comments on the term "madman" as one affected by any of the various sorts of insanity, proceeding from air, bile or phlegm, from delirium or from planetary influence; and, an "idiot" as a person deprived of the internal faculty; meaning one incapable of discriminating right from wrong. ⁽⁷⁾ It has been held that these definitions harmonize with the English view of lunacy and idiocy ⁽⁸⁾ according to which idiocy is *non compos mentis* but does not imply utter mental darkness.

Cl. (1) (c).

2141. In order to disqualify, the lunacy or idiocy need not be congenital ⁽⁹⁾ or incurable. ⁽¹⁰⁾ But then it must at least be idiocy and not a mere weakness of intellect, dullness or stupidity. ⁽¹¹⁾ In one case a boy bordering on idiocy was allowed to transmit a heritable right to his widow. ⁽¹²⁾ In the case of co-parcenary property where the interest of a co-parcener vests immediately on his birth the case would be different. If he then suffered from no disability, the estate would vest in him and what vested in him then could not be divested by his subsequent disability. A lunatic though disqualified to inherit is not disqualified to possess property of which he is possessed. ⁽¹³⁾

2142. Leprosy.—In order to disqualify a person from inheritance the leprosy must be of a virulent form. ⁽¹⁴⁾ It is only the case of agonizing, sanious or ulcerous type of leprosy that creates the disqualification. ⁽¹⁵⁾ A person suffering from the

Cl. (1) (e).

(1) *Venkata v. Purushottam*, 6 M. 133; *Kayarahana v. Subbaraya*, 26 M. L. J. 251; 19 I. C. 690; *Subba v. Venkatarama*, 26 M. L. J. 208 23 I. C. 538.

(2) Dayabhag, V-V-9. The term 'born' is connected in construction with the words 'blind' and 'deaf' *Gunjeshwar v. Durga*, 45 C. 17 P. C.; *Bakubai v. Manchabai*, 2 B. H. C. R. 5; *Murnaji v. Porvatibai*, 1 B. 177; *Umabai v. Bhavu*, 1 B. 57; *Kulidas v. Krishna*, 11 W. R. 11; *Mohesh v. Chunder*, 28 W. R. 78.

(3) *Muddun Gopal v. Khikhinda*, 18 C. 841 (348) P. C.

(4) Mit II X 2.

(5) Dayabhag, V V 10.

(6) *Venkata v. Purushottam*, 26 M. 133; *C. F. Pattick v. Juggut*, 22 W. R. 348

(7) Mit. II-X 2.

(8) *Tirummal v. Ramaswami*, 1 M. H. C. R. 214 (215).

(9) *Braja Bhukan v. Bichan*, 14 W. R. 380; *Ram Sahye v. Laljee*, 8 C. 149 followed in *Ram Soonder v. Ram Sahye*, 18 C. 919

(922) *Purna Chandra v. Gopal*, 8 C. L. J. 369; *Ram Smoh v. Bhrit*, 38 A. 11; *contra Hot chand v. Manghanmal*, 8 S. L. R. 29 F. B.; 29 I. C. 42.

(10) *Dwarakanath v. Denobundoo*, 18 W. R. 305; *Deo Kishen v. Budh Prokash*, 5 A. 509.

(11) *Surti v. Naram Das*, 12 A. 580.

(12) *Anrit v. Manik* 12 B. H. C. R. 79, W. and B. H. L. Intr. p. 155.

(13) *Court of Wards v. Kupulmun*, 19 W. R. 164.

(14) *Bhugaban v. Ram Prapana*, 22 C. 843 (858) P. C.; *Janardhan v. Gopal*, 5 B. H. C. R. (A. C.) 145; *Ananta v. Ramabai*, 1 B. 554; *Rav Chud v. Ajobbai*, 9 Bom. L. R. 149 (1151); *Raju v. Ramasami*, 16 M. L. T. 254, 25 I. C. 63.

(15) *Lakhi v. Bhairab* 5 B. S. R. 315; *Bhubannuresec v. Gourie Dass*, 11 W. R. 585; *Janarahn v. Gopal* 5 B. H. C. R. (A. C.) 145; *Ananta v. Ramabai*, 1 B. 554; *Mulgritaya v. Parasakti*, 1 M. S. D. 289; *Rangayya v. Thankachalla*, 19 M. 74; *Kayarahana v. Subharaya*, 38 M. 260 (258).

anæsthetic form of leprosy, though considered incurable by medical men, is not disentitled to inherit. "Both the texts of the Hindu Law and the decided cases fully establish that it is only the agonizing, sanious or ulcerous type of leprosy that can be regarded as a ground of exclusion. It may be that it is only that type that was regarded as incurable by the Hindu writers. It is not safe to adopt the test whether the disease is curable or not. That is very much a matter of opinion, on which the medical profession itself might be divided. The test would moreover be an indefinite one for legal purposes as what is at one time regarded as curable may at other times be regarded as incurable. Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what has been accepted in both the texts and the decisions as the most satisfactory tests." (1) But however practical or convenient, this was not the shastric test, which seems to have regarded the disability as arising from permanent disability, which is clear from the concluding clause "other incurable disease" which seems to suggest that all other disabilities must be of a like nature.

2143. Impotency.—Procreation of a son being the one desirable purpose of life, impotency was naturally regarded as a serious disqualification and eunuchs were debarred of all civil rights. The impotency may of course be both congenital and incurable. In this and similar cases, the courts require the very clearest proof of the disease before decreeing disinherison. (2)

2144. Other incurable diseases.—The other incurable diseases must be point of seriousness *ejusdem generis*, that is to say, they must be of such a malignant type as to put the sufferer out of count as a member of society. (3) In one case the disease alleged was the "drying up of the bones", some kind of atrophy but the plea failed for want of cogent evidence. (4) It has been held the disqualifying disease must be beyond the skill of medical science. Dropsy as such is not an incurable disease, nor is so a nasal tumour. (5)

2145. Unchastity.—The following texts bear on the subject of unchastity as a ground for exclusion.

Yridhamanu :—The widow of a childless man keeping unsullied her husband's bed and persevering in religious observances shall present his funeral oblation and obtain his entire share (6)

Katsyayn :—Let the childless widow keeping unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the property until her death.

2146. Other texts letting in other females do not refer to their chastity, which only occurs in the case of the widow. It is consequently held that it is a condition applicable only to the widow and not to all female heirs. (7) But the

(1) *Kayavohana v. Subbaraya*, 38 M. 250 (255); *Ranchod v. Ajoobai*, 9 Bom. L. R. 1149 (1151).

(2) *Issur Chunder v. Ranee*, 2 W. R. 125 (126); *Nullit v. Bagola*, 21 W. R. 249.

(3) *Murli v. Jai Singh*, 5 A. I. J. 115.

(4) *Issur Chunder v. Ranee*, 2 W. R. 125 (126).

(5) *Subba v. Venkataramu*, 26 M. L. J. 208; 23 I. C. 528.

(6) Cited in Mit. II 1-6, 18.

(7) *Advyaya v. Rudrava*, 4 B. 104; *Kojiyadu v. Lakshmi*, 5 M. 149; *Angammal v. Venkata*, 26 M. 509; *Vedammal v. Vedannayaga*, 31 M. 100 (109); *Ganga v. Ghasita*, 1 A. 46; *Baldeo v. Mathura*, 38 A. 702.

contrary has been held in Bengal (1) on the authority of Raghunandan "a high authority in the Bengal school" which the Madras court refused to follow. (2) But in Bombay, the Bengal view was supported on the ground that since unchastity is either a vice or results in excommunication the woman is incompetent to inherit in any and every capacity. (3)

2147. Unchastity does not dissolve the marital tie (4) but is a disqualification for the wife's succession to her husband (5) unless it was condoned by him. (6) Unchastity does not, however, debar a woman from inheriting the *stridhan* property of her female relatives. (7) According to the Bengal school unchastity is a ground for disinheriting a daughter (8) but the disqualification is stated to be limited to the widow, being inapplicable to other female relations. *e.g.*, the mother. (9) But the Privy Council in one case said: "It seems clear, however, that though an unchaste daughter is excluded from inheriting her father's estate, or an unchaste mother that of her son, it is not by virtue of either of the above mentioned texts of Vrihat Manu or Katyayan." (10)

2148. Murderous heir.—On the subject of other grounds for exclusion, the Mitakshara discourses as follows:—

Mitakshara.—Under the term "others" are comprehended one who has entered into an order of devotion, an enemy to his father, a sinner in an inferior degree...Narad also declares "An enemy to his father, an outcaste, an impotent person and one who is addicted to vice, takes no share of the inheritance even though they be legitimate much less if they be sons of the wife by an appointed kinsmen." (11)

2149. Whatever may be the literal value of these virtuous precepts, it has been held that the precept is not altogether destitute of legal value. In one case the son was sought to be excluded on the ground that he was extravagant, disobedient and rebellious, gambled and had prostitutes in his keeping; whereupon the court said: "We observe that the evidence given of the plaintiff's gambling and licentious propensities is of a vague and general character and not such as would allow us to conclude that he has disqualified himself by "addiction to vice" for the performance of obsequies and such like acts of religion. In like manner we observe that, although he is shown to have quarrelled with his father, and on the occasion referred to by the witnesses to have forgotten himself so far as to have struck him, the evidence would not pronounce him a professed enemy of his father. The evidence does not disclose anything like habitual maltreatment or active and malignant hostility. We think, therefore, that the texts quoted by the Subordinate Judge, which are

(1) *Ramanath v. Durga*, 4 C. 550; *Ramananda v. Raikishori*, 22 C. 847 (854); *Sundari v. Pitambari*, 82 C. 871

(2) *Vedammal v. Vedanayaga*, 31 M. 100 (110).

(3) *Gangu v. Chandrabhaga*, 82 B. 275 (294.)

(4) *Bisheshar v. Mata*, (1870) N. W. P. H. C. B. 800; *Gunga v. Ghasita*, 1 A. 46 F. B.; *Narayan v. Tirlak*, 29 A. 4; *Subharaaya v. Ramasami*, 28 M. 171; *Chhotakurni v. Ratoram*, 8 I. C. 874, contra *Ram Prasad v. Suhu Bai*, 4 N. L. R. 81

(5) *Khottermoni v. Kadambini*, 16 C. W. N. 964; 17 I. C. 88; *Sita Ram v. Laxman*, 8 N. L. R. 128.

(6) *Gangadhar v. Yelu*, 36 B. 188.

(7) *Nagendra v. Benoy*, 80 C. 521; *Angam mal v. Venkata*, 26 M. 506.

(8) *Ramchandra v. Raikishori*, 22 C. 347.

(9) *Advayapa v. Rudraa*, 4 B. 104; *Koji yadu v. Lakshmi*, 5 M. 149; *Angammal v. Venkata*, 26 M. 509; *Vedammal v. Vedanayaga*, 31 M. 100 (105). *Baldeo v. Mathura*, 38 A. 702.

(10) *Kery v. Moneeram*, 13 B. L. R. 1 (45) affirmed O. A. *Moniram v. Keri*, 5 C. 776 (787) P. O. explained in *Ramananda v. Raikishori*, 22 C. 847 (858) To the same effect *Ram Nath v. Durga*, 4 C. 550; *Sundari v. Pitambari*, 82 C. 871

(11) Narad II 18, 21: cited in Mit II-X-3; Dayabhag V-11, 18 X 1-1-56.

understood to have become obsolete in practice, are not applicable in the case before us ..." (1)

2150. But this was not the view of the earlier courts. A case arose in 1836 when the son on attaining his majority sued for recovery of his father's estate from his mother who held it during his minority. The mother pleaded that the son had forfeited all right of inheritance in the property he sued for, "in consequence of his having falsely and maliciously accused her on oath of profligate and disgraceful conduct" of which she was judicially acquitted. Thereupon the court consulted its pandits who opined on the authority of the Shastras that the son's conduct was sufficient to disqualify him from inheriting the property of either parent. The son appealed to the Sudar Divani Adalat who again consulted the *Pandits* who regarded the false accusation as an expiable sin whereupon the court held that the plaintiff could not inherit the disputed property until he had performed such penances as the shastries prescribed, for the offence to decency and morality of which he had been guilty. (2)

2151. More recently it has been held that a person who has been a party to the murder of another cannot succeed to his estate. (3) All that he can claim is maintenance. (4)

2152. Outcaste.—The texts provide for the exclusion of an outcaste but this is repealed by the Caste Disabilities Removal Act 1850 (5) so that conversion or loss of caste is no longer any disqualification for inheritance.

2153. Ascetics.—The texts already cited (6) debar a person who has abandoned the world from claiming as an heir. So Vashisth says: "Those who have changed the domestic order and entered into another are debarred from shares." (7) Referring to this Nilkanth says that this means that the person must have entered the order of perpetual student, hermit or ascetic. The fact that a person is a *Bairagi*, has however been held to be no ground for exclusion, since Bairagis still pursue secular occupations. (8) And since a Shudra cannot enter the order of *Yati* or *Sanyasi* a Shudra who becomes an ascetic is not excluded from inheritance to his family estate unless some usage is proved to the contrary. The texts applicable to the disinheritance of ascetics do not apply to Shudras (9) There are degrees in asceticism and it does not follow that a man by becoming an ascetic has so completely renounced the world as to make himself incapable of taking an inheritance. It has been held that his becoming a *Fakir* entails that disability (10) and that the burden of proving otherwise is upon him. (11) But it is submitted that he who relies upon the disqualification

(1) *Kalka v Budree*, 3 N. W. P. H. C. R. 267 (1870); see *Vedammal v. Vedanayaga*, 31 M. 100 (1905).

(2) *Bhola Nath v. Sabitra*, 6 B. S. R. 71. 7 I. D. (O. S.) 720.

(3) *Vedamaga v. Vedammal*, 27 M. 591; S. C. after remand *Vedammal v. Vedanayaga*, 31 M. 100; *Gangu v. Chandrabhaga*, 32 B. 275; *Nilmadhab v. Jotindra*, 17 C. W. N. 841.

(4) *Nilmadhab v. Jotindra*, 17 C. W. N. 841.

(5) XXI of 1850 S. 1; *Bhujjunal v. Gyaprasad*, 2 N. W. P. H. C. R. 446; *Tajisingsh v. Konsilla*, 1 Agra 90; *Honamma v. Thimabhatta*, 1 B. 559; *Gopal v. Dhungasec*, 3 W. R. 206; *Kuruthedatta v. Mele*, 1 I. J. (N. S.) 286; *Subbaraya v. Ramanammi*,

28 M. 327; *Kumnilal v. Govind*, 33 A. 866 P. C. reversing O. A. Govind v. *Khumnilal*, 29 A. 487; *Jabha v. Mehtab* (1867) P. R. 67; *Goverdhan v. Piora*, (1872) P. R. 6; *Gurmukesh v. Malla*, (1872) P. R. 12.

(6) Mit. II-X 8; *Dayabhag*, V-V.11; *Mayukh*, IV 11-5 (Mandlik) p. 109.

(7) Cited in *Mayukh* IV-XI-5 (Mandlik) 100.

(8) *Teeluck v. Shama Churn*, 1 W. R. 209; *Jagannath v. Bidyanand*, 10 W. R. 172.

(9) *Harish v. Atir*, 40 C. 545 (547).

(10) *Teku v. Busti*, (1874) P. R. 15.

(11) *Badhawa v. Soehat*, (1892) P. R. 7.

must prove it. It has been doubted whether a Gossain forfeits his secular estate by becoming an ascetic.⁽¹⁾ Gossains marry and their marriage has not the necessary effect of entailing forfeiture of their office and of its appendant property and rights.⁽²⁾

2154. Widow's Re-marriage.—The clause relating to the forfeiture of inheritance on re-marriage by a Hindu widow under the enabling provisions of the Hindu Widows' Remarriage Act⁽³⁾ only applies to widows who could not otherwise re-marry.⁽⁴⁾ It creates no fresh disability.⁽⁵⁾ Consequently widows of a Sweeper⁽⁶⁾ Ahir⁽⁷⁾ Kurmi⁽⁸⁾ Halwai⁽⁹⁾ or a Taga Brahman⁽¹⁰⁾ have been held to be entitled to re-marry by the custom of their caste, and as such they do not forfeit their inheritance unless there is a custom to that effect.

2155. Barrenness.—Barrenness does not disqualify a woman from succession.⁽¹¹⁾ In the case of the wife, the texts empower the husband to supersede but not to disinherit her.⁽¹²⁾ But in Bombay where the daughter would otherwise take an absolute estate a childless widowed daughter does not in the absence of custom inherit absolutely to her father but takes only a life-estate which she cannot alienate except for legal necessity.⁽¹³⁾

2156. Customary variation.—Though contract cannot.⁽¹⁴⁾ custom may modify the law of succession. As such, custom vests the Jan widow with absolute rights by inheritance.⁽¹⁵⁾ On the other hand, custom is sometimes severe on the daughters excluding them altogether from succession.⁽¹⁶⁾ Whatever may be its effect, a custom which has the effect of varying the law, must like all customs, be strictly proved.⁽¹⁷⁾ But sometimes as in the case of impartible estates, the custom that they are as regards succession, subject to the rule of primogeniture has become a fact of sufficient notoriety to be presumed till the contrary is shown.⁽¹⁸⁾

2157. Pleading.—Since succession is the rule and exclusion an exception, he who relies upon an exclusion by reason of any disability must establish it by clear evidence. He must not only prove a disability but the disability pleaded by him must be, shewn to be such as justifies the exclusion. A stranger cannot attack the plaintiff's title unless he has himself a valid title to the estate. Where the defendant pleaded a will in answer to the plaintiff's suit based upon his inheritance it is for him to establish the will without which he would be a trespasser and as such not entitled to defeat the plaintiff by throwing on him the burden of proving his title free from infirmity at the time when

(1) *Mula v. Partab*, 32 A. 489; *Asharbi v. Ishri*, 11 A. L. J. 683; 20 L. C. 88; *Kailasgir v. Kishorgir*, Oudh, S. C. Pt. V 111-No. 99.

(2) *Rambharti v. Surajbharti*, 5 B. 662.

(3) XV of 1856.

(4) *Gajadhar v. Kaunsilia*, 31 A. 161 (165)

(5) *Mula v. Partab*, 32 A. 489; *Ramkishan v. Medh Singh*, 1 I. C. (A) 141; *Solan Lal v. Durga*, 24 I. C. (A) 691; *Nihal v. Kanah Singh*, 25 I. C. (A) 617.

(6) *Har Saran v. Nanda*, 11 A. 380.

(7) *Dharam Das v. Nandlal*, (1889) A. W. N. 78.

(8) *Ranvi v. Radha*, 20 A. 176.

(9) *Gajadhar v. Kaunsilia*, 31 A. 161.

(10) *Sinmani v. Mutammal*, 8 M. 265.

(11) *Khem Koer v. Jai Koer*, (1876) P. R. 16.

(12) *Ram v. Loorindas*, (1867) P. R. 40.

(13) *Bulohkadas v. Kesharlal*, 6 B. 85.

(14) *Tagore v. Tagore*, 9 B.L.R. 377 P. C.; *Purna v. Kalidhan*, 36 C. 608 P. C.

(15) *Madanji v. Tribhuvan*, 36 B. 396; *Sheo Singh v. Bakho*, 6 N. W. P. H. C. R. 382 affirmed O. A. 1 A. 688 P. C.

(16) *Bojraung v. Manokarnika*, 9 Bom. L. R. 1348 P. C.

(17) *Bhagwan Devi v. Nihal Chand*, (1879) P. R. 73.

(18) *Katama Nachiar v. Raja of Shivgunga*, 9 M. I. A. 539; *Sivasubramanya v. Subramanya*, 17 M. 316; *Mallikarjuna v. Durga*, 18 M. 406 P. C.; *Muttiraduganadha v. Periasami*, 19 M. 451 P. C.; *Kachi v. Kachi*, 25 M. 506 P. C.; *Ram Nundun v. Janki*, 29 C. 898 P. C.; *Sartaj Kuari v. Deoraj*, 10 A. 272 P. C.; *Jagdish v. Sheo Partab*, 23 A. 869 P. C.

the succession opened. (1) The fact that he was suffering from it at the time of the suit does not prove his disqualification to inherit which must be established at the moment the succession opened (2). It is only a person with a superior right that can disturb another in possession of property (3). A person with defective title may perfect it by adverse possession.

238. When an heir is disqualified, the next heir of the deceased succeeds but the disqualified heir is entitled to maintenance for himself and his family.

Succession on exclu-
sion of disqualified
heir.

Synopsis.

- (1) *Disqualification personal* (2158). (3) *Maintenance of disqualified heir and his family* (2160).
(2) *Right of issue of disqualified person* (2159).

2158. Analogous Law.—The following texts support the rule stated in the section:—

Mitakshara:—The disinherision of the persons above described seeming to imply disinherision of their sons, the author adds: "But their sons, whether legitimate, or the offspring of the wife by a kinsmen are entitled to allotments if free from similar defects. (4)

Dayabhag:—When the father is dead (as well as in his lifetime) an impotent man, blind man etc., are not competent to share the heritage. Food and raiment should be given to them, excepting the outcaste. But the sons of such persons, being free from similar defects, shall obtain their father's shares of the inheritance (5)

2159. Effect of Exclusion upon Inheritance.—The effect of exclusion of an heir upon inheritance is that the excluded heir receives maintenance charged on the estate, and the succession devolves upon the next heir as if he were dead or had relinquished his right. (6) It is immaterial that the next heir claims through him, since the incapacity being personal does not taint the blood. (7) Consequently, the wife or widow of a disqualified person is not incapable of inheriting property merely by reason of her husband's disqualification whether she claims as heir to a deceased person through her husband or otherwise, if she is herself free from any of the defects which excludes a person from inheritance. (8)

2160. Maintenance of excluded heir.—The excluded heir and his family are provided with maintenance as a solatium for loss of inheritance. The subject has been already considered in S. 77.

(1) *Janidi v. Kanshi Ram*, (1899) P. R. 19; *Lochan v. Babai*, 5 N. L. R. 161.

(2) *Murlī Singh v. Jai Singh*, 5 A. L. J. 115.

(3) *Mangal Das v. Raila Ram*, (1912) P. R. 88.

(4) *Yaj.* II-142; *Mit.* II X-9.

(5) *Dayabhag*, V.V-11.

(6) *Pareshmani v. Dinanath*, 1 B. L. R. (A. C.) 177; *Bodhnarain v. Omrao*, 18 M. I. A. 519.

(7) *Gangu v. Chandrabhaga*, 32 B. 275 (295).

(8) *Gangu v. Chandrabhaga*, 32 B. 275 (295).

CHAPTER XXII.

ORDER OF THE MITAKSHARA INHERITANCE TO MALES.

Classification of
Sapindas.

239. (1) Sápindas are of two classes: (a) Gotraj and (b) Bandhus.

(2) Gotraj comprise Gotraj Sapinda and Samanodaks who are the preferential heirs, failing whom the succession devolves on the Bandhus.

(3) Among the Gotraj Sapindas the nearest Sapinda succeeds provided the deceased and his heir were related to each other as Sapindas and provided further that the Sapinda who was joint with the deceased is preferred to other Sapindas of the same class, except in the case of brothers and sons of brothers among whom no distinction is made between persons of the whole blood and those of the half blood.

Explanation.—Legitimate sons by different mothers succeed equally to the property of their father. ⁽¹⁾

Exception.—The rule as to propinquity stated in clause 3 does not apply to the issue of the owner as defined in S. 50 who inherit by representation.

Synopsis.

- (1) *Texts on Mitakshara succession* (2161). (2) *Table of heirs* (2162).
(3) *Order of succession* (2162).

2161. Analogous Law.—The following texts bear on the subject of succession :—

Manu:—To the nearest Sapinda, male or female, after him in the third degree, the inheritance next belongs; then on failure of Sapindas and of their issue, the Samanodaks or distant kinsman shall be the heir or the spiritual preceptor, or the pupil or the fellow student of the deceased. ⁽²⁾

The Mitakshara ⁽³⁾ and the Mayukh ⁽⁴⁾ contain a more elaborate dissertations on the subject which will be presently examined.

According to the Mitakshara 57 relations of a person constitute his Sapindas as follows :—

- (1) His 6 male descendants in the male line.
(2) His 6 male ascendants in the male line, and their wives.

(1) *Samat v. Amra*, 6. B. 894 (897).

(2) *Manu*, IX-187.

(3) *Mit* II-V.

(4) *May*. IV-VIII-21.

(3) The 6 male descendants in the collateral male line of each of his male ascendants.

(4) His wife, daughter and daughter's son. After the Sapindas come the Samanodaks comprising 147 relations, *i.e.*, all his agnates from the 8th to the 14th degree and even beyond so long as the pedigree can be traced.⁽¹⁾

2162. Order of succession.—The order of Mitakshara succession is as follows :—

- (1) Son.
- (2) Son's son.
- (3) Son's son's son.
- (4) Widows.
- (5) Daughter.
- (6) Daughter's son.
- (7) Mother.
- (8) Father.
- (9) Brother.
- (10) Brother's son.
- (11) Brother's son's son.
- (12) Father's mother.
- (13) Father's father.
- (14) Father's brother.
- (15) Father's brother's son.
- (16) Father's brother's son's son
- (17) Father's father's mother.
- (18) Father's father's father.
- (19) Father's father's brother.
- (20) Father's father's brother's son.
- (21) Father's father's brother's son's son.
- (22) Son's son's son's son.
- (23) Son's son's son's son's son.
- (24) Son's son's son's son's son's son.
- (25) Brother's son's son's son.
- (26) Brother's son's son's son's son.
- (27) Brother's son's son's son's son's son.
- (28) Father's brother's son's son's son.
- (29) Father's brother's son's son's son's son.
- (30) Father's brother's son's son's son's son's son.
- (31) Father's father's brother's son's son's son.
- (32) Father's father's brother's son's son's son's son.
- (33) Father's father's brother's son's son's son's son's son.
- (34) Father's father's father's mother.
- (35) Father's father's father's father.
- (36) Father's father's father's father's son.
- (37) Father's father's father's father's son's son.
- (38) Father's father's father's father's son's son's son.
- (39) Father's father's father's father's mother.

(1) *Kalka v. Mathura*, 80 A. 510 P. C. *Amritram*, 10 B. 872, *Ram-Boran v. Kamla*, 82 A 594; *Devkore v.*

- (40) Father's father's father's father's father.
- (41) Father's father's father's father's father's son.
- (42) Father's father's father's father's father's son's son.
- (43) Father's father's father's father's father's son's son's son.
- (44) Father's father's father's father's father's mother.
- (45) Father's father's father's father's father's father.
- (46) Father's father's father's father's father's father's son.
- (47) Father's father's father's father's father's father's son's son.
- (48) Father's father's father's father's father's father's son's son's son.
- (49) Father's father's father's father's son's son's son's son.
- (50) Father's father's father's father's son's son's son's son's son.
- (51) Father's father's father's father's son's son's son's son's son's son.
- (52) Father's father's father's father's father's son's son's son's son.
- (53) Father's father's father's father's father's son's son's son's son's son.
- (54) Father's father's father's father's father's son's son's son's son's son's son.
- (55) Father's father's father's father's father's father's son's son's son's son.
- (56) Father's father's father's father's father's father's son's son's son's son's son.
- (57) Father's father's father's father's father's father's son's son's son's son's son's son's son.

240. The heirs of a deceased person are the following, who, subject to the other provisions herein-after contained in this behalf, succeed in the order given below :—

Order of succession
of heirs.

- (1) Gotraj Sapindas.
- (2) Samanodaks.
- (3) Bandhus.
- (4) Spiritual Preceptor.
- (5) Pupil.
- (6) Fellow Student.
- (7) The Crown.

Synopsis.

- | | |
|---|---------------------------------------|
| (1) <i>Texts on the order of succession</i> | (2164). |
| (2163). | (3) <i>Heirs under the Mitakshara</i> |
| (2) <i>Manu's enumeration of heirs</i> | (2164). |

2163. Analogous Law.—Both Manu, Yajnavalkya and his commentator Vijyaneshwar first enumerate the particular heirs and then generally lay down the order of succession in the following texts :—

Manu :—187. To the nearest Sapinda, male or female, after him in the third degree, the inheritance next belongs ; then on failure of Sapindas and of the issue, the Samanodakas or distant kinsmen shall be the heir : or the spiritual preceptor or the pupil or the fellow student, of the deceased.

188. On failure of all those, the lawful heirs are such brahmins as have read the three vedas, as are pure in body and mind, as have subdued their passions ; and they must consequently offer the cake ; thus the rites of obsequies cannot fail.

189. The property of a Brahman shall never be taken as an escheat by the king ; this is a fixed law ; but the wealth of the other classes, on failure of all heirs, the king may take (1).

Yajnavalkya :—185-186. (*After stating that the son inherits continues.*) The wife, daughters, both parents, brothers, and likewise their sons, Gotrajs, bandhus, a pupil and a fellow student, on these on failure of the preceding, the next following in order is heir to the estate of one who has departed for heaven, leaving no *putra*. This rule extends to all [males whether belonging or not to the four] classes.

187. The heirs who take the wealth of a hermit (*Vanapurasth*) of an ascetic (*Yati*) and a student (*Brahmchari*) are in their order, the preceptor, the virtuous pupil, and one who is a supposed brother and belonging to the same order

188. A re-united co-heir (takes the wealth) of a re-united co-heir (and) a uterine brother (that) of a uterine brother (The re-united brother) shall give up the wealth of the deceased to one born (of his body) or (failing one such,) shall retain it.

189. One born of a different mother, if reunites, may take the wealth : but one born of a different mother and not re-united (cannot take,) but a uterine brother even if not re-united should obtain the wealth and one born of a different mother, even if re-united, shall not take alone (2).

Mitakshara :—1. That sons, principal and secondary, take the heritage has been shown. The order of succession among all (tribes and classes) on failure of them, is next declared. (Here cites Yaj II-185, 186 quoted *supra*)

5. In the first place the wife shares the estate. Wife (*patni*) signifies a woman espoused in lawful wedlock : conformably with the etymology of the term as implying a connection with religious rites.

6. **Yridh Manu** also declares the widow's right to the whole estate. "The widow of a childless man keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain (his) entire estate."

II-II-1. On failure of her, the daughters inherit (Rest of the chapter explanatory of this term. II-II-1 On failure of these heirs the two parents meaning the mother and the father, are successors to the property (Rest explanatory)

II-IV-1. On failure of the father, brethren share the estate, (Rest explanatory).

7. On failure of brothers also, their sons share the heritage in the order of the respective fathers.

8. In case of competition between brothers and nephews, the nephews have no title to the succession ; for the right of intertance is declared to be on failure of brothers. ("both parents, brothers likewise, and their sons")

9. However when a brother has died leaving no male issue (nor other nearer heir) and, the estate has consequently devolved on his brothers indifferently, if any one of them die before a partition of their brother's estate takes place, his sons do in that case acquire a title through their father and it is fit, therefore, that a share should be allotted to them, in their father's right at a subsequent distribution of the property between them and the surviving brothers.

II-V-1. If there be not even brother's sons, agnates share the estate. Agnates are the paternal grandmother and relations connected by funeral oblations of food and libations of water (*Sapindas* and *Samanodaks*) (3).

II-VII-1. On failure of agnates, the cognates are heirs. (4)

II-VII-1. If there be no bandhus of the deceased, the preceptor or, on the failure of him, the pupil, inherits under the text of *Apastamb*. "If there be no male issue, the nearest *Sapinda* inherits : or, in default of kindred, the preceptor ; or failing him the

(1) *Manu* IX-187-189.

(2) *Yaj.* II-187-189.

(3) *Setur* p. 47.

(4) *Ib.* p. 48.

disciple." (1) (Then follow the pupil, the fellow student and priest and in the case of a non-Brahmin the King " and not a priest may take the estate of a Kshatriya or other person of an inferior caste on failure of heirs down to the fellow-student.")

Mayukh contains a long disquisition on the same lines (2).

2164. Heirs.—Manu mentions the son as the heir *par excellence* and after him any Sapinda. Yajnavalkya was the first to classify heirs by naming (i) the son (ii) the wife, (iii) daughters (iv) parents, (v) brothers, (vi) brother's sons, (vii) Gotrajs, (viii) bandhus, (ix) the pupil, (x) a fellow-student, and (xi) the king.

The Mitakshara mentions the following particular heirs, (i) son, (ii) son's son, (iii) son's son's son, (iv) widow, (3) daughter (vi) daughter's son (vii) mother (viii) father (ix) brother (x) brother's, son which concludes what it calls "the compact series of heirs" i. e. those whose order is "fixed," the rights of the rest being "after the manner of the entry of intruders who are placed at the end" (4).

241. The issue of the deceased inherit in accordance with the following rules :—

(1) When there are more than one son, whether by the same or different mothers, they take equal shares.

(2) Sons who were joint with their father at the time of his decease inherit to the exclusion of those who were separate.

(3) Grandsons of a predeceased son inherit in the right of their father taking per stirpes and not per capita.

(4) An adopted son of the deceased inherits the whole estate. But where the deceased has left an *auras* son him surviving, the adopted son takes one fifth of the share of an *auras* son as provided in S. 50 (4).

(5) The illegitimate son of a twice born does not inherit to his putative father. But the son of a Shudra inherits to the same extent as a legitimate son provided that he was born of a continuous concubine intercourse with whom was neither incestuous nor adulterous. Provided further, that where a Shudra father has sons both legitimate and illegitimate, the latter takes half the share of a legitimate son in default of whom he inherits the whole ; but he has otherwise no right to collateral succession. He shares equally with the widow and the daughter's son.

Synopsis.

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|-------------------------------------|---------------------------------------|
| (1) Son the nearest sapinda (2165). | (3) Dasi Putra (2168-2170). |
| (2) Illegitimate sons (2166-2167). | (4) Share of illegitimate son (2171). |

(1) Apastamb II-14-23 ; Setlur, p. 49.

(2) IV-VIII (Mandlik) pp. 76, 84.

(3) Mit. II—V—2.

(4) May. IV-VIII-17 (Mandlik) p. 81
Mohan Das v. Krishnabai, 5 B. 597 (602).

Synopsis.

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| (5) <i>Share in competition with other heirs</i> (2172). | (16) <i>Mother</i> (2185). |
| (6) <i>No right of inheritance to collateral heirs</i> (2173). | (17) <i>Step-mother</i> (2186). |
| (7) <i>Comparison with adopted son</i> (2174-2175). | (18) <i>Father</i> (2187). |
| (8) <i>Share of adopted son</i> (2175). | (19) <i>Brother</i> (2188). |
| (9) <i>Grandson and Great grandson</i> (2176). | (20) <i>Effect of reunion</i> (2189). |
| (10) <i>Widow</i> (2177). | (21) <i>Brother's sons</i> (2190). |
| (11) <i>Daughter</i> (2178-2179). | (22) <i>Bombay rule</i> (2192). |
| (12) <i>Illegitimate daughters</i> (2180). | (23) <i>Brother's son's son</i> (2193-2194). |
| (13) <i>Unchaste and prostitute women</i> (2181). | (24) <i>Paternal grand-mother</i> (2195-2196). |
| (14) <i>Exclusion of daughters by custom</i> (2182). | (25) <i>Sister in Bombay</i> (2198). |
| (15) <i>Daughter's son</i> (2183-2184). | (26) <i>Paternal uncle</i> (2199). |
| | (27) <i>Paternal uncle's son</i> (2200). |
| | (28) <i>Paternal uncle's son's son</i> (2201). |
| | (29) <i>Other heirs</i> (2202). |
| | (30) <i>Table of remote sapinda heirs</i> (2203-2206). |

2165. Son.—Of all the Sapindas the son is the nearest. He naturally succeeds to his father and if there are more sons than one, they all take equally, whether they were born of the same or different mothers. (1) The term "Son" must in this connection be understood to be a loose paraphrase of "*putra*" which is used in the Mitakshara and its commentary the *Subodhini* as a generic term for male issue or descendants including the grandson and the great grandson. (2) Consequently, the son of a deceased son would share equally with a living son the self-acquired property of his grand father. (3) Sons who were joint with their father exclude those who had separated (4) on the principle that those who have gone out of the family cannot have the same right as those who have remained within it (5) who have not received their share and were probably in union with the father at the time of his death (6) (§ 2168).

2166. Illegitimate sons were at one time on a par with legitimate sons (7) but, except in the case of Shudras, they have no right now beyond a bare right of maintenance. (8) As the Mitakshara puts it, "From the mention of Shudra in this place" (9) it follows that the son begotten by a man of a regenerate tribe on a female slave does not obtain a share even by the father's choice, nor the whole estate after his demise. But if he be docile he receives a simple maintenance. (10) The son has no greater right because the father was himself illegitimate or belonged to a mixed class between the second and third of the regenerate classes. (11)

(1) *Ragendur v Rayhonath*, (1864) W. R. 20.

(2) *Butcheputy v Ravundur*, 2 M. I. A 182 (156); *Ananda v. Nownit*, 9 C. 815 (319); Mit. 1-VI-4-6.

(3) *Luchomun v Debee Pershad*, 1 W. R. 317; *Fakirappa v. Yellappa*, 22 B. 101.

(4) *Fakirappa v. Yellappa*, 22 B. 101.

(5) *Sarv. Inh.* 886; 2 Mac. H. L. Sec. 1. Case 12; W and B. H. L. (3rd Ed.) 68 followed in *Marudaji v. Doraisami*, 80 M. 248 (350); *Nana v. Ramachandra*, 92 M. 377 (381); *Balkrishna v. Savitri Bai*, 3 B. 54.

(6) *Ramappa v. Silhammal*, 2 M. 182 (185).

(7) *Manu* IX-159, 160, 180; Mit. 1-II-2; Str. H. L. 1-4, 211.

(8) *Pandaiya v. Puli*, 1 M. H. C. R. 478 482 affirmed O. A. *Inderun v. Ramaswamy* 13 M. I. A. 141 (159); *Ram Kali v. Jamma*, 30 A. 508 (509); *Bhaoni v. Maharaj Singh*, 3 A. 788; *Mohun Singh v. Chumun Rai*, 1 B. S. R. 37; *Pershad Singh v. Maheares*, 3 B. S. R. 176.

(9) Refers to Yaj. II-184, 186. "Even a son begotten by a Shudra on a female slave may take a share by the father's choice..."

(10) Mit. 1-XII-8.

(11) *Hari v. Radhika*, 2 M. H. C. R. 869 (374).

So the illegitimate son of a Kshatriya one of the regenerate castes by a woman of the Shudra⁽¹⁾ or any other caste, e.g., a Kshatriya woman⁽²⁾ cannot in the absence of custom⁽³⁾ succeed to his putative father, ⁽⁴⁾ the reason for exclusion being that law does not recognize the *status* of the issue when the intercourse between its parents was in violation of or forbidden by law, ⁽⁵⁾

2167. The contrary was laid down in a case on the principle of equity and good conscience, in which one Khuman a Brahmin was outcasted for co-habiting with a Bania widow. He left his home with the widow, acquired property which on his death passed to the widow and his natural son from whom Khuman's brothers claimed possession but their suit was dismissed on the ground that on his excommunication from his caste Khuman must be deemed to have started a separate family altogether and that his brothers were therefore equitably not entitled to dispossess his son. ⁽⁶⁾ This reasoning is not convincing for the fact that Khuman's excommunication did not snap the tie of relationship between him and his brothers who as his nearest Sapindas were entitled to inherit in the absence of a nearer relation. An illegitimate person has no right to succeed to the property of another illegitimate collateral ⁽⁷⁾

2168. Dasi Putra.—But the case of a Shudra is exceptional. In his case an illegitimate son is an heir to his father if he is not the offspring of an incestuous or adulterous intercourse. His case is expressly provided by the following texts :—

Yajnavalkya.—Even a son begotten by a Shudra on a female slave may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share and one who has no brothers may inherit the whole property in default of a daughter's son. ⁽⁸⁾

Mitakshara.—(Quoting the last) 2. The son begotten by a Shudra on a female slave (*Dasi Putra*)⁽⁹⁾ obtains a share by the father's choice or at his pleasure. But after the demise of the father, if there be sons of a wedded wife, let those brothers allow the son of the female slave to participate for half a share, that is, let them give him half as much as is the amount of one brother's allotment. However should there be no sons of a wedded wife, the son of the female slave takes the whole estate provided there is no daughter of a wife nor sons of daughters. But if there be such, the son of the female slave participates for half a share only. ⁽¹⁰⁾

2169. With the abolition of slavery a *Dasi Putra* as such has ceased to exist but that term must now be taken to mean the son of a permanent concubine

(1) *Jwala Singh v. Sardar*, 51 I. C. (A) 216; *Brandavana v. Radamani*, 12 M. 72.

(2) *Silla Baksh v. Gajraj*, 14 O. C. 227.

(3) *Bhagni v. Maharaj Singh*, 8 A. 738 (744).

(4) *Chuturya v. Sahub*, 7 M. I. A. 18 (47, 49); *Fuhoop Singh v. Khaaman*, 8 Agra 313.

(5) *Venkatachella v. Paravatham*, 8 M. H. C. R. 134.

(6) *Radha v. Raj Kuar*, 18 A. 573 (575).

(7) *Bacha Singh v. Chatterpal*, 9 O. C. 353

(8) *Yaj.* II. 131, 135.

(9) Jolly regards "dasi" to include any unmarried Shudra. Jolly's H.L. of Partition P. 189. But it is submitted that though Shudras were called Dasyas, the contextual meaning in the following texts leaves no

doubt that the term was primarily applied to the "son by a female slave". Manu IX-179; Mit. I-XII-13; May. IV-IV-32; Dayakram Sangrah VI-32 33; Datt. Mim. II-80; Datt. Ch. V. 80; Jagannath Charka Panchanan V-III-174 Kalluka Bhatt defines a female slave as one captured in a battle and one of the seven kinds of slaves mentioned by Manu VIII 415. So in Datt. Mim. IV 76 the author says: "A female purchased for price and enjoyed or co-habited with is termed by former sages a slave. The son who is born of her is considered a *dasi putra*." See *Datti v. Datti*, 4 M. H. C. R. 204 (208), *Krishnayyan v. Muttu-sami*, 7 M. 407 (411).

(10) Mit. I-XII-1, 2.

or a mistress as distinguished from the son of a casual connection. (1) The intercourse is necessarily immoral but it must not be illegal. Consequently the son of an incestuous or (2) an adulterous intercourse with a married woman (8) or by a Shudra widow whose re-marriage is forbidden (4) is disqualified.

2170. So the illegitimate son of a Shudra being the offspring of an incestuous intercourse between a father-in-law and his daughter-in-law is not entitled to inherit his father's estate. (5) So again it has been held that a son born of a woman of the Shudra caste amongst whom re-marriage is prohibited will entail the same disability upon the issue, (6) but the reason for this view is not apparent and the fact that concubinage led to excommunication is never the test for disinheriting the issue.

2171. Being then an heir to his father the Dasi putra is a co-parcener with his father and his legitimate sons as regards their joint property with the right of survivorship (7) to the exclusion of the widow (8) and on partition, he takes half the share of a legitimate son. (9) This is an ambiguous expression (10) and may mean either half of what the son takes (11) or half of what he would have taken if he were legitimate. (12) "In the former case the legitimate and the illegitimate sons would share in the proportion of two to one, while in the latter case they would share in the proportion of three to one." There are two methods of determining the extent of the share. One method is to divide the whole estate in such a way as to give to each of the illegitimate sons exactly half of the share of each of the legitimate sons. The other method is to divide the estate into as many shares as there may be sons treating the illegitimate sons as legitimate sons and then from one share to give half to each illegitimate son and give the remainder to the legitimate sons. To take the simplest instance if there be one legitimate son and one illegitimate son, according to the first method, the whole estate would be divided into three shares two shares going to the legitimate son and one share to the illegitimate son. According to the other method the estate would be divided into two shares and the illegitimate son will be given half of one share that is one fourth of the whole and the remaining portion that is, three fourths of the whole, will go to the legitimate son. (13) The second method was favoured by Vijyaneshwar (14) but the first method is now adopted by the courts. (15)

(1) *Rahi v. Govinda*, 1 B. 97 (118); *Sadu v. Baiza* 4B. 37 (54); *Sheshagiri v. Girema*, 14 B. 282; *Gangabai v. Bandhu*, 40B. 362 (371, 372); *Krishnayyan v. Mullusami*, 7 M. 407 (412); *Karuppan v. Bulokan*, 23 M. 16; *Meenakshi v. Appakutti*, 33 M. 226; *Annayyan v. Chinman*, 33 M. 366; *Sarsuti v. Mannu*, 2 A. 184; *Har Gobinda v. Dharam*, 6 A. 329; *Ramkali v. Jomba*, 30 A. 508; *Soundarajan v. Arumachalam*, 39 M. 136 F. B. *Jogendra v. Nityananda*, 11 C. 702 affirmed O. A. 18 C. 151 P. C.; *Chatturbhui v. Krishna*, 17 C. W. N. 442 (144).

(2) *Datti v. Datti*, 4 M. H. C. R. 204.
(8) *Rahi v. Govinda*, 1 B. 97; *Datt v. Ganpat*, 8 A. 387; *Venotachella v. Parvatham*, 8 M. H. C. R. 184.

(4) *Annayyan v. Chinman*, 33 M. 366.

(5) *Datti v. Datti*, 4 M. H. C. R. 204 (208).

(6) *Annayyan v. Chinman*, 33 M. 366; dis-sented from in *Subramania v. Rathuvelu* 41 M. 44 F. B.

(7) *Jogendra v. Nityanand*, 18 C. 157 P. C. affirming 11 C. 702; *Sondanarayan v. Arumachalam*, 39 M. 136.

(8) *Sadu v. Baiza*, 4 B. 37.

(9) Mit. I-XII.2. May 1V-IV.82; *Virmitrod-aya* (Sarkar) 130; *Radi v. Gobinda*, 1 B. 97 (104).

(10) In original अर्धभागिक (urdl-half, bhagik-Sharer) "half sharer."

(11) *Kesaree v. Samardhan*, 5 N. W. P. H. C. R. 95; *Sadu v. Baiza*, 4 B. 37; (43); *Gangabai v. Bandhu*, 40 B. 369 (373, 374).

(12) Mit. I-VII.7: W and B. H. J. (2nd Ed) 40, 41, 108, 110.

(13) *Ib.* p. 374.

(14) Yaj. I-VII.6-10.

(15) *Dhodyela v. Malanait*, (1874) B. P. J. 43; *Sadu v. Baiza*, 4 B. 37; *Gangabai v. Bandhu*, 40 B. 369 (373, 374); *Kesaree v. Samardhan*, 5 N. W. P. H. C. R. 94; *Chellammal v. Ranganatha*, 34 M. 277.

2172. He is entitled to the same share in competition with the legitimate daughter.⁽¹⁾ In Madras he was held entitled to an equal share with the daughter's son,⁽²⁾ but the remark is casual and opposed to the express text.⁽³⁾ His right as against the widow is held to be similar,⁽⁴⁾ though there are cases in which he is to take to the exclusion of the widow who is merely entitled to maintenance as in the case of a legitimate son,⁽⁵⁾ but it is argued on the other side that the texts are silent on the point, probably because the widow's right is a later development but from the fact that in competition with the daughter who takes after the widow such son gets only one-half, there is no reason why he should exclude the widow whose right is greater but in no case less than that of the daughter.⁽⁶⁾ In the Dattak Chandrika her right is stated to exist.⁽⁷⁾ Even those who oppose the widow's right admit the force of this reasoning but consider it to be "one of those arbitrary arrangements not uncommon in Hindu Law."⁽⁸⁾

But assuming that the illegitimate son cannot exclude the widow, the question still remains as to what share he is entitled. In Madras relying on the authority of Dattak Chandrika he is held to share equally with her⁽⁹⁾ and down to the daughter's son, after which he takes the whole to the exclusion of other heirs.⁽¹⁰⁾

2173. The illegitimate son inherits only to his parents and has no right to collateral succession. Manu treated illegitimate issue as no heirs at all, treating them merely as kinsmen.⁽¹¹⁾ His right to inheritance is provided by an express text beyond which it cannot be extended.⁽¹²⁾ Of course, when he is a co-parcener he will succeed by survivorship,⁽¹³⁾ but otherwise he is not a collateral heir.

2174. An illegitimate son has not the same position as an adopted son. As compared with the adopted son, the illegitimate son's position is certainly inferior. The adopted son has a co-ordinate interest with his father in ancestral property. He can claim partition from his father. He represents his father as against the father's co-parceners. He excludes the widow, the daughter and the daughter's son. In ancient law he was one of the twelve descriptions of sons whereas the illegitimate son as the son of a female slave had no place amongst them.⁽¹⁴⁾ If the adopted son takes a smaller share in competition with the legitimate son it is because he is a mere substitute provided by a fiction of law whilst in the case of the "auras" there is actual blood relationship consecrated by a legal marriage. In default of a legal marriage the fiction operated as a special rule of law to give the adopted son the same status in the family as

(1) *Gangabai v. Bandu*, 40 B. 369 (374)

(2) *Parvathi v. Thirumalai*, 10 M. 384 (344).

(3) Yaj. II-183, 184; Mit. I-XII-2.

(4) *Ambabai v. Govind*, 28 B. 257 (265).

(5) *Rahi v. Govinda* 1 B. 97.

(6) *Ranaji v. Kandoji* 8 M. 557; *Parvati v. Thirumalai*, 10 M. 384 (344); *Ramalinga v. Paradai* 25 M. 519 (521); *Meenakshi v. Appakutti*, 28 M. 226; *Ambabai v. Govind*, 28 B. 247 (265).

(7) Datt. Ch. V-80, 81.

(8) *Sadu v. Baiza*, 4 B. 37 (56) F. B. citing *Rahi v. Govinda*, 1 B. 105.

(9) Datt. Ch. V-80, 81; *Meenakshi v. Appakutti* 38 M. 228 (227, 228).

(10) Datt. Ch. V-81; *Sarasuti v. Mannu*, 2 A 134.

(11) Manu IX-159 160 cited in Mit. 1-XI-80.

(12) *Shome Shankar v. Rajesar*, 21 A. 96 (108); *Nissar v. Dhunwant Marshall*, 609; *Krishnayyan v. Muttusami* 7 M. 407.

(13) *Jogendra v. Nityanand*, 18 C. 151 P.C. explained in *Shome Shankar v. Rajesar*, 21 A. 9 (102).

(14) Mit. 1-XI.

against every one of its members on the other hand. Save as to taking an inferior share there is no analogy between him and the illegitimate son. (1)

2175. Adopted son.—The share which an adopted son takes in competition with an auras son has already been set out in S. 50 (§§ 809-812).

2176. Son's son and son's son's son.—The right of divided sons, grandsons, and great grandsons of the last male owner to succeed to his separate property is the same as in the case of undivided family property. The right of representation exists equally in the former as in the latter case and the divided son will not on the principle of the exclusion of remoter by nearer Sapindas, exclude the divided grandson in the succession to divide property of the ancestor. (2) It has already been seen that Hindu Law regards the son, the grandson, and the great grandson as really a single person in different bodies (§1033) and this theory applied both as regards their share on partition or inheritance. Consequently if the father dies leaving a son of his predeceased son and the son's son of a predeceased son, that is a son of a son's son of a grandson and a great grandson by his two predeceased sons, it has been seen that on a partition of his estate they will take one-third each. (3) They will take the same share on inheritance. The rule that the nearest heir excluded the one more remote does not apply where the heirs are the owner's own issue who take *per stripes* and not *per capita* as stated in S. 139. (§§ 1467—1478) From this rule it follows that the legitimate son of an illegitimate son has the same right of inheritance as his father had against his father and his other sons. So where *A* and *B* were two Shudra brothers and one of them *B* had an illegitimate son *C* by his permanent concubine who had a legitimate son *D*, *C* predeceased *B* on whose death *A* claimed the estate against *D* but his claim was thrown out on the ground that *D* represented *C* and as *C* would have excluded *A* so will his son *D* who represented his father. (3) The case would not have been different if *D* had himself been illegitimate (4).

2177. After the great grandson, comes the widow whose right to inherit is expressly provided by all the smritikars, (5) with the following refrain.—“The widow of a childless man preserving unsullied the bed of her lord and persevering in religious observances shall present his funeral oblation and obtain his entire share.” (6) Her right to inherit her husband's estate has been recognised in numerous cases. (7) On marriage the wife assumes the *Gotra* of her husband and she is classed amongst his Gotraj Sapindas, (8) (§ 664) though the term Gotraj is strictly speaking confined only to the agnatic kinsman. (9) When there is more than one widow all take jointly as a single heir

(1) *Parvati v. Thirumalai*, 10 M. 384 (345).

(2) *Marudayi v. Doraisami*, 90 M. 848; *Mutturaduganatha v. Periasami*, 16 M. 11 (15).

(3) *Ramalinga v. Pavadar*, 25 M. 519 (523, 524).

(4) *Fakirappa v. Fakirappa*, 4 Bom. L. R. 809 (811).

(5) Manu cited in Mit. II-1 6; Katyayan cited *Ib.*, Vishnu XVII 4-7; Yaj II-186, 187.

(6) Vrihat Manu cited in Mit. II-1 6.

(7) *Keerut Singh v. Khoolahul*, 2 M. I. A. 381; *Katama Natchiar v. Raja of Shivungu*,

9 M. I. A. 548 (611); *Venkata v. Lakshman*, 18 M. I. A. 113; *Radhika v. Nilamani Ib.* p. 497; *Periasami v. Periasami*, 1 M. 812 P.O. *Sheo Singh v. Dakho*, 1 A. 688 P. C. O. A. from 6 N. W. P. H. C. R. 382; *Patnimal v. Manoharlal*, 5 B. S. R. 410; *Norayan v. Lakshmi*, 8 M. H. C. R. 289; *Gulab v. Phool*, 1 Borr 154, *Govinddass v. Muta*, 1 Borr. 241.

(8) Steele's Law of Caste 27 Note; 1 W and B. H. L. 283, Q. 3 P. 281 note; *Lallubhai v. Mankuvarbai*, 2 B. 388 (420).

(9) *Lallubhai v. Mankuvarbai*, 2 B. 388 (440)

with the right of partition and survivorship, (1) (§§ 1420-1426) which she may however relinquish in favour of the co-widow but such relinquishment cannot extend beyond her life-interest. (2) It has already been stated that the interest which the widow acquires is liable to be divested by the birth or adoption of a son (S. 34).

(5) **Daughter.**

2178. The daughter ranks next to the widow as provided in the following text :—

Mitakshara :—1. On failure of her (i. e. the wife) the daughters inherit. They are named in the plural number (3) to suggest the equal or unequal participation of daughters alike or dissimilar by class.

2. Thus Katyayan says "Let the widow succeed to her husband's wealth provided she be chaste and in default of her, let the daughters inherit if unmarried. Also Brihaspati :— "The wife is pronounced successor to the wealth of her husband and in her default the daughter. As a son, so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth."

3. If there be competition between a married and unmarried daughter, the unmarried one takes the succession under the special provisions of the text above cited (in default of her, let the daughter inherit, if unmarried).

4. If the competition be between the unprovided and enriched daughter the unprovided one inherits but on the failure of such, the enriched one succeeds for the text of Gautam is equally applicable to the paternal as to the maternal estate. "A woman's separate property goes to her daughter's unmarried or unprovided" (4).

2179. It is clear from these texts that though daughters as a class rank after the widow, (5) the grounds of preference between them *inter se* are that the unmarried excludes the married (6) the poor daughter the rich, that is to say the competition is only as between the married and unmarried and the rich and the poor. Consequently the unmarried daughter excludes the married daughter whether she be rich or poor. (7) In default of unmarried daughters, the married daughter succeeds and amongst them the poor excludes the rich, (8) whatever may have been the source of her wealth whether from her husband or from her father or otherwise. (9) Now what is the test of poverty? It has been held that comparative poverty is the sole test for settling the claims of daughters amongst themselves but the court should not go into minute details since all that it has to enquire is whether there is such marked difference between the wealth of the two, that one should be called poor in comparison with the other. (10) Under the Dayabhag law the capacity to produce a Sapinda is the sole cause of her daughter's succession. (11) Hence a barren daughter or one who is not likely to have male issue or who is already a childless widow is not

(1) *Bhagwandeon v. Myna Baee*, 11 M. I. A. 487; *Nilmani v. Radhamani*, 1 M. 290 P. C.; *Venkayamma v. Venkataramasayamma*, 25 M. 678 (687) P. C. *Rumea v. Bhagee*, 1 B. H. C. R. 66; *Tijiamba v. Kamakshi*, 3 M. H. C. R. 424.

(2) *Ramakal v. Ramasawmi* 22 M. 522 (524).

(3) Mit II 1-2.

(4) Mit II-II.1-4: To the same effect *Mayukh V.* viii-10, 11.

(5) *Kattama v. Dorasinga*, 6 M. H. C. R. 310; *Narayan v. Manohar*, 7 B. H. C. R. 153; *Narayan v. Govind* 1 N. L. R. 154 (156);

(6) *Hemanchul v. Maharaj Singh* 1 Agra

210 (211); *Golab v. Hunsee* 2 Agra 166; *Binode v. Purdhan* 2 W. R. 176 (177).

(7) *Dowlat v. Burma* 22 W. R. 54; *Jam nabai v. Khimji* 14 B. 1 (13).

(8) In original "सधन", (*Sadhan*) with wealth and निर्धन (*niradhan*) without wealth.

In *Gautam* अप्रतिष्ठित (*apra'thishthit*) i. e., "unprovided for."

(9) *Danoo v. Darbo* 4 A. 243 *Totawa v. Basawa* 28 B. 229 (233); *Audh Kumari v. Chandra* 2 A. 561; *Danoo v. Darbo* 4 A. 243 (245).

(10) *Tinunoni v. Nibaran* 9 C. 154 (159) F. B.

entitled to succeed but no such distinction exists in the Mitakshara. (1) But though the poor sister excludes the rich she does not become a fresh stock of descent but on her death the rich sister succeeds to her in preference to the poor sister's son. (3) In Bengal the latter would exclude the sister, (4) while in Bombay the same rule prevails, since the daughter there takes absolutely and on her death her own heirs will succeed (5) and the same rule extends to Berar which is a disciple of the Bombay school (6) and Sindh. (7)

2180. Illegitimate daughters whether of a twice born or of a *Shudra* have no right of inheritance. The illegitimate son of a *Shudra* succeeds because his case is covered by a special text. (8) There is no text to favour an illegitimate daughter. In one case it was contended that the texts applicable to the son applied equally to the daughter, since the word "son" included the daughter, but this contention was of course not acceded to. (9) The texts do not favour the claims of females generally and they now only allow the claims of those expressly named. As such the texts mention the daughter, but while they expressly allude to an illegitimate son they nowhere mention an illegitimate daughter which implies that illegitimate daughters were conceded no right. But illegitimate daughters are entitled to inherit to their mothers. (10)

2181. Unchastity is no bar to a daughter's inheritance (11) but a prostitute cannot be regarded as an "unprovided maiden," entitled to inherit in preference to her married sister. (12) Being neither a maiden nor married she will inherit only in default of either unmarried or married sisters. (13) But it is submitted that there is no textual support for this view and that the conclusion reached is the result of reasoning which can only be justified on the ground of equity.

2182. A daughter may be excluded by custom. Such a custom has been successfully pleaded in several cases relating to several races such as the Bhale Sultan tribe of Kshatriyas (14) and the Jangra Chauhans (15) of Oudh. In the latter case it was contended that the evidence of custom as to impartible estate was inadmissible to prove it as regards the ordinary partible property. But the Privy Council held the distinction untenable. Similar customs excluding daughters have been successfully

(1) *Simmani v Muttanmal* 3 M. 265 (267, 268).

(2) *Dulari v. Mulchand* 32 A. 314 (316).

(3) *Ramdhani v. Beharee* 1 N. W. P. H. C. R. 114; *Dulari v. Mulchand* 32 A. 314 (316); *Dowlat v. Burma* 22 W. R. 54; *Mula v. Maharaj* 2 C. P. L. R. 166

(4) *Dowlut v. Burma* 22 W. R. 54 (56) *Kattamma v. Dorasinga* 6 M. H. C. R. 310 (392).

(5) *Bhagirathi Bai v.*

285:

(6) *Dowlut Rao v. Govinda Rao* 5 L. N. R. 13 (Berar case).

(7) *Dowlut v. Govind* 2 S. L. R. 59, 1 L. C. 243.

(8) *Manu* 1X-179, Yaj. 11-183, 134, Mit. 1-X11-2.

(9) *Bhikya v. Babu*, 32 B. 562 (566), *Chinturja v. Sanub*, 7 M. I. A. 18 (50); The state-

ment in *Inderun v. Ramaswamy*, 13 M. I. A. 131 (159); *Sarasuti v. Manu*, 2 A. 184; *Rahi v. Govinda*, 1 B. 97 that illegitimate children or offspring of the *Shudra* inherit is a *lapsus calami* for a "son."

(10) *Anunagiri v. Ranganayaki* 21 M. 40.

(11) *Adajappa v. Rudrappa*, 4 B. 104; *Tara v. Krishna*, 31 B. 495 (502); *Kojiyadu v. Lakshmi*, 5 M. 149.

(12) *Sirasangu v. Minal*, 12 M. 277; *Tara v. Krishna*, 31 B. 495 (502); *Saraswati v. Kathurama*, 4 C. P. L. R. 48; *Bhagalal v. Churaman*, 9 C. P. L. R. 88.

(13) *Obiter in Tara v. Krishna*, 31 B. 495 (510).

(14) *Bajrangi v. Manokarnika*, 30 A. 1 (15) P. C.

(15) *Parbati v. Chandarpol*, 31 A. 457 (461, 474) P. C.

proved in the case of utpat families of Pandharpur ⁽¹⁾ Chudasama Gamati Garasias ⁽²⁾ and the Bhagars in the Broach Collectorate. ⁽³⁾ In the case of Gobel Girasias the custom was held proved by the trial judge but the High Court reversed him holding that the District Judge was wrong in holding the custom proved from the absence of a single instance in which the daughter had inherited; whereas the real issue was were there sufficiently numerous instances of her exclusion. ⁽⁴⁾ In another case the case for exclusion was held rebutted by proof of a large number of instances of daughters inheriting. ⁽⁵⁾

It will be seen in the sequel that except in Bombay, the daughter takes a limited estate and on her death the estate devolves on the next heir of the father. ⁽⁶⁾

(6) Daughter's son. **2183.** The following text supports the succession of the daughter's son :—

Vishnu :— On failure of sons, and of their male issue, the sons of daughters shall obtain the property: for the male offspring of a son of a daughter are equally qualified to perform obsequies for men of all classes. ⁽⁷⁾

The daughter's son is a *bandhu* and not a *Gotraj Sapinda*, though he ranks before the parents of the deceased for the purpose of succession. But this is so by special texts ⁽⁸⁾ due to his history. Under the old law failing a son a daughter might be appointed by the father to raise up issue to him and the son born is called a "*putrika-putra*" or the son of the (appointed) daughter. In early times such son was treated as an *auras* or self-begotten son. In course of time the practice of appointment fell into disuse but the special position which he had attained remained. The daughter's son is competent to perform the *Shradh* of his maternal grandfather ⁽⁹⁾ and Yajñavalkya mentions him as an heir. ⁽¹⁰⁾ Vishnu regards him as equal to a son's son and supports his claim in the text before cited. The daughter's son has no right of inheritance in his maternal grandfather's estate so long as the estate vests in his mother. ⁽¹¹⁾ He is the reversioner whose estate comes into being on the daughter's death. ⁽¹²⁾ But they are nevertheless entitled to protect their reversionary rights against an improper alienation made by their mother ⁽¹³⁾ the cause of action arising on the date of alienation. ⁽¹⁴⁾ Sons jointly inheriting to their maternal grandfather on the death of their mother have the right of survivorship ⁽¹⁵⁾ and except under the Mayukh, they take *per capita* and not *per stirpes*. ⁽¹⁶⁾

* (1) *Nanaji v Sundrabai*, 11 B. H. C. R. 249.

(2) *Verabhai v. Hiraba*, 27 B. 492 (498).

(3) *Pranjivan v. Reva*, 5 B. 482.

(4) *Ranchoddas v. Rawal*, 21 B. 110 (117).

(5) *Niadri v. Kura*, 13 L. J. 91 27 L. C. 707.

(6) *Chotaylal v. Chunno*, 4 C. 744 P. C.; *Vaduganadha v. Dorasinga*, 8 M. 290 P. C.

(7) Vishnu cited in Mit. II-ii-6.

(8) Manu IX-192; Yaj. II-13, Mit. II-II-6; Mayukh IV-VIII 18; Sm. Ch. XI II 28; Vivad (Hint. Tagore) 294; Nirnai Sindhu 815; Dayakara Sangrah and Mand Pandit's Vajjyanm cited Sav. Inh 479, 492, 2 Dig. 498.

(9) Vishnu cited in Mitak II-II-6, Mayukh V-VIII-13.

(10) Yaj. II-186, 187.

(11) *Bajjnath v. Mahatir*, 1 A. 608; *Sant v*

Gov Saran, 8 A. 365.

(12) *Anritotal v. Rajoonweekant*, 15 B. L. R. 10 P. C.

(13) *Krishnier v. Lakshminiammal*, 18 M. L. J. 275.

(14) *Chiruvetu v. Chiruvetu*, 29 M. 390, explained in *Veerappa v. Gangamma*, 36 M. 570 (578, 574).

(15) *Venkeyamma v. Venkata*, 20 M. 217 reversed on this point O. A. 25 M. 578 (688) P. C. overruling *contra Jasoda v. Sheo Pershad*, 17 C. 38; *Samunadha v. Thangathanni*, 19 M. 70.

(16) *Nagesh v. Gurnrao*, 17 B. 308; *Itam Swarup v. Dasdeo*, 2 Agra 68; *Sheo Sahai v. Omed*, 6 B. S. R. 378; *Ranidhan v. Kishen*, 8 B. S. R. 138; *Laloo v. Laloo*, 10 I. C. 448; *Ram v. Basdeo*, 2 Agra 168; *Dau v. Mohesh*, 30 C. 89; *Birj v. Sheeraj*, 10 C. 159.

2184. A daughter's son may succeed though the daughter be disqualified. (1) But if the daughter's son predeceases his maternal grandfather his son cannot inherit in the right of his father (2) though he will succeed in his own right as a bandhu. "A daughter's son, on whom the inheritance has actually fallen takes it as full owner and thereupon he becomes a new stock of descent and on his death the succession passes to his heir and not back again to the heir of his grandfather. (3) But until the death of the last daughter capable of being an heiress he takes no interest whatever and therefore can transmit none. Therefore, if he should die before the last of such daughters, leaving a son, that son would not succeed, because he belonged to a different family and he would offer no oblation to the maternal grandfather of his own father." (4)

An impartible property will pass on the death of all daughters to the eldest surviving son. (5)

(7) **Mother**

2185. The following texts bear on the subject of her right.

Manu:—Of him, who leaves no son, the father shall take the inheritance and the brothers. (6)

Mitakshara:—Besides, the father is the common parent to other sons but the mother is not so: and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance conformably with the text "To the nearest Sapinda, the inheritance next belongs." (7)

Mayukh:—In default of daughter's son comes the father in default of him, the mother. (8)

It will be seen that while the Mitakshara places the mother before the father, the Mayukh reverses the order and this preference for the father has been given effect to in Guzerat on the ground "that the majority of eminent Hindu writers give the preference to the father over the mother." (9) But in the Ratnagiri district where the Mitakshara is pre-eminent the mother was held to inherit before the father. (10) The mother like all females will take only a limited estate and on her death the estate will devolve on the son's heir. (11)

2186. On the general principle that females are excluded from succession unless expressly mentioned in the texts the step-mother has no place in the table of succession. She cannot, therefore, succeed to her step-son. (12) And for the same reason a step-grandmother is not the heir of her step-grandson. (13)

(1) *Venkayamma v. Venkataramanayya*, 20 M. 207 affirmed O. A. 25 M. 678 P. C., *Bansi Dhar v. Lachmi*, 8 A. L. J. 849.

(2) *Srinivasa v. Dandayudapani* 12 M. 411 (413, 420); *Dharup v. Gobind*, 8 A. 614 (621).

(3) *Muttuvaduganadha v. Periasami*, 16 M. 11 affirmed O. A. 19. M. 451 P. C.; *Muttu v. Dora*, 8 M. 290 P. C.

(4) *Mayne cited in Dhanrup v. Gobind* 8 A. 615 (621).

(5) *Kattama Nachiar v. Dorasingha*, 6 M. H. C. R. 310 (333); *Muttu v. Dorasinga*, 8 M. 290.

(6) *Manu* II-185.

(7) *Mit* II-III-8 To the same effect *Dayabag* XI-1-5; XI-IV-1-6; *Vivad Chint* (Tagore) 293-295; *Dayakram Sangrah* XI-1-5; XI-IV-1-6; 1-V-1-2; *Vir mitrodaya* (Sarkar) 190, 191; *Vellanki v. Venkata*, 1 M. 174 P. C.

(8) *Mayukh* IV-VIII-18 (Mandlik) 80.

(9) *Khodabhai v. Bahadhar*, 6 B. 541 (546).

(10) *Balkrishna v. Lakshman*, 14 B. 605 (612) For the territorial extent of the Mayukh see Per Sir M. Westropp, C. J. in *Sakharam v. Sitabai*, 8 B. 353 (365).

(11) *Sakharam v. Sita Bai*, 8 B. 353 (363); *Narsappa v. Sakharam*, 6 B. H. C. R. (A. C.) 215; *Bachiraju v. Venkatapadu*, 2 M. H. C. R. 402 (406).

(12) *Jotilal v. Durani*, W. R. (F. B.) 178; *Tahalai v. Gaya Pershad*, 37 C. 214 followed in *Sundar Moni v. Bangsidhar*, 16 I. C. 900 (902); *Rama Mand v. Surgiani*, 18 A. 221; *Kumaravelu v. Virana*, 5 M. 22; *Muttanmal v. Vengalakshmi*, 5 M. 32; *Ramasami v. Narasamma*, 8 M. 133; *Keeserbai v. Valab*, 4 B. 318 (208); *Kirpi v. Ramjas* (1889) P. B. 158.

(13) *Jotilal v. Durani*, W. R. (F. B.) 178.

2187. But though the step-mother cannot succeed as mother, she may still succeed in Bombay as a widow of her husband and as such his Gotraj Sapinda.⁽¹⁾ As such she is held to be preferable to the widow of the half brother⁽²⁾ and the widow of a first cousin *ex paterna* of the deceased propositus was preferred to a fifth male cousin⁽³⁾ and in another case she was held to succeed to her step-son in preference to her step-son's paternal uncle's son⁽⁴⁾ on the principle that the widows of Gotraj Sapindas in the case of collaterals are to be preferred to the male Gotrajs in a more remote line, and a *fortiori* the widow of a male Gotraj in the ascending line should be preferred to such collateral.⁽⁵⁾ As West and Buhler put it "The step mother ought to be placed on account of her near relationship to the deceased immediately after the paternal grandmother up to whom only the succession is settled by special texts."⁽⁶⁾

2188. It has already been stated before that the father takes before the mother under the Mayukh. Otherwise he follows her.⁽⁷⁾

(8) Father. The step-father has of course no place in the Hindu table of succession. Even the wife who re-marries forfeits her husband's inheritance so that her son cannot lay any claim to his father's estate.

2189. After the father, come the brothers, those of the whole blood being preferred to those of the half blood. The following texts support him.

(9) Brother.

Mitakshara :—On failure of the father, the brothers share the estate. Accordingly Manu says "of him who, leaves no son the father shall take the inheritance or the brothers."⁽⁸⁾

5. Among brothers, such as are of the whole blood, take the inheritance in the first instance under the text before cited "To the nearest Sapinda the inheritance next belongs."⁽⁹⁾ since those of the half blood are remote through the difference of the mothers⁽¹⁰⁾

It will be noted that except in the case of brothers and sons of brothers neither the Mitakshara nor the Mayukh makes any distinction between persons of the whole blood and those of the half blood. Legitimate sons by different mothers take equally the property of their father. The Mitakshara in the succession of brothers, places uterine brothers *i.e.*, brothers of the whole blood before brothers of the half blood. It then brings in brothers of the half blood and places the sons of brothers respectively in the same order as their respective fathers.⁽¹¹⁾ The Mayukh also prefers brothers of the whole blood to brothers of the half blood but next to the brothers of the whole blood brings in their sons.⁽¹²⁾ It names as next in succession the paternal grandmother, and after her the sister, and after the sister introduces together the paternal grandfather and the half brother and after them the paternal great grandfather, the

(1) *Keser Bai v. Valab*, 4 B. 188 (208).

(2) *Rakhmabai v. Tukaram*, 11 B. 47.

(3) *Lallubhai v. Mankuvarbai* 2 B. 888 affirmed O. A 5 B. 110 P. C.

(4) *Russoobai v. Zoolakhbai*, 19 B. 787.

(5) *Rachava v. Kalngapa*, 16 B. 718 explained *Lallubhai v. Mankuvarbai*, 2 B. 888.

(6) W. and B. H. L. (8rd Ed.) 472; cited with approval in *Russoobai v. Zoolakhbai*,

19 B. 707 (710).

(7) Mit. II-III 2.

(8) Manu IX-185; Mit II-IV-1.

(9) Manu IX-187.

(10) Mit. II- VI 1, 5; To the same effect Mayukh IV-VIII-16.

(11) *Ib.* II-IV-7.

(12) Mayukh IV-VIII-16.

father's brother and the sons of brothers of the half blood. (1) But so far as brothers of the full and half blood are concerned both the Mitakshara and the Mayukh agree. (2) Of course custom may eliminate the textual difference between brothers of the whole and brothers of the half blood and in one case such custom was sought to be supported upon the strength of an entry in the *wajib-ul-arz* which the Privy Council ruled out as connoting "the views of individuals as to the practice that they would wish to see prevailing rather than the ascertained fact of a well established custom." (3) But in the Punjab such a custom is presumed in the case of certain tribes. (4)

It has already been seen that there is no relation between the sons of the mother by her first marriage and of those of her second marriage after death or divorce of her first husband. The later Smritis abhor a woman's re-marriage and it would be a far cry to expect them to suffer any relationship between the offspring of a sacramental and those of a sinful union.

2190. As between brothers of the whole blood and those of the half blood those re-united take in preference to those not re-united.
Effect of reunion. But a reunited half brother takes equally with the separated whole brother. In other words---

(1) A whole brother reunited excludes a whole separated brother. Here the relationship being equal the succession is regulated by union.

(2) A whole brother reunited excluded a half brother reunited. Here the union being equal superior relationship rules the succession.

(3) A whole brother separated and a half brother re-united share equally. Here superior relationship without union and union with inferior relationship are equal. (6)

This subject has been already considered elsewhere (S. 152)

2191. The sub-division of brothers into those of the whole blood and those of the half blood extends to their sons, both the
(10) Brother's Son. Mitakshara and the Mayukh placing sons of brothers of the whole blood before the sons of brothers of the half blood. On this subject the Mitakshara says:—

Mitakshara:—7. On failure of brothers also, their sons share the heritage in the order of the respective fathers

Ib. 8. In case of competition between brothers and nephews, the nephews have no title to the succession for their right of inheritance is declared to be on a failure of brothers.

(1) Mayukh IV-VIII 18 20.

(2) *Krishnaji v. Pandurang*, 12 B. H. C. R. 65; *Samal v. Amra*, 6 B. 394; *Parmappa v. Shiddappa*, 80 B. 607 (610)

(3) *Anant Singh v. Durga Singh* 32 A 363 (373) P. O.

(4) *Jafar v. Mhd. Khan*, (1906) P. L. R. 29; *Roda v. Amar* (1878) P. R. 75; *Devi v. Mangal*, (1874) P. R. 84; *Tekhu v. Waliab*, (1876) P. R. 6; *Phaggan v. Buta*, (1877) P. R. 9;

Hazara v. Samita, (1876) P. R. 76; *Ram v. Bishen*, (1879) P. R. 123; *Albela v. Pat* (1881) P. R. 21; *Mahtaba v. Jaimal*, (1883) P. R. 187; *Maya v. Rishen*, (1884) P. R. 28; *Gopal v. Nainu* (1887) P. R. 71.

(5) *Sham Narain v. Court of Wards*, 20 W. R. 197 (202).

(6) Mit II IV-57; May. IV-VIII-17; *Samal v. Amra* 6 B 394 (397).

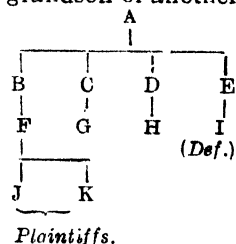
9. However when a brother has died leaving no male issue (nor other nearer heir) and the estate has consequently devolved on his brothers indifferently, if any one of them died before a partition of their father's estate takes place, his sons do in that case acquire a title through their father and it is fit therefore that a share should be allotted to them in their father's right at a subsequent distribution of the property between them and the surviving brothers (1).

Shrikrishna :—In default of brothers, the brother's son is the successor. Here also a nephew of the whole blood inherits in the first instance and on failure of such, the nephew of the half blood but in case of re-union of co heirs and on the supposition of all being of whole blood the associated son of the whole brother is in the first place heir; and on failure of him, the unassociated nephew of the whole blood or on the supposition of all being of the half blood, the associated nephew of the half blood is the first heir and on failure of him, the unassociated nephew. But if the son of the whole brother be separate and the son of the half brother associated, both inherit together, like brothers in similar circumstances" (2)

2192. According to the Mitakshara the nephews do not share with their uncles but take a share which had vested in their father. (3) According to the Mayukh the sons of a deceased brother succeed along with the surviving brothers. (4) The rule is held to extend even to sons of cousins. (5) But this rule cannot be extended to the Mitakshara country without proof of custom. In one case of the Ahban Thakers of Oudh such a custom was pleaded but the Privy Council held the four instances adduced in proof of it to be of a comparatively modern date and insufficient to prove a family custom pleaded in derogation of the ordinary law. (6)

Even in Bombay the rule does not go beyond the brothers and their children. (7)

2193. In an undivided family a brother's son takes his own share as well as the lapsed share of a brother's son in preference to the grandson of another brother. (8) Where for instance *A* had four grandsons *F*, *G*, *H*, & *I* of whom *I* alone was alive at the date of the suit by *F*'s two sons *J* and *K* who claimed to divide *A*'s estate in two equal shares claiming a share by survivorship to which *I* replied that being a nearer Sapinda of *G* and *H* he was entitled to inherit their share to the exclusion of *J* & *K*. the court held that inasmuch as *F* had predeceased both *G* & *H*, their share devolved on *I* to the exclusion of the plaintiffs. (9) In other words, under the Mitakshara the nephew succeeds not as the heir of his father but as the direct heir of his uncle. (10) As such, brother's sons take per *capita* and not per *stirpes*. (11)



The brother's son is the last of what Mitakshara calls the "compact series of heirs." (12)

(1) Mit. II-IV-7-9.

(2) Cited in Sarv. Inh. 927, 928.

(3) Sarv. Inh. 928.

(4) May. IV-VIII-17.

(5) 1 W. and B. H. L. (3rd. Ed.) P. 108.

(6) *Chandika v. Muna*, 24 A. 278 P. C.

(7) *Chandika v. Muna*, 24 A. 278 P. C.

(8) *Madho v. Bindessary*, 3 Agra. 101.

(9) *Madho v. Bindessary*, 3 Agra 101.

(10) *Brojo Kisore v. Srinath*, 9 W. R. 468 ;
Brojo Mohun v. Gourree, 15 W. R. 70. •

(11) *Brojo Kishore v. Srinath*, 9 W. R. 468.

(12) Mit II-V-2; *Mohan Das v. Krishna Bai*,
5 B. 597 (602).

2194. On the assumption that the Mitakshara passage relating to a brother's son ⁽¹⁾ includes also a grandson it was held and it is now settled that the brother's son's son's place is next after the brother's son. ⁽²⁾ But if the word "Santan" used by Yajnavalkya and in the Mitakshara be used in a generic sense as including three descendants namely, the son, the son's sons and the son's son's son, it would follow by parity of reasoning that the three generations must be let in simultaneously with the generic interpretation of the term. This question was considered by the Privy Council who quoted Shama Charan Sarkar's solution of the difficulty as follows:—"The answer is that in law calculation is made from the son of the common ancestor which here is the father of both the deceased and his brother. Consequently the term 'son' (of that ancestor) is inclusive of his great-grandson who is the brother's grandson." ⁽³⁾

2195. This raises the question whether the distinction between the whole and the half blood should equally apply to brothers' grandsons. In Allahabad it is held that such distinction is applicable equally to all collaterals. ⁽⁴⁾ But in Bombay it was held to be limited to the brothers and brother's sons ⁽⁵⁾ but in the view now settled there appears to be no reason why it should not apply to brother's grandsons as well.

(12) Paternal grandmother. **2196.** The paternal grandmother comes in next. After the brother's son the Mitakshara summarily dismisses the remaining heirs with the following texts:—

Mitakshara:—4. Here on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons.

2. On failure of the paternal grandfather's line, the paternal great-grandmother, the great grandfather his sons and their issue inherit. In this manner must be understood the succession of kindred belonging to the same general family and who are Sapindas. ⁽⁶⁾

Mayukh:—(7) In default of brother's sons [come] the Gotraj Sapindas [gentile relations] Among them first is the paternal grandmother according to the text of Manu ⁽⁸⁾ which says: "And the mother also being dead the father's mother shall take the heritage" ⁽⁹⁾ And although she is to be entered at the end after the brother's sons, after the manner of the entry of intruders who are placed at the end, because she is not mentioned among those whose order of [succession] is fixed ending with brother's sons.

2197. It has been held in Bombay that a paternal grandmother in Gujerat inheriting property whether moveable or immoveable from her maiden grand-daughter takes an absolute interest therein and on her death the property goes to her heir and not to the heir of the grand-daughter and that the grandmother is entitled to dispose of such property by will. ⁽¹⁰⁾

(1) Mit II-IV-7; II-V 1 The word in the original is 'Santan' which means the "issue" See *Buddha Singh v. Lattu Singh*, 34 A. 668 affirmed O. A. 87 A. 604 (616) P. C.

(2) *Buddha Singh v. Lattu Singh*, 34 A. 668 affirmed O. A. 87 A. 604 (612) P. C.; *Kalian v. Ramachandar*, 24 A. 128; *Kureem Chand v. Odung*, 6 W.R. 158; *Cochin v. Rajoo* 14 W.R. 208; *Chinnaswamy v. Kunju*, 85 M. 152 contra *Suraya v. Lakshminarasamma*, 5 M. 291.

(3) *Buddha Singh v. Lattu Singh*, 37 A.

604 (619) P. C.

(4) *Suba v. Sarafraz*, 19 A. 215; *Kesari v. Ganga*, 32 A. 541 - B.

(5) *Narayan v. Chintamun*, 6 B. 393 (397);

Puthalrao v. Ramrao, 24 B. 817; *Saguna v. Sadasiv*, 26 B. 710.

(6) Mit. II-V-4.

(7) May. IV-VIII-19.

(8) Manu IX 217.

(9) Mit. II-1-60 May IV-VIII-16 (Mandlik) 81.

(10) *Gandhi v. Jadab*, 24 B. 193 (214, 218).

The paternal grandmother inherits in her own right and not as a widow. (1)

- (12) (a) **Sister in Bombay.** 2198. According to the Mayukh the sister has a place between the grandmother and the grandfather according to the following text:—

Mayukh:—In default of her [*i. e.* the paternal grandmother] comes the sister, for says Manu (2) "The wealth of the deceased goes to whoever is next among Sapindas and the rest," And similarly Erihaspati:—"Where a childless man leaves several clansmen Sakulyas (kinsmen) and Bandhvas (relations), whoever of them is the nearest, takes the wealth of the deceased." Being begotten in her brother's family (gotra), she possesses the qualifications of a Gotraj. The community of Gotra does indeed, not exist in the case of a sister. But the quality of being a *Sagotra* is not mentioned here as a condition of the right of taking the wealth as heritage. (3)

The sister is not a Gotraj, since on her marriage she assumes the *Gotra* of her husband. As Westropp, J., observed: "Some of the Bombay shastris have been so far influenced by Nilkanth's play upon the term '*gotra*' as to style the sister '*gotraj*' as well as *Sapinda*." The better opinion seems however to me to be that which would regard her heirship as dependant either on the special mention of her by Brihaspati or Nilkanth or upon the *Sapindaship*." (4) Whatever may be the logic of her right she has now the established right to heirship after the paternal grandmother in the country subject to the Mayukh.

2199. According to the Mitakshara (5) the paternal grandfather comes immediately after the paternal grandmother. But as already stated the Mayukh postpones him in favour of the sister who intervenes between himself and the paternal grandmother. According to the Mayukh again, he takes equally with the half brother "because their propinquity is equal." (6)
- (13) **Paternal grandfather.**

2200. The paternal uncle takes next, an uncle of the full blood being preferred to an uncle of the half blood, (7) and the latter to his cousins. (8) According to the Mayukh the paternal uncle shares the inheritance equally with paternal great grandfather, and sons of the half brother. (9)
- (14) **Paternal Uncle**

The distinction between an uncle of the whole blood and one of the half blood only applies where the two are related to the deceased in the same degree. That distinction cannot apply when there is a difference in degrees. Consequently, after the paternal grandfather the order of succession will be as follows: paternal uncle of full blood (10) paternal uncle of half blood (11) paternal uncle's son of full blood, paternal uncle's son of half blood (12).

2201. On the ground that the "son" includes also the "grandson" a view now confirmed by the Privy Council (13) a paternal uncle's son cannot succeed in preference to a brother's grandson. The contrary was held in Madras in a case (14)
- (15) **Paternal Uncle's Son.**

(1) *Ib* P. 201.
 (2) Manu IX-187.
 (3) Mayukh IV VIII-17 (Mandlik) 81.
 (4) *Lallubhai v. Mankuvarbhai*, 2 B. 388
 (422)
 (5) Mit II IV-4, 5.
 (6) May. IV-VII-20.
 (7) *Vithal Rao v. Ram Rao* 24 B. 317;
Sham v. Kushun, 6 C. L. J. 190.
 (8) *Ganga Sahai v. Kesari* 37 A. 545 (56, 557) P. C.
 (9) May. IV-VIII-20.
 (10) *Kesari v. Ganga*, 82 A. 541 F. B.;

Ganga v. Kesari 37 A. 545 (556) P. C.; *Muthusami v. Samambedu*, 19 M. 408 (410) P. C. *contra Siba v. Sraja* 19 A. 215.

(11) *Kalian v. Ram Chander*, 24 A. 128 approved in *Buddha-Singh v. Lallu Singh*, 37 A. 604 (621) P. C.

(12) *Surya v. Lakshminarayana*, 5 M. 291 overruled in *Buddha Singh v. Lallu Singh* 37 A. 604 (622, 623) P. C. approving *Chinnasami v. Kunju* 35 M. 152

(13) *Buddha Singh v. Lallu Singh* 37 A. 604 P. C.

(14) *Surya v. Lakshminarayana*, 5 M. 291.

which has been overruled by the Privy Council. (1) A paternal uncle's son is preferable in Bombay to the daughter of a brother (2) for the obvious reason that a Gotraj is always preferable to a bandhu.

2202. On the ground that the term "Son" (*putra*) is used in its generic sense as comprising the grandson the place of the paternal uncle's grandson is the same as the paternal uncle's son. (3) In this view the great grandson of the grandfather will succeed in preference to the grandson of the great grandfather on the ground that the propinquity of Gotras is to be determined by lines of descent, that is to say, the inheritance is to go first in the *Santan* or line of the paternal grandfather, then in default of any one in that line of the paternal great grandfather and so forth; that is to say the line of the grandfather must be first exhausted before the great grandfather and his line come in. (4) In this view the three immediate descendants of the grandfather succeed in preference to the great grandfather and his descendants and consequently the great grandson of the grandfather is a preferential heir as against the grandson of the great grandfather.

2203. The remaining heirs though categorized by the Smritikars are seldom liable to be present to take the succession. They are—

- (17) Father's father's mother. (5),
- (18) Father's father's father.
- (19) Father's father's brother.
- (20) Father's father's brother's son.
- (21) Father's father's brother's son's son.

The above order is supported by the following text :—

Mitakshara 5. On failure of the paternal grandfather's line, the paternal grandmother, the great grandfather, his sons and their issue inherit. In this manner must be understood the succession of kindred belonging to the same Gotra and Sapindas. (6)

2204. The Subodhini carries the enumeration of Gotraj Sapindas a little further adding the following :—

- (1) paternal great grandfather's mother,
 - (2) great grandfather's father,
 - (3) great grandfather's brothers and their sons,
 - (4) paternal great grandfather's grandmother,
 - (5) great grandfather's grandfather,
 - (6) great grandfather's uncles and their sons,
- adding—"the same analogy holds in the succession of Samanodaks".

2205. The Mayukh contends for a different series of heirs after the brother's sons :—

- (1) Paternal grandmother.
- (2) Sister.

(1) *Buddha Singh v. Lalla Singh*, 37 A 604 (622 623) P. C

(2) *Manekbai v. Navanji*, 12 Bom. L. R. 454

(3) *Buddha Singh Lahu Singh*, 34 A 663 affirmed O. A. 37 A. 604 P. C. *Kashi Bai v. Moreswar*, 35 B. 389.

(4) *Ranchara v. Kalingapa* 16 B. 716 followed in *Budha Singh v. Lattu Singh*, 34 A. 663 (675) affirmed O. A. 37 A. 604 P. C. ; To the same effect *Kashi Bai v. Moreswar* 35 B. 389 ; *Chinnasami v. Kunju*, 35 M. 152.

(5) Mit II-V-5.

(6) II-VI-5.

- (3) Paternal grandfather and brothers of half blood.
- (4) Paternal great grandfather.
- (5) Paternal uncle and sons of a brother of half blood.

It does not pursue the enumeration further, and the principle stated by it, nearness of kin does not clearly indicate the rule of continuation of this series. (1)

2206. Under the Hindu law prevailing in the Bombay Presidency the grandson of the paternal great grandfather of the propositus is entitled to succeed in preference to the paternal aunt⁽²⁾ on the ground that being a Gotraj, he is preferred to a bandhu. So a great grandson of the great grandfather comes in before the widow of a son of the great grandfather since she is not expressly mentioned or provided for in the text. (3)

2207. Remote Sapinda heirs.—Grandsons in the fourth and fifth removes are *Sapindas* and heirs to their common ancestors. (4) The text of the Mitakshara is in such cases decisive, unless it can be shown that its plain language has received some qualification or judicial construction. (5) Such are descendants of the deceased from the fourth to the sixth degree:—

- (22) great grandson.
- (23) great great great grandson.
- (24) great great great great grandson.

Descendants of father of deceased from fourth to the 6th degree.—

- (25) Brother's great grandson.
- (26) Brother's great great grandson.
- (27) Brother's great great great grandson.

Descendants of grandfather of deceased from fourth to sixth degree.

- (28) Father's brother's son's son's son.
- (29) Father's brother's son's son's son's son.
- (30) Father's brother's son's son's son's son's son.

Descendants of great grandfather of deceased from fourth to sixth degree.

- (31) Father's father's brother's son's son's son.
- (32) Father's father's brother's son's son's son's son.
- (33) Father's father's brother's son's son's son's son's son.

Ancestors of deceased in the fourth degree and their descendants to the third degree.

- (34) Father's father's father's mother.
- (35) Father's father's father's father.
- (36) Father's father's father's father's son.
- (37) Father's father's father's father's son's son.
- (38) Father's father's father's father's son's son's son.

Ancestors of deceased in fifth degree and their descendants to the third degree.

- (39) Father's father's father's father's mother.
- (40) Father's father's father's father's father.

(1) Colebrooke's note to Mit. II-VI 5.

(2) *Ganesh v. Waghu*, 27 B 610.

(3) *Bayana v. Dinkar*, 6 N. L. R. 89.

(4) *Ram Singh v. Ugur Singh*, 18 M. L. A

878.

(5) *Ram Singh v. Ugur Singh*, 18 M. L. A 378 (899.)

- (41) Father's father's father's father's father's son.
- (42) Father's father's father's father's father's son's son.
- (43) Father's father's father's father's father's son's son's son.

Ancestors of deceased in sixth degree and their descendants to the third degree.

- (44) Father's father's father's father's father's mother.
- (45) Father's father's father's father's father's father.
- (46) Father's father's father's father's father's father's son.
- (47) Father's father's father's father's father's father's son's son.
- (48) Father's father's father's father's father's father's son's son's son.

Descendants from fourth to sixth degree of ancestors in fourth degree.

- (49) Father's father's father's father's son's son's son's son.
- (50) Father's father's father's father's son's son's son's son's son.
- (51) Father's father's father's father's son's son's son's son's son's son.

Descendants from fourth to sixth degree of ancestors in fifth degree.

- (52) Father's father's father's father's father's son's son's son's son.
- (53) Father's father's father's father's father's son's son's son's son's son.
- (54) Father's father's father's father's father's son's son's son's son's son's son.

Descendants from fourth to sixth degree of ancestors in sixth degree.

- (55) Father's father's father's father's father's father's son's son's son's son.
- (56) Father's father's father's father's father's father's son's son's son's son's son.
- (57) Father's father's father's father's father's father's son's son's son's son's son's son.

242. The order of succession amongst Samanodaks is

Order of Succession subject to the following rules:
amongst Samanodaks

(1) The nearer line excludes the line more remote ; and

(2) A nearer kinsman excludes a remoter kinsman in the same line.

Synopsis.

- (1) *Order of succession among Samanodaks* (2208). 2212.)
- (2) *Who are Samanodaks* (2209-2212). (3) *Enumeration of Samanodaks* (2212).

2208. Analogous Law.—As to the order of succession amongst Samanodaks, the Mitakshara says:—(After citing Manu) “To the nearest Sapinda the inheritance next belongs.” ⁽¹⁾ Nor is the claim in virtue of propinquity restricted to Sapindas; but on the contrary, it appears from this very text that the rule of propinquity is effectual, without any exception, in the case of Samanodaks as well as other relatives when they appear to have a claim to the succession. ⁽²⁾

The principle of propinquity then amounts to this. The descendants of a nearer ancestor succeed in preference to those of a remoter ancestor, and

amongst descendants of the same ancestor the nearest excludes the more remote.

2209. Samanodaks.—Failing all Gotraj Sapindas the inheritance falls to the Samanodaks, who are all agnates beyond the degree of Sapindas ⁽¹⁾ i e., from the 7th to the 13th degree, 147 relations in number. The Mitakshara carries them even further so long as the pedigree can be proved. ⁽²⁾

(1) The seven descendants of the propositus from the 7th to the 13th degree. (=7)

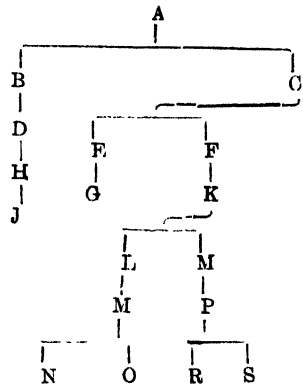
(2) The seven ascendants of the owner from the 7th to the 13th degree. (=7)

(3) The seven descendants from the 7th to the 13th degree in each of the 6 collateral lines of the owner. (=6×7=42)

(4) The 13 descendants in each of the collateral lines of the 7 ascendants who are up in the line from the 7th to the 13th degree from the owner. (=7×13=91) (=147.)

2210. All Samanodaks inherit in the order of propinquity ⁽³⁾ one related in the 7th degree excluding one related in the 8th degree and so on. In one case the Samanodaks were related as shown in the pedigree.

Tulsi (T) was the widow of G and the question was who were her next reversioners, whether N. O. R. & S. on the one side or J on the other. It was held that N. O. R. & S were in the 8th degree whereas J was in the 12th degree. As such they being nearer according to the rule of propinquity than J who was a descendant of A the great great grandfather of J, were entitled to succeed in preference to J. ⁽⁴⁾



The order of succession amongst Samanodaks is as follows :

2211. Failing all gotraja sapindas, the inheritance passes to what are called the samanodaks who are all agnates beyond the degree of sapinda.

"The order of succession" amongst the samanodaks, appears to be governed by two principles, namely:—

(1) The descendants of a nearer ancestor succeed in preference to those of a remoter ancestor.

(2) Amongst the descendants of the same ancestor the nearer excludes the more remote.

In the case of samanodaks it is not possible to apply the test of religious efficacy.

(1) *Kalka v. Mathura* 30 A. 510 P.C.;
Ram Baran v. Rajwanti, 32 A. 594 (597),
 (2) *Mit.* II-V-6; *May.* IV III 8; To the
 same effect *Manu* V-60. See *Devkore v.*
Amrit Ram, 10 B. 372 (380).

(3) *Manu* IX-187; cited in *Mit.* II-III-8.
 (4) *Uman Prasad v. Delvi Prasad*, 2 A. L.
J. 705. See the table of succession in
Sarv. Inh. 656.

- (1) *Who are the Bandhus* (2214). (3) *Division of Bandhus into three*
(2) *Texts on the subject* (2213). *classes* (2215).

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|---|--|
| (4) <i>Ground for preference</i> (2216). | <i>Bandhus</i> (2221). |
| (5) <i>Order of enumeration in the texts</i> (2216-2217). | (10) <i>Atma Bandhus</i> (2223). |
| (6) <i>Sub-division of Bandhus</i> (2218). | (11) <i>Sister's son</i> (2224). |
| (7) <i>Intervention of two or more females</i> (2219). | (12) <i>Daughter's daughters son</i> (2225). |
| (8) <i>Nearer excludes the more remote</i> (2220). | (13) <i>Mother's sister's son</i> (2226). |
| (9) <i>Classified order of heritable</i> | (14) <i>Pitri Bandhu</i> (2227). |
| | (15) <i>Matri Bandhus</i> (2228). |

2218. Analogous Law.—The following texts support the section :—

Mitakshara :—On failure of gotraj the bandhus are heirs. Bandhus are of three kinds (i) those related to the person himself, to his father or to his mother as is declared by the following text "The sons of his own father's sister, the sons of his own mother's sister and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncles must be reckoned his mother's cognate kindred."

2. Here by reason of near affinity, the *Atma Bandhus* are his successors in the first instance ; on failure of them his *Pitri Bandhus* or if there be none, his *Matri Bandhus*. This must be understood to be in the order of succession here intended. (1)

Two questions arise in a case of Bandhu succession *First*. Is the claimant a Bandhu? and secondly if so, is he the nearest Bandhu. These two questions are not solved by any text in the Mitakshara, which contains a meagre reference to them.

2214. Bandhus.—With the exception of the daughter's son who succeeds by virtue of a special text (2) all other Bandhus take the last place in the order of succession, which as already remarked, first falls on the Gotraj's Sapindas, then on the Samanodaks and lastly on Bandhus who cannot inherit so long as there is a Sapinda or Samanodak in existence. (3) As such the Samanodak however, remote even in the 13th degree, will succeed in preference to the deceased's sister's son who is a bandhu. (4)

The term "Bandhu" has already been defined. A Bandhu is a cognate Sapinda, that is to say, one related through a female. They are, therefore, called *Bhinna Gotra Sapindas*. A person is a Bandhu if he can show that he is related to the deceased through a female and that he is his Sapinda. There must be at least one female between the propositus and the Bandhu and in the case of Bandhus *ex parte paterna* there cannot be more than two females between them. (5)

2215. The text divides Bandhus into three classes.

(1) **Atma Bandhus.**—comprising

- (1) Father's sister's son.
- (2) Mother's sister's son.
- (3) Mother's brother's son.

(1) Mit. II-VI-1, 2.

(2) Mit. II-II 6 ; May IV-VIII-18, Viv. Chint. (Tagore), 294 Srikrishna XI II-28.

(3) Mit II-V-I, *Jasbhai v. Court of Wards* 28 W. R. 409 P.C. *Ram Singh v. Ugur Singh* 18 M. I. A. 878 ; *Narain v. Chandu Din* 9 A.

467 ; *Dindayi v. Bhatan Lall* 11 W. R. 800.

(4) *Rani v. Khagendra*, 31 C. 871 (892) P. C. (Mithila case) ; *Kalika Prasad v. Mathura Prasad*, 80 A. 510 P. C. ; *Dig Daji v. Bhatan* 11 W. R. 500.

(5) Sarv. Inh. 689.

(2) **Pitri Bandhus.**—comprising

- (1) Father's father's sister's son.
- (2) Father's mother's sister's son.
- (3) Father's mother's brother's son.

(3) **Matri Bandhus.**—comprising

- (1) Mother's father's sister's son.
- (2) Mother's mother's sister's son.
- (3) Mother's mother's brother's son.

In addition to the textual Bandhus—other relations are classed as Bandhus. Thus in Bombay the daughters of descendants and collaterals within seven degrees are bandhus (1) who come in after the Bandhus expressly named in the Mitakshara. (2) Such is the son's daughter (3) daughter's daughter (4) or a brother's (5) or a sister's daughter. (6)

In Madras the son's daughter (7) daughter's daughter (8) brother's daughter (9) father's sister (10) are bandhus. But a sister's daughter is not a bandhu in Madras (11) as she is in Bombay. Various reasons have been given in Bombay and Madras for letting in these relations. But the fact is that the woman's right had not developed when the Mitakshara was written and its subsequent acceptance by the courts as the last word in Hindu law has stereotyped the inequity which, however, justified in a patriarchal age, is wholly unsuitable to modern times.

But though the Bombay and the Madras courts have succeeded in letting in the female relations named, the courts in the other Mitakshara country strictly follow the text of the Mitakshara admitting none but those expressly mentioned therein as heirs. (12) As such even a sister is excluded because she is not expressly named. (13)

2216. Ground for Preference.—The first clause relates to affinity, this to propinquity. Having once established the Sapinda relationship as therein provided we have next to select out the nearest Sapinda, that is to say, the heir, between whom and the deceased there must be closest community of blood. Now how is this to be determined? The following text offers a solution:—

Mitakshara:—Here by reason of near affinity the Bandhus of the deceased himself are his successors in the first instance; on failure of them his father's Bandhus; or, if there be

- (1) W. & B. H. L. 137, 496, 498.
- (2) *Ib.* 491
- (3) *Venolal v. Parjaram*, 20 B. 173.
- (4) *Lallubhai v. Mankuwarbai*, 2 B. 388
- (446) *Tuljaram v. Mathuradas*, 5 B. 662
- (672) ; *Madhav Ram v. Dave*, 21 B 739.
- (5) *Nallanna v. Ponnal*, 14 M. 149.
- (6) *Krishnayya v. Pichamma*, 11 M. 287 ;
- Ramappa v. Arumugath*, 17 M. 182.
- (7) *Nallanna v. Ponnal* 14 M. 149.
- (8)
- (9) *Ramappa v. Arumugath*, 17 M. 182.
- (9) *Venkata Subramaniam, v. Thayarammal*, 21 M. 263; *Kutti v. Radakristna*, 8 M.H. C. R. 88; *Ramappa v Arumugath*, 17 M. 182

- (10) *Narasimma v. Mangammal*, 13 M. 10
- Chinnammal v. Venkatachella*, 15 M. 421;
- Venkatasubramaniam v. Thayarammah*, 21 M. 263.

- (11) *Sundrammal v. Rangasami*, 18 M. 193.
- (12) *Ram Dyal v. Magnes*, 1 W. R. 227.
- Treelochun v. Raj Kishan*, 5 W. R. 214;
- Mothooranath v. Eusuff*, 14 W. R. 856; *Julesur v. Uggur*, 9 C. 725 ; *Balaji v. Maina*. (1883) C. P. S. C. Pt. VIII 102; *Lalita v. Sita Ram*, 6 O. P. L. R. 138 ; *Lochan v. Babai*, 5 N. L. R. 161.

- (13) *Jagat Narain v. Sheo Das*, 5 A 811 ;
- Julesur v. Uggurge*, 725 ; *Lochan v. Babai*, 5 N. L. R. 161.

none, his mother's Bandhus. This must be understood to be the order of succession here intended. (1)

So far as this text goes it is conclusive. But the question still remains whether this order of precedence was limited only to the Bandhus named in the Mitakshara or applies equally to others not therein named. That it must apply to all is clear from the fact that it is now settled that the Mitakshara list is merely illustrative and not exhaustive from which it follows, and it has been so held that the same rule as to propinquity should be applied in testing the claim of all Bandhus. (2) At one time considerations of religious efficacy were held to determine the preference (3) but this is not the real test and as stated in the Vimitrodaya, "nearness of propinquity is alone the criterion of succession." (4)

2217. It was also at one time suggested that the enumerated bandhus in the Mitakshara or by Satatap must be given preference over others; but this view too has been negatived by the courts in which the contest lay between the sister's son (5) and the maternal uncle (6) against the mother's sister's son. "But the introduction of the maternal uncle and the sister's son into a list of Bandhus so as to effect a breach in the order of persons named is no reason for repudiating the notion of order amongst the persons *inter se* who have been named. (7)

2218. Even amongst Bandhus a ground for preference *inter se* is said to be found into the two sub-divisions into which they are grouped, *viz* (1) those related through the daughters of the family, and (2) those, related through the mother of the deceased. Of these the former are said to exclude the latter and among them preference is given to the descendants of the deceased. But this further classification is deprecated (8) and the better course held to be to prefer one who is nearer in degree to the common ancestor. (9)

2219. Another ground of preference equally unsupported by the texts is founded upon the fact "the general preference exhibited by the Mitakshara for the male over the female line . . . may legitimately be extended so as to prefer, all other considerations being equal, that claimant between whom and the stem there intervenes only one female link, is preferable to that claimant who is separated from the stem by two such links." (10) But this view has been dissented from elsewhere. (11)

It may then be stated that apart from these divergences the rule stated in the clause remains and is all that has received the consensus of approval.

(1) II-VI-2; *Saguna v. Sadashiv*, 26 B. 710 (715).

(2) *Muthusami v. Simambedu*, 19 M. 405 (410); P.C., *Appandai v. Bagubali*, 38 M. 489 (448).

(3) *Ram Singh v. Ugar Singh*, 18 M. 1. A. 878 (892); *Suba Singh v. Sarajroz*, 19 A. 215 (223, 224, 2 6, 231); *Muthusami v. Mutukku, mara*, 16 M. 23 (30); *Balusami v. Narayana*, 20 M. 342 (348).

(4) *Vimitrodaya* p. 174 cited and followed *Appandai v. Bagubali*, 38 M. 489 (445).

(5) *Gumesh v. Nil Kumul*, 22 W. R. 264.

(6) *Mohandas v. Krishnabai*, 5 B. 597.

(7) *Appandai v. Bagubali*, 38 M. 489 (445,

446).

(8) *Uma Shankar v. Nageswari*, (1919) Pat 162 (173) F. B.

(9) *Adit Narayan v. Mahabir* 1 Pat L. J. 324; *Uma Shankar v. Nageswari* (1919) Pat. 162 (178) F.B.; *Ramcharan v. Rahim Baksh*, 38 A. 416 (425); *Madho v. Janki*, 12 N. L. R. 148.

(10) *Tirumalachariar v. Andal* 30 M 406 (407); *Appandai v. Bagubali*, 38 M. 489 (445).

(11) *Ramacharan v. Rahim Baksh*, 38 A. 416 (424); *Uma Shankar v. Nageswari*, (1919) Pat. 162 (192) F.B.; *Ramcharan v. Rahim Baksh*, 38 A. 416 (421).

2220. Nearer excludes the more remote.—This clause merely repeats the often quoted general rule of inheritance propounded

01. (3). by Manu and repeated by all commentators, *viz.* "To the nearest Sapinda the inheritance next belongs," (1) The question is how is the nearness of the Sapinda to the deceased to be determined. A large number of rules have been suggested (i) that nearness should be determined by religious efficacy (ii) that it should be determined by nearness in degree. As previously remarked the second test has now received the sanction of the Privy Council and must be the sole test. Now nearness in degree may arise (i) from the fact that he is so mentioned in the texts or (ii) because of his proximity to the common ancestor. The last clause deals with the textual proximity and the rules arising therefrom. This clause deals with natural proximity. But in some cases this proximity must, it is said, follow the analogy of the former. (2) Reasons have already been given why this view cannot be accepted.

2221. There then remains the sole test, *viz.*, nearness of the line of the heir to the deceased in the case of Bandhus other than those enumerated in the Mitakshara who succeed in the order in which they are named. (3) But here again Bandhus connected through the father are preferred to those connected through the mother. (4) Other Bandhus obtain no fictitious priority by any analogy drawn therefrom but follow the rule of propinquity which places them in the following order:—

Classified order of heritable Bandhus:—

- (1) The son's daughter's son.
- (2) The son's son's daughter's son.
- (3) Sister's son (5) which includes a step sister's son. (6)
- (4) Brother's daughter's son. (7)
- (5) Brother's son's daughter's son.
- (6) Father's father's daughter's son.
- (7) Father's father's son's daughter's son.
- (8) Father's father's son's son's daughter's son.

2222. Here certain writers place the great grand father's daughter's son (9) as an Atma Bandhu but the Mitakshara describes him as a Pitri Bandhu (9) and he is so held. (10) It follows that the great grand father's son's daughter's son, the great grand father's son's son's daughter's son, the great great grand father's daughter's son, and his son's daughter's son, and son's son's daughter's son cannot be classed as *Atma Bandhus* though they have been so classed by them.

(1) Manu IX. 187.

(2) *Thirumalachariar v. Andal*, 80 M. 406 (407); *Krishnaswami v. Bagubai*, 88 M. 489 (445) contra *Romcharan v. Rahim Baksh*, 88 A. 416 (424); *Uma Shankar v. Nageshwar* (1:19. Pat. 162 (12 F. B. : *Porat v. Mehta*, 19 B. 681 (634); *Umoid Bahadur v. Udai Chand*, 6 C. 119; *Venkatgiri v. Chandra*, 28 M. 128; *Krishna v. Venkatarama*, 29 M. 115.

(c) *Muttusami v. Muttukumaraswami*, 16 M. 28 affirmed O. A. *Muthusami v. Simambedu*, 19 M. 405 P. C.

(4) *Saguna v. Sadashiv*, 26 B. 710 (715).

(5) *Amrita v. Lakhi Narayan*, 10 W. R.

76 F. B.; *Chelikani v. Vencata*, 6 M. H. C. R. 278; *Srinivasa v. Rangasami*, 2 M. 804; *Lakshmanammal v. Tiruvengada*, 6 M. 241; *Naraini v. Chandi Din*, 9 A. 487; *Raghunath v. Munnan*, 20 A. 191.

(6) *Subharaya v. Kylasa*, 15 M. 80; *Mari v. Chinnammal*, 8 M. 126.

(7) *Doorga v. Janaki Pershad*, 18 W. R. 188

(8) *Bhattacharya v. H. L.* (2nd Ed) 460; *Sarv. Inh.* 713.

(9) Mit II VI. 1.

(10) *Muthuswami v. Simambedu*, 16 M. 28 affirmed O. A. 19 M. 495 P. C.; *Krishna v. Venkata Rama*, 29 M. 115.

- (9) Daughter's son's son. (1)
- (10) Son's daughter's son's son. Son's son's daughter's son's son. (2)
- (11) Father's daughter's son's son (3)
- (12) Brother's daughter's son's son.
- (13) Father's father's daughter's son's son.
- (14) Father's father's son's daughter's son's son.

2223 Atma Bandhus.—The Mitakshara defines the term "Atma Bandhu" as comprising the sons of a man's own father's sister, the sons of his own mother's sister and the sons of his own maternal uncle or in short, the sons of his father's sister or those of the sister or brother of the mother. These are held to be merely illustrative of the kind of relations intended. Even as illustrations, they are not those of the nearest of kin and the courts have supplemented that list by declaring many more relations as included in this class. They are mentioned below :

- (1) *Sons of the daughters of the family :*
- (1) Son's daughter's son.
- (2) Son's son's daughter's son.
- (3) Son's daughter.

A son's daughter is entitled to inherit her grandfather's estate as a bandhu (4) though she cannot inherit in preference to the father's sister's son because he is a bandhu expressly mentioned in the Mitakshara. (5)

2224. The sister's son has had a strenuous struggle to get admitted into the table of heirs. At first he was ruled out as no heir at all, (6) since he was not enumerated in the list of heritable bandhus in the Mitakshara which was taken to be exhaustive and this view was even concurred in by the Privy Council (7) but his claim was too strong to be ignored and it was first conceded almost simultaneously (8) by a Full Bench decision of the Calcutta High Court (9) and by the Privy Council in 1868 (10) and since then in several cases. (11) In Madras a sister's son's right to succeed is held superior to that of a sister. (12) He is a nearer heir than the father's uncle's daughter's son (13) as also the sister's daughter's son. (14) The sister's son includes a step sister's son. (15) A sister's son's son's son is

(1) *Sheobarat v. Bhagwati* 17 A. 523. *Krishnappa v. Pichamma* 11 M. 297. *Tirumala chariar v. Andar* 80 M. 406.

(2) *Sarv. Inh.* 714.

(3) *Balusami v. Narayana*, 20 M. 342.

(4) *Nallana v. Ponnal*, 14 M. 149; *contra Koomud v. Seetakanth*, W. R. (F. B.) 75; *Vilhal v. Ganpth Rao*, 10 C. P. L. R. 65.

(5) *Nanhi v. Gauri*, 28 A. 1-7.

(6) *Iohari v. Kilaso*, 1 W. R. 74; *Girdhari Lal v. Secretary of State*, 4 W. R. 18; *Deo v. Kuppu*, 1 M. H. O. R. 85.

(7) *Thakoorain v. Mohun Lal*, 11 M. I. A. 386; *Kurun Singh v. Fysali*, 14 M. I. A. 178.

(8) The Calcutta Full Bench decided on the 12th September 1869 and the Privy Council on the 17th July 1868.

(9) *Omrit v. Luckee Narain*, 10 W. R. 76 (88) F. B.

(10) *Girdharilal v. Government* 10 W. R. 31

P. C.

(11) (1871) *Chelikani v. Raja Surenani* 6 M. H. C. R. 278; *Srinivasa v. Rangasami* 2 M. 304 (806); *Lakshmanammal v. Tiruvengada* 5 M. 241; *Umaid Bahadur v. Udoi Chand* 6 C. 119 F. B.; *Naraini v. Chondi* 9 A. 467; *Raghunath v. Munnai*, 20 A. 191; *Ram Baran v. Komla* 7 A. L. J. 802; 6 I. C. 698; *Uma Shankar v. Nageswari* (1919) Pat. 162 F. B.; *Goormukh v. Goomanee*, (1866) P. R. 30; *Mohunee v. Mohunna*, (1866) P. R. 35.

(12) *Lakshmanammal v. Tiruvengada*, 5 M. 241.

(13) *Kharagai v. Debi*, 9 I. C. 389.

(14) *Uma Shankar v. Nageswari*, (1919) Pat. 162 F. B.

(15) *Mari v. Chinnammal*, 8 M. 126; explained in *Subbaraya v. Kylasa*, 15 M. 800 (801, 802); *Muthusawmy v. Muttukumara*, 18 M. 28; *Sreenarain v. Bhya Jha*, 2 B. S. R. 39.

no bandhu because he and the propositus are not mutually related as Sapindas, as the propositus is not connected with him either through his maternal grandfather's line or his father's maternal grandfather's line or his mother's maternal grandfather's line. ⁽¹⁾

2225. According to the view of the Madras High Court a bandhu with one female in the line is preferred to a bandhu with two females in the line. ⁽²⁾ This view has been dissented from in Allahabad ⁽³⁾ and Patna. ⁽⁴⁾ But if the Madras view be sound the daughter's son's son will take precedence over the daughter's daughter's son. In any view the daughter's son's son has precedence since he claims through the father while the daughter's daughter's son claims through the mother.

- (15) Son's daughter's son.
- (17) Father's daughter's daughter's son ⁽⁵⁾
- (18) Father's son's daughter's daughter's son.
- (19) Grandfather's daughter's daughter's son ⁽⁶⁾
- (20) Grandfather's son's daughter's daughter's son.

According to Dr. Bhattacharya and Professor Sarvadhikari the following relations should come in next:—

- (1) Great grandfather's daughter's daughter's son.
- (2) Great grandfather's son's daughter's daughter's son.
- (3) Great great grandfather's daughter's daughter's daughter's son.
- (4) Great great grandfather's son's daughter's daughter's son.

But in view of the preference given to a maternal uncle of half blood over a paternal aunt ⁽⁷⁾ they cannot be classed amongst Atma Bandhus.

2226. Atma Bandhu Ex-parte Materna:—These are all sons of daughter's sons.

39. Mother's sister's son's son ⁽⁸⁾ The Patna High Court have in two cases given preference to a *Matri* Bandhu over a *pitri* bandhu because he was nearer in degree counting from the common ancestors in their respective lines, and also on the ground of religious merit, holding that when there is a contest between Bandhus other than the 9 Bandhus or between one of the former and one of the latter, the principle of numerical propinquity alone will determine the heritable right supplemented in case of doubt by the rule of religious efficacy and such other rules derived from the succession of agnates as may be appropriate. ⁽⁹⁾ In this view it has postponed the mother's sister's son's son to the maternal grandfather's daughter's son as being one degree nearer to the common ancestor though he is described as a *matri* bandhu in the

(1) *Lowji v. Mthabai*, 2 Bom. L. R. 842.

(1) *Ajudhia v. Ramsumer*, 31 A. 454; *Ramphal v. Panmati*, 32 A. 640.

(2) *Tirumalachariar v. Audul*, 30 M. 604; *Appandai v. Bagubali*, 38 M. 439 (415).

(3) *Ramcharn v. Rahim Bux*, 38 A. 416.

(4) *Uma Shankar v. Nageswari*, (1919) Pat. 162 (173).

(5) *Umaid Bahadur v. Udiachand*, 6 C. 119 F. B.

(6) *Perot v. Mehta*, 19 B. 681 (684) follow

ing Umaid Bahadur v. Udoichand, 6 C. 119 F. B.; *Venketagiri v. Chandru*, 28 M. 198; *Krishna v. Venkatarama*, 23 M. 115.

(7) *Muthusami v. Muttukumara*, 16 M. 23 affirmed O.A.; *Muthuswami v. Simambodu*, 19 M. 405 P. C.

(8) *Vijli v. Prabhakishmi*, 9 Bom. L. R. 1129; *Chaman Lal v. Ganesha*, 28 B. 453.

(9) *Umashankar v. Nageswari*, [1919] Pat. 162 (174) F. B.

Mitakshara and the former is an *Atma Bandhu*.⁽¹⁾ These decisions proceed upon the view that outside the specially named nine bandhus there is no justification for following the same gradation.

It was so decided by the majority of three judges of a Full Bench, the minority of two however being in favour of the tripartite distinction as applicable to all bandhus, whether out of the nine enumerated in the Mitakshara or those not so named.⁽²⁾

40. Mother's brother's daughter's son's son:—

Dr. Bhattacharya⁽³⁾ and Professor Sarvadhikari⁽⁴⁾ here place:—

- (1) Maternal great grandfather's daughter's son's son.
- (2) Maternal great grandfather's son's daughter's son's sons.
- (3) Maternal great great grandfather's son's daughter's son's sons.
- (4) Maternal great great grandfather's son's daughter's son's sons.

But as the maternal great grandfather's daughter's son is mentioned in the Mitakshara as *Matri Bandhu* it follows that his son and those following his son are not *Atma* bandhus.

- (41) Mother's sister's daughter's son.
- (42) Mother's brother's daughter's daughter's son.

These last two are *Atma* Bandhus *ex parte materna* to whom the deceased was *Matri Bandhu*. They are sons of daughter's sons.

Here the two learned authors above named place

- (1) the maternal great grandfather's daughter's daughter's son.
 - (2) the maternal grandfather's son's daughter's daughter's son.
 - (3) the maternal great great grandfather's daughter's daughter's son.
 - (4) the maternal great grandfather's son's daughter's daughter's son.
- but for the reason last noted they are not *Atma* Bandhus.

2227. Pitri Bandhus.—Next in the order of propinquity stand the *Pitri* bandhus, who are as follows:—

- (43.) Great grandfather's daughter's son⁽⁵⁾
- (44.) Great grandfather's son's daughter's son⁽⁶⁾
- (45.) Great grandfather's son's son's daughter's son.
- (46.) Great great grandfather's daughter's son.
- (47.) Great great grandfather's son's daughter's son.
- (48.) Great great grandfather's son's son's daughter's son.⁽⁷⁾
- (49.) Great grandfather's daughter's son's son.⁽⁸⁾
- (50.) Great grandfather's son's daughter's son's son.

(1) *Adit Narayan v. Mahabir*, [1917] Pat. 12; followed *Uma Shankar v. Nageswari*, [1919] Pat. 162 (178, 174 F. B.

(2) *Uma Shankar v. Nageswari*, [1919] Pat. 162 F. B.

(3) H. L. (2nd Ed) 460.

(4) *Sarv. Inh.* 716.

(5) *Mit.* II-VI-1.

(6) *Kissen v. Javallah*, 3 M. H. C. R. 346

(351 352).

(7) *Manikchand v. Jagat Settani*, 17 C. 518 (Jain case) following *Uma Shankar v. Kali K. mul*, 6 C. 256 affirmed O. A. 10 C. 282 P. C. *Padmakumari v. Court of Wards*, 8 C. 302 P. C.

(8) *Sethurama v. Ponnammal* 12 M. 155 following *Ratnasubba v. Ponnappa* 5 M. 69; *Chamanlal v. Doshi* 28 B. 453

- (51) Great great grandfather's daughter's son's son.
- (52) Great great grandfather's son's daughter's son's son.
- (53) Great grandfather's daughter's daughter's son.
- (54) Great grandfather's son's daughter's daughter's son.
- (55) Great great grandfather's daughter's daughter's son.
- (56) Great great grandfather's son's daughter's daughter's son.

Here follow the *Pitri Bandhus* to whom the deceased was *AtmaBandhu ex-parte paterna*

- (57) Father's maternal grandfather's son (1)
- (58) Do. grandson
- (59) Do. great grandson
- (60) The father's maternal grandfather's son
- (61) Do. grandson
- (62) Do. great grandson
- (63) The father's maternal great great grandfather's son.
- (64) Do. grandson.
- (65) Do. great grandson.
- (66) The father's maternal grandfather's daughter's son.
- (67) Do. son's daughter's son.
- (68) Do. son's son's daughter's son.
- (69) The father's maternal great grandfather's son.
- (70) Do. son's daughter's son.
- (71) Do. son's son's daughter's son.
- (72) The father's maternal great grandfather's daughter's son.
- (73) Do. son's daughter's son.
- (74) Do. son's son's daughter's son.
- (75) Father's mother's father's great grandson.
- (76) Father's mother's father's father's great grandson.
- (77) Father's mother's grandfather's great grandson.

(Here follow the *Pitri* bandhus to whom the deceased was *Pitri* bandhu.)

- (78) The father's maternal grandfather's daughter's grandson.
- (79) Do. son's daughter's grandson.
- (80) The father's maternal grandfather's daughter's grandson.
- (81) Do. son's daughter's grandson.

(Here follow the *Pitri* bandhus to whom the deceased was *Matri* Bandhu).

- (82) The father's maternal grandfather's daughter's daughter's son.
- (83) Do. son's daughter's daughter's son.
- (84) The father's maternal great grandfather's daughter's daughter's son.
- (85) Do. son's daughter's daughter's son.

(1) *Girdharilal v. Government* 12 M. I. A. 448.

2228. Matri Bandhus.--Next follow Matri Bandhus but this is not acceded to by the Patna High Court who regard propinquity and religious benefit the sole test. (1)

- (86) The maternal great great grandfather's daughter's son.
- (87) Do. son's daughter's son.
- (88) Do. son's son's daughter's son.
- (89) The maternal great grand father's daughter's son.
- (90) Do. son's daughter's sons.
- (91) Do. son's son's daughter's son.
- (92) The maternal great grandfather's daughter's son's son.
- (93) Do. son's daughter's son's son.
- (94) The maternal great great grandfather's daughter's son's son.
- (95) Do. son's daughter's son's son.
- (96) The maternal great grand father's daughter's daughter's son.
- (97) Do. son's daughter's daughter's son.
- (98) The maternal great great grandfather's daughter's daughter's son,
- (99) Do. son's daughter's daughter's son.

(Here follow the *Matri* Bandhus to whom the deceased was *Pitri Bandhu ex-parte Paterna*.)

- (100) The mother's maternal grandfather.
- (101) Do. his son.
- (102) Do. his grand son (2)
- (103) Do. his great grandson.
- (104) The mother's maternal great grandfather.
- (105) Do. his son.
- (106) Do. his grandson.
- (107) Do. his great grandson.

Here Dr. Bhattacharya places his great grand father, (3) but according to Mr. Sarvadhikari he should come after the daughter's son of the mother's maternal great grandfather (4).

(Here follow the *Matri* Bandhus to whom the deceased was *Atma Bandhu ex-parte materna*.)

- (108) The mother's maternal grandfather's daughter's son.
Here, according to Mr. Sarvadhikari there should come
(1) his great great grandson.
and (2) his great grandfather.
- (109) The mother's maternal grandfather's son's daughter's son.
- (110) Do. son's daughter's grandson.

(1) *Addi Narain v. Mahabir*, (1917) Pat. 12 followed. *Uma Shankar v. Nageswari*, (1919) Pat. 162 (178, 174) F. B. (Per Mullick, Jwala Prasad and Thornhill, JJ. *contra* Dawson

Miller, C. J., and Manuk, J. *dissentients*.)

(2) Mit. II-VI-1

(3) H. L. (2nd Ed.) 461.

(4) *Inb*, 717.

- (111) The mother's maternal great grandfather's daughter's son.
 (112) Do. the son's daughter's son.
 (113) Do. grandson's daughter's son.
 (114) The mother's maternal grandfather's great great grandson. (1)
 (Then follow the *Matri Bandhus* to whom the deceased was *Pitri Bandhu*.)
 (115) The mother's maternal great grandfather's Do
 (116) The mother's maternal great grandfather's daughter's son.
 (117) Do. son's daughter's son.
 (118) The mother's maternal great grandfather's daughter's grandson.
 (119) Do. son's daughter's grandson.
 (Then follow the *Matri Bandhus* to whom the deceased was *Matri Bandhus*.)
 (120) The mother's maternal grandfather's daughter's daughter's son.
 (121) Do. son's daughter's daughter's son.
 (122) The mother's maternal great grandfather's daughter's daughter's son.
 (123) Do. son's daughter's daughter's son.

The relative position of all these relations may be more conveniently studied in the chart here appended.

244. In Bombay, Berar and Sindh subject to the **Special Female heirs in Bombay.** Mayukh, the wives of Gotraj Sapindas are themselves treated as such and take their husband's

places in the line of heirs subject to the two following rules.—

(1) They come in only after all the Gotraj Sapindas in the line to which their husbands belonged are exhausted.

(2) A widow of a gotraj sapinda cannot inherit until after the sister.

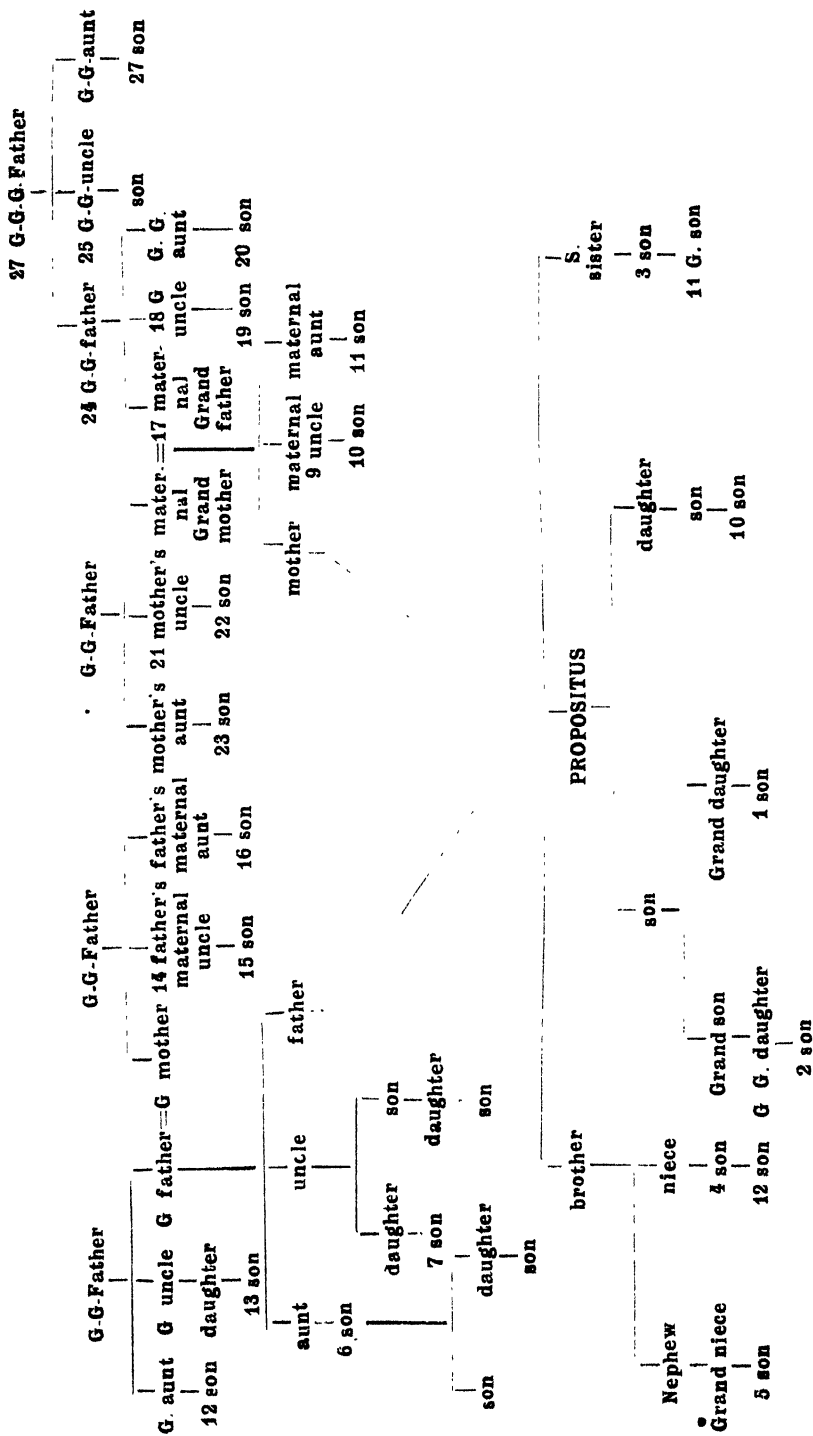
(3) As such, the following other females are recognized as heirs.—

- (4) Sister, whether of the whole or half blood.
- (5) Widows of predeceased Sapindas and Samanodaks.
- (6) Son's widow.
- (7) Step-mother.
- (8) Father's widow.
- (9) Brother's widow.
- (10) Brother's son's widow.
- (11) Paternal uncle's widow and the widows of the paternal first cousins.
- (12) Daughter's descendants and collaterals within 5 degrees.

- (a) The son's daughter.
- (b) The daughter's daughter.
- (c) Brother's daughter.
- (d) Sister's daughter.

(1) Dr. Bhattacharya would place him after No. 107.

(Remote ones omitted)



such as who all inherit after the nine *bandhus* expressly enumerated in the Mitakshara.

(13) Father's sister who comes in after all the Gotraj Sapindas but before the Bandhus.

Synopsis.

- | | |
|---|--|
| (1) <i>Special female heirs in Bombay</i> (2229) | (6) <i>Sons' widow</i> (2234). |
| (2) <i>Sister</i> (2231). | (7) <i>Step-mother</i> (2235). |
| (3) <i>Half sister</i> (2232). | (8) <i>Brother's widow</i> (2236). |
| (4) <i>Father's half-sister</i> (2233). | (9) <i>Brother's son's widow</i> (2237). |
| (5) <i>Widows of predeceased sapindas</i> (2230). | (10) <i>Paternal uncle's widow</i> (2238). |
| | (11) <i>Daughters of descendants</i> (2239). |

2229. Analogous Law.—The special female heirs in Bombay are the **CL** (1) outcome of usage which has outgrown the law and the mode in which their rights have become recognized is set out in the cases which will now be examined.

In Bombay the wives of Gotraj Sapindas are themselves classed as such. But, as already remarked it is so by general acceptance and custom and is based upon no special text. As West, J., said: "The recognition of the widows of Gotraj Sapindas as themselves Gotraj Sapindas, however, slender the basis on which it originally rested so far as collaterals are concerned, has become a part of the customary law wherever the doctrines of the Mitakshara prevail, and the Courts must give effect to it accordingly. Whether indeed, the widow of a collateral should take before the son or grandson of the same man, may admit of question. The mother of the propositus takes before her son or grand son, and a like precedence is assigned to his grandmother and great grand mother; but the brother's wives on the other hand are not mentioned between brothers and their sons in Yajnavalkya's text, nor has Vijñāneshwar found a special place for them or for a descendant widow as he has for the daughter's son. Although, therefore, a woman, becoming a member of her husband's family, takes the benefit of a rule resembling that of the Roman law, yet as in that law the widow's right of inheritance was limited, and of late introduction..... Thus if the foundation of the rights of widows of Gotrajs under the Mitakshara is slender, under the Mayukh it may be almost shadowy. No widow of a collateral is expressly provided for; the only wife of an ascendant expressly admitted, is one for whom there is a special text." (1) In another case Telang, J., said: "When it is remembered that the widows of collaterals among the Gotrajs are not specially mentioned, even in these works like the Mitakshara, where collateral males like uncle's son etc are expressly named, it seems to be the fair interpretation to hold that a female Gotraj Sapinda in any one line cannot exclude any male properly belonging to that line." (2) Referring to these observations the Privy Council said: "It is obvious that the right of the widow must be mainly rested on the ground of positive acceptance and usage." (3) As such the same rule cannot be extended to the wives of Bandhus.

(1) *Lallubhai v. Mankuvarbai*, 2 B. 388 (445, 447) F. B.

(2) *Ranchava v. Kalingappa*, 16 B. 716.

(3) *Lallubhai v. Cassibai*, 5 B. 110 (124) P. C.

2230. Widows of predeceased Sapindas.—It has already been stated ^{ci 2.} that widows of gotraj Sapindas are also classed in Bombay as Gotraj Sapindas with their husbands, and as such possess the right to collateral succession but not immediately after their husbands as was at one time supposed ⁽¹⁾ but after all the male gotrajs are exhausted by any males existing in that line, within the limits to which the Gotraj relationship extends. ⁽²⁾ The word "line" here means the same as gotra or continuation of the line of ascent or descent.

For example, widows of the males in the paternal grandfather's line come after males who are heirs in the same line and similarly those in the paternal grand father's line and the paternal great grandfather's line. The males are exhausted before the females come in. ⁽³⁾ Now since the line of heritable sapindas includes descendants up to the 6th degree it follows that widows in any line will take in default of the males in that particular line to which their husband belong. In this view the paternal uncle's grandson is preferable to the paternal uncle's widow, since both are in the same line and male Gotrajs are preferable to females. ⁽⁴⁾ In dealing with the line of Gotraj Sapindaship the descendants must be exhausted at each step of the ascent, before proceeding higher to bring other heirs into the competition. ⁽⁵⁾ In this view a brother's widow is entitled to succeed in preference to the grandson of the paternal grand uncle of the propositus. ⁽⁶⁾

(3) (1) Sister. **2231.** The sister is an heir by virtue of the following text :—

Mayukh:—In default of her (the paternal grandmother) comes the sister; for says Manu ⁽⁷⁾ " (The wealth of the deceased) goes to whoever is next amongst Sapindas and the rest." Similarly Brihaspati "Where a childless man leaves several Sakulyas and Bandhavas whoever of them is the nearest takes the wealth (of the deceased)" Being begotten in his brother's gotra she possesses the qualifications of a Gotraj. The community of Gotra (does) indeed not exist in the case of a sister. But the quality of being a Sagotra is not mentioned here as being a condition of (the right of) taking the wealth (as heritage). ⁽⁸⁾

On the strength of this text it was held by the Privy Council in a case decided in 1863 that sisters succeed to the estate of their deceased brother next in order of inheritance after the paternal grandmother both in accordance with the written law and usage prevalent in Bombay ⁽⁹⁾ unless there is evidence of any usage to the contrary. ⁽¹⁰⁾ Like the widow of the propositus, his mother and his paternal grandmother are *persona designata* to whom a particular position is assigned ⁽¹¹⁾ all of whom, however take after the male Gotraj Sapindas. The sister comes in as a Gotraj Sapinda and as such is postponed to the brother's son by virtue of the express text ⁽¹²⁾ but she takes before a half brother. ⁽¹³⁾ On

(1) *Lakshmi Bai v. Jagrave*, 6 B. H. C. R. (AC) 152 explained and dissented from Per Telang J. In *Rachava v. Kalingapa*, 16 B. 16 (719).

(2) *Rachava v. Kalingapa*, 16 B. 716 (719); *Kashi Bai v. Moresvar*, 35 B. 889 (392); *Khandacharya v. Govindacharya*, 13 Bom. L. R. 1005.

(3) *Kashi Bai v. Moresvar*, 35 B. 889 (492); *Kashi Bai v. Sitabai*, 13 Bom. L. R. 552.

(4) *Khandacharya v. Govindacharya*, 13 Bom. L. R. 1005 (1008).

(5) *Kashi Bai v. Sita Bai*, 13 Bom. L. R. 552; *Khandacharya v. Govindacharya*, 13

Bom. L. R. 1005 (1008).

(6) Manu. IX 107

(7) Mayukh IV-VIII-19 (Mandlik) 81.

(8) *Vinayak v. Lakshmi Bai*, 1 B. H. C. R. 117 affirmed O. A. 9 M. I. A. 516 (587, 588); followed *Sakharam v. Sitabai*, 3 B. 353 (360, 361)

(9) *Sakharam v. Sitabai*, 3 B. 353 in which at pp. 365 et seq the territorial jurisdiction of the Mayukh is examined and set out.

(10) *Sakharam v. Sitabai*, 3 B. 353 (361).

(11) *Gaensh v. Waghlu*, 27 B. 610 (613, 614).

(12) Mayukh IV-VIII-19; *Mulji v. Curandas*, 24 B. 568 (569).

(13) *Sakharam v. Sitabai*, 3 B. 353.

the other hand, under the Mitakshara even the son of a half brother is entitled to preference over her. (1)

Under the Mayukh she has precedence over her brother's step mother or his paternal first cousin or his son (2) the brother's widow (3) and uncle's widow (4) and his other remote male relatives. (5) The fact that another heir has intervened between the brother and the sister does not exclude the right of the sister. (6)

An unendowed sister has no prior right of succession over the endowed sister such as an unendowed daughter has over an endowed daughter, a distinction based on express texts which cannot be extended by analogy to sisters. (7) Sisters take equally (8) but in severalty and not as joint tenants. (9)

2232. Since a sister succeeds as a Sagotra Sapinda, a half sister is equally entitled to succeed to her half brother. She is however postponed to the full sister (10) though she succeeds before the

Half sister

step mother (11) paternal uncle and a paternal uncle's widow (12) or a paternal uncle's son (13)

"Now this court has held (14) that a step mother succeeds to the property of her step son in preference to the step son's paternal uncle's son, because the latter represents a remoter line of succession. If the step mother is nearer in the line than those in the line of the parental uncle, the half sister who is nearer than the step-mother must exclude those in the latter line." (15)

2233. A father's half sister has been held entitled to succeed in Bombay in preference to the mother's brother on the ground that as

Father's half sister.

between the deceased's own bandhus those connected through the father are to be preferred to those connected through the mother. (16)

2234. Sons' widow.—The principle that the wives of Gotraj Sapindas take the place of their husband subject to the limitation

Cl. (6).

before set out has been applied to the son's widow who has been held entitled to succeed to her father-in-law in preference to a paternal uncle's son (17) or a distant cousin (18) but not in preference to brother or a brother's son (19) or a sister or half sister. (20) She is placed by Balambhat, immediately after the paternal grandmother. (21)

(1) *Biagwan v. Warubai*, 32 B. 300; *Hari v. Vasudev*, 38 B. 488 (440).

(2) *Lakshmi v. Dada*, 4 B. 210 (214).

(3) *Rudrapa v. Irava*, 28 B. 82.

(4) *Mahanatap v. Nilgangawa*, 3 B. 868 N.; (1879) B. P. J. 390.

(5) *Dhondu v. Gangabai*, 3 B. 869.

(6) *Ib.* distinguishing *contra* *Virmiro daya* p. 195 as a Mitakshara authority.

(7) *Bagirathi Bai v. Baya*, 5 B. 264 (267)

(8) *Ib.*

(9) *Kindabai v. Anacharya*, 15 B. 206.

(10) *W. and B. H. L. (3rd Ed.)* pp. 469 470.

(11) *Kesserbai v. Valab*, 4 B. 188 (199 200); *Trikam v. Natha*, 86 B. 120 (122).

(12) *Kesserbai v. Valab*, 4 B. 188.

(13) *Trikam v. Natha*, 86 B. 120 (122)

(14) *Russobai v. Zoolekhabai*, 19 B. 707.

(15) *Trikam v. Natha*, 86 B. 120 (122).

(16) *Saguna v. Sadashiv*, 26 B. 710 (715);

Ganesh v. Waghu, 27 B. 610 (613, 614).

(17) *Vithal Das v. Jeshubai*, 4 B. 219 following *Lakshmi Bai v. Jayram*, 6 B. H. C. R. (A. C.) 155; *W. and B. H. L. Bk. 1 Ch. 11-S 14.*

(18) *Roopchand v. Phoolchand*, 2 Borr. 616; *Jetha v. Huribai*, (1872) B. P. J. No. 38 (Reprint) P. 318 following *Bugwande v. Myna Bai*, 9 W. R. 23 P. C.; *Thakoor v. Balukram*, 10 W. R. 3 P. C.; *Lakshmi Bai v. Jayram*, 6 B. H. C. R. (A. C.) 152;

(19) *Venkata v. Holyawa*, 13. Sp. A 60 of 1879; *Vithal v. Haribazec*, 3 B. 34 N.

(20) *Vithal Das v. Jeshubai*, 4 B. 219 (221), following *Vunayak v. Lakshmbai*, 1 B. H. C. R. 117 (126); *Sakharam v. Sita Bai*, 3 B. 553; *Dhondu v. Gangabai*, 3 B. 869; *Mahanatap v. Nilgangawa*, *Ib.* 868 N.; *Kesserbai v. Valab*, 4 B. 188.

(21) *Vithal Das v. Jeshubai*, 4 B. 219 (221).

2235. Step Mother.—For the same reason the step mother inherits to her stepson before the widow of a half brother ⁽¹⁾ and the paternal uncle's son. ⁽²⁾

2236. Brother's widow.—The brother's widow is excluded by a daughter ⁽³⁾ and by a brother's son even though separated. ⁽⁴⁾ But she is preferred to a paternal uncle's son ⁽⁵⁾ and to the grandson of the paternal grand uncle of the propositus. ⁽⁶⁾ But she is not entitled to inherit the estate of an undivided brother, being only entitled to maintenance though she may perhaps succeed to her brother-in-law as a *Gotraj Sapinda*. ⁽⁷⁾

2237. Brother's son's widow.—The brother's son's widow is preferred to the son of a maternal uncle who being a *Bandhu* is displaced by the widow of a *Gotraj Sapinda*.

2238. Paternal uncle's widow.—The paternal uncle, his widow and the widow of the paternal first cousin take after a paternal uncle's grandson on the ground that the latter being third in descent from the grandfather from whom the line of collaterals springs, is well within the line of *Gotrajs* after whom the female heirs come in. ⁽⁸⁾

2239. Daughters of descendants.—The same rule extends to the daughters of descendants and collaterals within five degrees who all inherit after the designated heirs. ⁽⁹⁾

Madras Female heirs.

245. In the Madras Presidency the following females are recognized as heritable *bandhus*.

- (1) Sister
- (2) Half Sister
- (3) Son's daughter.
- (4) Daughter's daughter.
- (5) Brother's daughter.
- (6) Such female *Bandhus* rank after all male *bandhus*.

Synopsis.

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| (1) <i>Female heirs in Madras</i> (2240). | (6) <i>Brother's daughter</i> (2245). |
| (2) <i>Sister</i> (2241). | (7) <i>Father's sister</i> (2246). |
| (3) <i>Half-sister</i> (2242). | (8) <i>Other heirs</i> (2247). |
| (4) <i>Daughter's daughter</i> (2244). | (9) <i>Crown as heir</i> (2248). |
| (5) <i>Son's daughter</i> (2243). | |

2240. Analogous Law.—Although Madras follows the orthodox rule that women do not inherit unless they are expressly named in the texts

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| (1) <i>Kesserbai v. Valab</i> , 4 B. 188 (208, 209). | <i>Situbai</i> , 18 Bom. L. R. 552. |
| (2) <i>Russobai v. Zoolekhabai</i> , 19 B. 707. | (7) <i>Madhav Ram v. Dave</i> , 21 B. 789 (742, 748). |
| (3) <i>Sita Ram v. Chintaman</i> , 24 A. 472. | (8) <i>Kashi Bai v. Moresbhar</i> , 35 B. 339 (312). |
| (4) <i>Nahal Chand v. Hemchand</i> , 9 B. 81. | (9) <i>Nallanna v. Ponnal</i> , 14 M. 149 (150). |
| (5) <i>Basangavda v. Basangavda</i> , 39 B. 87. | |
| (6) <i>Khandacharya v. Govindacharya</i> , 13 Bom. L. R. 1005; following <i>Kashi Bai v.</i> | |

still the courts have liberally construed the texts and let in certain female relations holding "that any relative who is also a cognate may be treated as coming within the definition of *Bhinna Gotraj Sapindas* and that the term *Sapindas* used in Chapter II Sec. VI of the *Mitakshara* includes females." (1) It will be seen that while the courts in Bombay and Madras both recognize the right of certain female relations to inheritance, each gives a different reason in support of its view. In Bombay females are admitted because they are held to pass into their husband's *Gotra* upon marriage and with them are entitled to be classed as *Gotraj Sapindas*, while in Madras the term *Sapinda* is construed regardless of sex, though it is conceded that female *Bandhus* take after all male *Bandhus*, a female *Bandhu* nearer in degree being excluded by a male *bandhu* more distantly connected. (2) This view is supported by the following reasoning. The *Mitakshara* designates nine heritable *bandhus*. The Privy Council have held that list to be merely illustrative and not exhaustive from which it follows that in regard to *Bandhus* the *Mitakshara* did not limit the right of inheritance to certain prescribed relationships of that nature; but since it lays down a definite order of succession prescribed by law for the several classes it follows "that all relatives, however remote, must be exhausted before the estate can fall to persons who have no connection with the family." (3) This made the way for all females easy and it was made easier by a judgment of Turner C. J., who passed the whole case law in review and disposed of the implied textual exclusion of females in the following words. "It may, we think, be admitted—and herein is the reason why we consider it unnecessary to pronounce definitely on the sister's claim that *Vijñaneshwar* recognized the texts excluding females so far as to give priority to males, and he indicates with sufficient clearness the rules which are to be observed in ascertaining the order of succession; but his work does not profess to be a code but a commentary or law already accepted and which he assumes to be generally known. There is therefore much force in the observation of Mr. Justice Holloway that the rule of law ought not to be derived from the positive words of such a commentator, much less from his omissions." (4) The Privy Council may perhaps condemn this process of reasoning (§ 243) but it is now too late to exclude the female heirs who have since 1875 been so recognized. As observed by Muthusamy Ayyar, J., "The course of decisions from that date proceeds on the principle that consanguinity may be recognized as the basis of title to succession in the absence of preferential male heirs." (5)

• On this principle the following female relations have been held to be heirs:—

2241. Sister.—To support the claim of the sister to inherit, the commentators *Balambhatt* and *Nand Pandit* read the term "brothers" in the text (6) as including sisters but this interpretation is discredited by the courts (7) as also other texts

(1) *Kutti v. Radhakrishna*, 8 M. H. C. R. 88 explained Per Muttusami Ayyar, J. in *Balanma v. Pullaya*, 18 M. 168 (170); followed in *Venkatasubramaniam v. Thayarammal*, 21 M. 268 ('67).

(2) *Venkata v. Surendra*, 31 M. 331 (324).

(3) *Kutti v. Rada Krishna*, 8 M. H. C. R. 88 (98).

(4) *Lakshmanammal v. Tiruvengada*, 5 M. 241 (250).

(5) *Nallanna v. Ponnal*, 14 M. 149.

(6) "But of him who leaves no issue the father shall take the inheritance or the brothers" *Manu* IX-185; cited in *Mit.* II-IV 1.

(7) *Thokoorain v. Mohunlall*, 11 M. I. A. 386 (402, 408); *Kutti v. Rada Krishna*, 8 M. H. C. R. 88 (98); *Chinnammal v. Venkatachala*, 15 M. 421 (422); *Lochan v. Babai*, 5 N. I. R. 161; 4 I. C. 786.

supporting her right "to share with uterine brothers."⁽¹⁾ The sister's claim was consequently rejected in several earlier cases;⁽²⁾ and in 1871 Holloway, J., was constrained to admit that a sister was not in the line of heirs though he condemned her exclusion as unsupported by the texts. (3) Four years later in 1875 her claim was admitted by the same Court in a judgment (4) from which a passage has already been quoted in the preceding paragraph.

The sister being a female Bandhu, is postponed to her son who is a male bandhu. (5)

2242 Half Sister.—The half sister is now equally in the line of heirs though she too must abide her chance till all the male bandhus have passed out of the line. (6)

2243. Son's daughter.—The son's daughter is entitled to inherit to her grandfather as a bandhu. (7)

2244. Daughter's daughter.—The daughter's daughter has been allowed to come in on the ground of her consanguinity which is recognized as the basis of title to succession in the absence of preferential male heirs. (8) It will also probably let in the sister's daughter, though they have been held not to be bandhus. (9) But as mere relatives they have a place in the line of heirs before the property escheats to the crown. (10)

2245. Brother's daughter.—On the same principle a brother's daughter would exclude the adopted son of the maternal uncle.

2246. Father's sister.—So the father's sister is a bandhu. Her son is expressly mentioned in the Mitakshara among the cognates related to the man himself. (11) His mother must be equally a bandhu of the same class though she cannot inherit in preference to the mother's brother (12) the maternal uncle (13) or the maternal grand father who ranks higher than the maternal uncle. (14)

2247. Preceptor, Pupil and fellow student.—The following texts support these heirs :—

Apastamb :—If there be no male issue the nearest kinsman inherits : or in default of kindred, the preceptor : or failing him the disciple. (15)

Mitakshara :—If there be no pupil, the fellow student is the successor. He who received his investiture or instruction in reading or in the knowledge of the sense of scripture from the same preceptor, is a fellow student (16)

(1) *Lakshmanammal v. Tiruvengada*, 5 M. 241 (242, 243); *contra Per Holloway, J. Raiyangaru v. Venkata*, 6 M. H. C. R. 278 (286); *Manu* IX 211, 212; cited by Yaj. and Mit. II IX-12, 13; *Brihaspati Bk. V.* 407; *Madhaviya* (Burnell's Tr. P. 87).

(2) *Nagalinga v. Vaidelinga*, (1859) M.S.D. 247.

(3) *Rayaningaru v. Venkata*, 6 M. H. C. R. 278 (287).

(4) *Per Morgan C. J. and Innes J in Kutti v. Radha Krishna*, 8 M. H. C. R. 88 (98).

(5) *Kutti v. Radhakrishna*, 8 M. H. C. R. 88 (98); *Lakshmanammal v. Tiruvengada*, 5 M. 241; *In Vellanki v. Venkata*, 1 M. 174 (185) P. C. the question was raised but not decided.

(6) *Kumaravelu v. Virana*, 5 M. 29.

(7) *Nallana v. Ponnal*, 14 M. 149 (150).

(8) *Ramappa v. Arumugath*, 17 M. 182 (188) following *Nailanna v. Pennal*, 14 M. 149 (150).

(9) *Sundrammal v. Rangasami*, 18 M. 193 (198, 199).

(10) *Ramappa v. Arumugath*, 17 M. 182; *Bansidhar v. Ganeshi*, 22 A. 388.

(11) *Mit. II VI.*

(12) *Narasamma v. Mangammal*, 18 M. 10 (14).

(13) *Girdharilal v. Government*, 12 M.J.A. 448; *Chinnammal v. Venkatachala*, 15 M. 421.

(14) *Chinnammal v. Venkatachala*, 15 M. 421.

(15) *Apastamb* cited in II-VII-1.

(16) *Mit. II-VII-8.*

2248. On failure of these a Brahmin shall succeed.—The preceptor, the pupil and the fellow student are heirs to the property of a house-holder. All these are teachers and associates of religious learning. The preceptor and the pupil are the teacher and the student of the Vedas while a fellow student is his fellow learner under the same *Acharya*. As the Shudra cannot partake of religious knowledge there is no intermediate heir to him between his *bandhus* and the crown.

2249. The Crown.—The Crown is regarded as the *ultima hæres* in all systems and the Mitakshara designates it as the last heir, except of a Brahmin whose property shall never be taken by the king ⁽¹⁾. "On failure of heirs the wealth of a Brahmin must be given to a Brahmin." ⁽²⁾

2250. The Mitakshara declares with some emphasis that the property of a Brahmin shall not be taken by the king and that "if there be no heir of a Brahmin's wealth, on his demise, it must be given to a Brahmin. Otherwise the king is taunted with sin." ⁽³⁾ The effect of this clause had to be considered in the case of a zemindari of which the last male holder a Brahmin had died, leaving a widow, who took a widow's estate, and upon her death there was no heir of the husband to inherit the zemindari. It was contended that the estate of a Brahmin did not escheat to the Crown and the Mitakshara was cited in support of the contention but the Privy Council held that his property equally escheated to the crown. In so holding they said: "It appears to their Lordships that the passage quoted by the Mitakshara from Narad in the very section which cites the prohibition of Manu shows what the law in its utmost strictness was. That passage is, 'If there be no heir of a Brahmin's wealth, on his demise it must be given to a Brahmin, otherwise the king is taunted with sin'. In other words, the king is to take the property but to take it subject to the duty, which he cannot neglect without sin, of disposing of it at his discretion amongst Brahmins of the kind contemplated by the preceding texts." ⁽⁴⁾ If this is so their Lordships held that the property vests in the king subject to a trust in favour of Brahmins."

2251. As the question in the case was between the Government claiming the property by escheat and an adverse claimant, their Lordships had not to consider the further question as to the nature of the trust, whether the duty imposed upon the king was one of imperfect obligation or a positive trust affecting the property in his hands or whether if a trust, it was or was not incapable of enforcement by reason of the uncertainty of its object; but they were inclined to the view that such a trust would fail for want of certainty of its object. ⁽⁵⁾ The crown by the general prerogative will take the property by escheat subject to any trusts or charges affecting it. ⁽⁶⁾ It is not however any more than the reversioner bound by any unauthorized alienations of the widow. ⁽⁷⁾ The right of an Istemrari Moukarari tenant in Bengal escheats to the crown and not to the zemindar on the ground that such tenure created an absolute interest in the tenant and reserved no such power to the zemindar. ⁽⁸⁾

Where the crown claims by escheat against a person in possession, the burden lies on it to show that the last proprietor had died without heirs :

(1) Manu IX 199; Mit. II-VII-5.

(2) Narad cited in II-VII-5.

(3) Mit. II-VII-5.

(4) *Collector v. Cavaly*, 8 M. I. A. 500 (558)

(5) *Collector v. Cavaly*, 8 M. I. A. 500

(524) followed in *Sonet Koer v. Himmul*, 1 C. 891 (899) P. C.

(6) *Ib.* p. 127; *Cavaly v. Collector*, 11 M.

I. A. 619; *Sonet Koer v. Himmul*, 1 C. 891 P. C.

(7) *Collector v. Cavaly*, 8 M. I. A. 529.

(8) *Sonet Koer v. Himmul*, 1 C. 891 (402) P. C.

and the defendant in possession has the right to defend his possession on the ground of an existing *jus tertii*. (1)

All property in India belonging to the king vests in the Secretary of State for India in whom the escheated property will also vest as the King's representative. The Bengal and Madras Regulations make provision for the superintendence of escheated property. (2)

246. The heir of a hermit (Vanprasth) is a spiritual brother or associate in holiness, of an ascetic (Sanyasi or Yati) a virtuous pupil and that of a professed student (Brahmachari) his religious preceptor. In default of these heirs any one associated in holiness may inherit.

Hermit's heir.

Synopsis.

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|------------------------------------|------------------------------------|
| (1) <i>Heirs of hermit</i> (2252). | (4) <i>Sanyasi or Yati</i> (2255). |
| (2) <i>Who is a hermit</i> (2253). | (5) <i>Brahmachari</i> (2256). |
| (3) <i>Mahant</i> (2253). | |

2252. Analogous Law.—

Yajnavalkya—The heirs of a hermit, of an ascetic and of a professed student are in their order, the preceptor, the virtuous pupil and the spiritual brother and associate in holiness. (3)

Mitakshara.—A spiritual brother is one who is engaged as a brotherly companion (having consented to become so). An associate in holiness is one appertaining to the same hermitage. Being a spiritual companion, and belonging to the same hermitage he is a spiritual brother associate in holiness.

4. The virtuous pupil is one who is assiduous in the study of theology, in retaining the holy science and in practising its ordinances. For a person whose conduct is bad, is unworthy of the inheritance, were he even the preceptor or (standing in) any other (venerable relation.)

3. The student (Brahmachari) must be a professed or perpetual one, for the mother and the rest of the natural heirs take the property of temporary students; and the preceptor is declared to be heir to a professed student as an exception (to the claim of the mother and the rest.)

7. Are not those who have entered into a religious profession unconcerned with heritable property (4)

8. The answer is a hermit may have property; for the text (of Yajnavalkya) expresses "The hermit may make a hoard of things sufficient for a day, a month, six months or a year and in the month of *Aswin* he should abandon (the residue of) what has been collected." (1) The ascetic too has clothes, books and other requisite articles; for a passage (of the *veda*) directs that "he should wear clothes to cover his privy parts" and a text (of law) prescribes, that "he should take the requisite for his austerities and his sandals." The professed student likewise has clothes to cover his body and he possesses also other effects.

9. It was therefore proper to explain the partition or inheritance of such property. (5)

2253. To begin with, this section only relates to inheritance to persons therein named. It cannot be extended by analogy to persons who affect to belong to a religious order, but follow secular occupations. Then again it applies only to the twice-born classes to whom these orders were open. It cannot apply to Gossain or a Bairagi because the order of Bairagis is not confined to members of the twice-born castes. (6) It is also pertinent to note that the sort of property

(1) *Girdhari Lal v. Government*, 12 M. I. A. 448 (469).

(2) *Beng. Reg. XIX of 1810*, s. 7; *Mad. Reg. VII of 1817*, s. 6.

(3) *Yaj. III-47*; See *Manu VI-15*.

(4) *Yaj. II-138*; cited in *Mit II VIII-1*.

(5) *Mit. II-VIII-1-9*.

(6) *Ram Das v. Baldeoasji*, 89 B. 168 (174); *Dharmapuram v. Virapandiya*, 22 M. 803.

for which the chapter prescribes rule of inheritance is the personal belongings of the ascetic such as his clothes and grain. The law cannot be diverted to apply to property acquired or possessed by quasi ascetics and hermits who do not belong to the class to whom the rules were intended to apply. As was observed in a case "To become a religious ascetic and exclude his heirs from succession to property subsequently acquired, he must *bona fide* retire from all worldly affairs and in fact become, as it were, dead to the world, leaving all the property then vested in him to his legal heirs who succeed to it at once." (1) In order to entitle the heir to succeed to the deceased he must show that the latter had completely and permanently renounced the world. Such is the case of the Mahant of a Math whose private effects would be subject to the ordinary law. (2) It must be confessed that the orders here provided for have long since ceased to exist and the rules can only apply by analogy and should be applied with caution.

2254. Hermit.—The hermits as such do not now possess any property of value. Whatever he does, goes to his associates and not to one belonging to the same order since the principle of succession is based entirely upon fellowship and personal association with the ascetic and a stranger, though the same order of ascetics is excluded. (3)

2255. Sanyasi or Yati.—Sanyasi means an ascetic or anchorite. Yati means a Bhiksu, a religious mendicant who lives upon the voluntary alms given to him. (4) The pupil is his heir, but the pupil here intended is the *Shishya* as opposed to the Chela, that is a pupil who has *undergone* the final ceremony which severs him from his family. (5) A pupil who deserts his master cannot inherit to him. (6)

2256. Brahmachari.—The professed religious student may himself be the preceptor of another to whose assets he will succeed. In one case such a case was supported on custom which was held proved. (7)

2257. Heirs of other Ascetics.—In another case, a religious mendicant died, leaving no heir except a pupil of the same spiritual teacher who was held entitled to succeed in accordance with the opinion of the Pandits who said "On the death of a religious mendicant, his spiritual teacher's pupil has the right of succession to his estates and there is no relationship between them; but the person who becomes a follower of the spiritual teacher is universally termed a religious brother by the fraternity of devotees. If such person attend on the deceased at the time of death, and performs his exequial rites, and if the spiritual teacher himself disclaim all right of succession, such religious brother is entitled to the inheritance. This doctrine is justified by universal usage." (8) In still another case of succession to a Bairagi his pupil was held to succeed in preference to his own brother whose fraternal relationship was held to have effect so long only as the proprietor continued in the order of a house-holder. (9) But his own gurus would succeed to the Shebaitship of a temple founded by them. (10)

(1) *Mudobun v. Kishan*, (1852) S. D. A. B. 1089 (1093); 12 I. D. (O. S.) 840 (843); *Khodderam v. Rookhnee*, 16 W. R. 17; *Gouri Sunkar v. Nader Singh*, 18 C. W. N. 59.

(2) *Dukharam v. Lochmun*, 4 C. 954.

(3) *Khuggender v. Sharrupgir*, 4 C. 548.

(4) *Gouri Sankar v. Nader Singh*, 18 C. W. N. 191; 28 I. C. 287.

(5) *Ramdan v. Dalmir Puri*, 14 C. W.

N. 191.

(6) *Sogun Chand v. Gopal Gir*, 4 N. W. P. H. C. R. 101.

(7) *Collector v. Jagat chunder*, 28 C. 608. (610).

(8) 2 Maon H. L. Sec. vii. case 2 p. 81.

(9) *Ib.*

(10) *Ib.* 92.

CHAPTER XXIII.

THE DAYABHAG SUCCESSION.

247. In this chapter unless there is anything repugnant in the subject or context *Sapinda* means a *Sapinda* as defined in S. 224 but not more than 3 degrees removed and includes cognate *Sapindas* within that limit.

248. “*Sakulya*” is a male agnate relation of the *propositus* in the *Dayabhag* law, four to six degrees remote from him.

Synopsis.

(1) *Who is a Sakulya* (3259).

(2) *Texts on the subject* (2258)

2258. Analogous Law.—The term “*Sakulya*” occurs in the following texts :—

Manu.—On failure of such kindred (*i. e.*, *Sapindas*) the *Sakulyas* shall be the heir of the spiritual preceptor, or the pupil.⁽¹⁾

Dayabhag (citing the last).—The distant kinsman (*Sakulya*) is one who shares a divided oblation, as the grandson's grandson or other descendant beyond three degrees reckoned from him, or the offspring of the grandfather's grandfather or other remoter ancestor.⁽²⁾

Shrikrishna (Referring to the last) The *Samanodaka* used to be taken to be included in the term *Sakulya* because they also have sprung from the same family. Although both classes of heirs (near *Sakulyas* and *Samanodakas*, or remote *Sakulyas*) are included in the same term, their order of succession is regulated by the degree of benefit conferred. This is the meaning.

The following texts of the *Dayabhag* define this term.

The paternal great-grandfather, and grandfather, the father and man himself, his brothers of the whole blood, his son by a woman of the same tribe, his son's son and his great-grandson, all these partaking of undivided oblations are pronounced *sapindas*. Those who share divided oblations are called *Sakulyas*. Male issue of the body being left, the property must go to them. On failure of *Sapindas* or near kindred, *Sakulyas* or remote kinsmen are heirs. “If there be none, the preceptor, the pupil or the priest takes the inheritance. In default of these the King has the escheat”⁽³⁾

If there be no such distant kindred the *Samanodakas*, kinsmen allied by a common libation of water must be admitted to inherit as being signified by the term *Sakulya* (conformably with *Baudhayan's* explanation of it) The distant kinsmen, that is the descendants of the paternal grandfather's grandfather or other remoter ancestor and such relatives, are denominated *Samanodaks*.⁽⁴⁾

2259. The term “*Sakulya*” literally means belonging to the same *Kul'* or family. Originally a *Sakulya* was one contradistinguished from a stranger. But later on the term underwent several changes. It has already been seen that the ancestor in the 4th, 5th and 6th degree was treated as a *Sakulya* but this term does not occur in the *Mitakshara*. The term is used in the *Dayabhag* to all persons who presented divided oblations to the deceased who received divided oblations from them, and who presented divided oblations (to common ancestors) in which the deceased had a right of participation.⁽⁵⁾ This is not all. The descendants of those ancestors to whom the deceased presented divided oblations were also his *Sakulyas* because the last owner had also a right of participation in the *pindas* (undivided or divided) which these presented to common ancestors.⁽⁶⁾

(1) *Manu* IX.187.

(2) *Dayabhag* XI-VI.21

(3) *Baudhayan* cited in *Dayabhag* XI-1-87.

(4) *Dayabhag* XI-VI.28.

(5) *Ib.* XI-VI.16.

(6) *Dayabhag* XI-1-88; *Sarv. Inher.* 888.

Now Sakulyas are divided into those who are near and those remote. While the former can be ascertained with some certainty, it is not possible to exhaust the enumeration of the latter.

The subject will have to be further considered in the sequel.

Heritable property, 249. All property owned by a person whether joint or separate passes on his death by succession.

2260. Analogous Law.—It has been stated before (2068) that the Mitakshara recognizes two modes of succession according to the nature of the property. But the Dayabhag school recognizes no succession by survivorship, the only succession it recognizes is that by descent whether the property be co-parcenary or separate. Consequently when the owner dies issueless, his estate, whether comprising moveable or immoveable property, joint or separate, devolves upon his widow to the exclusion of her husband's co-parceners.⁽¹⁾ In other words in all cases succession is by descent and not by survivorship.

Principle governing succession. 250. The heirs of a deceased owner are in their order the following:—

- (1) Sapindas.
- (2) Sakulyas.
- (3) Samanodaks.
- (4) Bandhus other than those taking as Sapindas.
- (5) The preceptor.
- (6) A Pupil.
- (7) A Fellow student.
- (8) The King.

Synopsis.

- | | |
|--|---|
| (1) <i>Principles of Dayabhaga succession</i> (2261). | (6) <i>Definition of sapinda</i> (2266). |
| (2) <i>Theory of spiritual benefit</i> (2262). | (7) <i>Who are the sapindas</i> (2267). |
| (3) <i>Shradhs</i> (2262). | (8) <i>Enumeration of sapindas</i> (2268-2274). |
| (4) <i>Parvana shradh</i> (2263). | (9) <i>Female sapindas</i> (2275). |
| (5) <i>Relations competent to perform shradh</i> (2264). | (10) <i>Sakulyas</i> (2276). |
| | (11) <i>Samanodakas</i> (2277). |

2261. Analogous Law.—The principle of this section was settled by the Full Bench of the Calcutta High Court in which Mitter, J laid down the above as the heirs of the deceased owner subject to the Dayabhag law.⁽²⁾ But though this is the net result of the law, the process of reasoning by which it is reached requires examination. Under the Mitakshara system propinquity is the governing rule of succession; but the Dayabhag law of succession is the religious-law and succession is mainly, though not solely⁽³⁾ based upon the doctrine of spiritual benefit which the heir is supposed to confer upon the deceased. (4)

1. *Durga Nath v. Chintamani*, 81 C. 214 (219).

(2) *Gooroo Gobind v. Anund Lall*, 13 W. R. 49 (59) F. B.

(3) *Akshay v. Hari Das*, 85 C 721 (725)

(4) *Kali Pershad v. Anand Roy*, 115 C. 471 (480) P. C.

As was observed in a case: "Spiritual benefit, notwithstanding some authorities to the contrary is not always the guiding principle of inheritance under the Bengal school of law. The theory of spiritual benefit cannot apply to a good many cases of inheritance under the Dayabhaga school of law. Spiritual efficacy as a principle guiding rules of succession must fail in the case of all female relations. The widow, the daughter, the mother, and the paternal grandmother are said to inherit under express texts. It was necessary in their cases to have recourse to a different principle, and that principle must have been affinity and affection, which had led the more ancient sages to say that they come in the line of heirs. Yajnavalkya's texts, as well as the texts of many sages could not be either easily avoided or reconciled with the theory of spiritual efficacy in all cases. In most cases, propinquity, spiritual efficacy and natural love and affection run in the same lines and no difficulty arises, but whenever they run in different lines, Jimut Vahan was compelled to ignore spiritual efficacy and have recourse to other principles or express texts" (1) This too was pointed out in an earlier case in which another Hindu Judge had said, "The succession of females according to Hindu law is quite exceptional and is not founded upon the ordinary rule, *viz.*, that of spiritual benefit. It is true that in the case of the widow she confers some spiritual benefit, but if that were the sole test, she would have ranked much lower than what she does now. Daughters confer no benefit, but they succeed because their sons do. Thus it is evident that succession of females according to Hindus is not regular succession, and is not based upon the ordinary theory of spiritual benefit." (2)

But spiritual benefit is frequently a test and even a *conditio sine qua non*. It is, therefore, necessary to enquire what it means.

2262. Spiritual Benefit.—It has been pointed out before that Hindus with other ancient oriental races were given to ancestor worship (§ 5). It was believed that on death, man passed from the material world into a shadowy region where his earthly cravings continued. He needed food and drink and it was but natural that those who took his estate had to perform this office. This was regulated by the priests with elaborate ceremonies and of them one of the earliest prescribes them in the following texts:—

Apastamb :—(*Abridged*) 1-3. Formerly men and Gods lived together in this world. Then the Gods, as a reward for their sacrifices went to heaven, but men were left behind. Those men who perform sacrifices in the same manner as the gods did, dwell after death with the gods and Brahma in heaven. Now, seeing men left behind, Manu revealed this ceremony, which is designated by the word *Shradh*, and thus this rite has been revealed for the salvation of mankind. At that rite the manes (of one's father, grandfather, and great grandfather) are the deities to whom the sacrifice is offered. But the Brahmins who are fed are the sacrificial fire (the mouth of the gods).

22. That rite must be performed in the latter half of every month. Numerous and distinguished offspring, success in agriculture and trade, store of cattle, success in battle and the attainment of general prosperity are the rewards which the sacrificer obtains if he performs the ceremony at stated periods.

23-24. The substances (to be offered) at these (sacrifices) are sesamum, mash, rice, barley water, roots and fruit. But the satisfaction of the manes is greater, if food mixed with fat and if beef, buffaloes' meat, and the flesh of other tame and wild animals is offered to them. (3)

(1) *Per S.C. Mitter, J. in Akshay v. Hari Das*, 35 C. 721 (726)

(2) *Per S. C. Mitter, J. in Gunga Pershad v. Shumbhoo Nath*, 22 W. R. 898 (894)

(3) 2. S. B. E. 188-140, last verse is incorrectly translated therein see *Sarv. Inh.* pp 49, 50.

This was the original shraddh; but it has since undergone a change. Manu's description of it is more elaborate :—

Manu III. 82.—Each day let him perform a *Shraddh*: with boiled rice and the like, or with water or with milk, roots, and fruit; for this he obtains favours from departed progenitors. (1)

207. The divine manes are always pleased with an oblation of empty glades, naturally clean, on the banks of rivers, and in solitary spots.

214. Having walked in order from north to south, and thrown into the fire all the ingredients of his oblation, let him sprinkle water on the ground with his right hand

215. From the remainder of the clarified butter having formed three balls of rice let him offer them, with fixed attention in the same manner as the water, his face being turned to the south.

216. Then having offered those balls after due ceremonies and with an attentive mind, to the manes of his father, his paternal grand-father and great grand father, let him wipe the same hand with the roots of *Kūś* (grass), which he had before used, for the sake of his paternal ancestors, in the fourth, fifth and sixth degree who are the partakers of the rice and clarified butter thus wiped of

219. Whatever water remains in his ewer, let him carry back deliberately near the ball of rice, and, with fixed attention let him smelt those cakes, in order as they were offered.

220. If his father be alive let him offer the *Shraddh* to his ancestors in three higher degrees, or let him cause his own father to eat, as a brahman at the obsequies.

221. Should his father be dead, and his grand-father living, let him, in celebrating the name of his father, that is, in performing obsequies to him, celebrate also his paternal great grand-father.(2)

In course of time the *Shraddh* became sub-divided, and it was possible to perform a *Shraddh* for an individual ancestor or as before for the benefit of all ancestors generally. The latter was known as *Parvan* or ancestral and the former as *Ekodishit* or individual (3) These two *Shraddhs* have in course of time acquired a legal significance.

A *Parvan Shraddh* is a shraddh with a double set of funeral balls; three balls are offered to the father, paternal grandfather, and great grandfather, and three to the maternal grandfather, his father, and his grandfather; and the crumbs of each set to the remoter ancestors, paternal and maternal. (4)

2263. Parvan Shraddh.—This ceremony consists in the presentation of certain number of oblations, namely, one to each of the first three ancestors in the paternal line and maternal line respectively or in other words to the father, the grandfather, and the great grandfather, the maternal grandfather, great grandfather and the maternal great great grand father. (5)

The performance of an obsequial shraddh postulates three degrees of kinship to the deceased: (1) those who receive the entire rice balls; (2) those who receive the *lepa* or scrapings or rather wipings from the hand; and lastly those (3) who have to be content merely with the libations of water. These facts determine the degree of relationship between the two. The *Pindas* are offered to the three immediate paternal ancestors that is, the father, grandfather and great grandfather, and the three immediate maternal ancestors, that is

(1) Manu III 82.

(2) Manu III 207, 214-216, 218, 220, 221.

(3) 2 Dig. 339.

(4) *Ib.*

(5) 2 Cole. Mis. Essays 166; Sarv. Inh. 94; Nirn Sindhu 120.

the maternal grandfather, the maternal great grandfather and the maternal great grandfather. He who offers a *pinda* and to whom a pinda is offered are the sapindas of each other.

Next to them in degree are those to whom the *lepas* or wipings are offered. He who offers the pinda lepa and he to whom it is offered is the Sakulya of each other.

Lastly there are those to whom is offered libations of water and he who offers and he to whom they are offered are Samanodaks of each other.

This is the first principle. But there still remains another. It is a principle of religious law that the deceased ancestor receives not merely the oblation offered to him since he also participates in the benefit of oblations which though not offered to him are yet offered to the paternal ancestors to whom he himself was bound to offer them while he was alive. This widens the circle of relationship beyond those directly receiving the oblation. (1) Now as to those who make these offerings Vishnu Puran describes them thus; "The persons who are competent to perform the obsequies of relations connected by the offerings of the cake are the son, grandson, great grandson, the brother, the descendants of a brother, or the posterity of one allied by funeral offerings. In the absence of all these, the ceremony may be instituted by those related by presentation of water only; or those connected by offerings of cakes or water to maternal ancestors. Should both families in the male line be extinct, the last obsequies may be performed by women, or the associates of the deceased in religious or social institutions, or by any one who becomes possessed of the property of a deceased kinsman." (2)

It is thus clear the performance of the obsequies was a duty first charged on the inheritance. In process of time by a curious inversion of reasoning, the two became to be regarded as cause and effect, and the performance of a Shradh being instead of a mere duty of the heir, became the cause of his succession.

2264. Relations competent to perform Shradh.—But whatever may be the nature of connection between the Shradh and succession, the crucial question was what relations were eligible to perform it.

Bhav Deo mentions the following relations as eligible to perform each kind of Shradh.

(1) *Parvan*.

- (1) Son.
- (2) Grandson.
- (3) Great grandson.
- (4) Daughter's son.
- (5) Son's daughter's son.
- (6) Grandsons daughter's son.

(2) *Ekodisht*.

- (1) Son (i) Eldest son; (ii) youngest son.
- (2) Grandson.
- (3) Great grandson.

- (4) Widow (i) sonless (ii) mother of a disqualified son.
- (5) Daughter, (i) maiden (ii) betrothed and (iii) married.
- (6) Daughter's son.
- (7) Brother.
 - (i) Youngest full brother.
 - (ii) Eldest.
 - (iii) Youngest step brother.
 - (iv) Eldest.
- (8) Brothers's son,
 - (i) Son of youngest uterine brother.
 - (ii)eldestditto.....
 - (iii)youngest step brother.
 - (iv)eldest „
- (9) Father
- (10) Mother
- (11) Son's widow
- (12) „ daughter
- (13) „ „ married
- (14) Grandson's widow
- (15) Grandsons' daughter
- (16) Grandson's married daughter
- (17) Grandfather
- (18) Grand mother
- (19) Sapindas *ex parte paterna*
- (20) Samanodaks *ex parte paterna*
- (21) Sagotras
- (22) Maternal grandfather
- (23) Maternal grandmother
- (24) Maternal uncle
- (25) Sister's son
- (26) Sapindas, *ex parte materna*
- (27) Samanodaks
- (28) Widow belonging to a different caste.
- (29) An unmarried woman living as wife.
- (30) Father-in-law
- (31) Son-in-law
- (32) Grandmother's brother
- (33) Strangers.
 - (i) pupils
 - (ii) priests
 - (iii) spiritual preceptor
 - (iv) friend
 - (v) father's friend
 - (vi) servants of the same caste living in the same village. (1)

Raghuṇandan gives the same list except that the two differ on the competency of the maternal grandmother (No. 23) and the great grandson's widow to per-

form these sacred rites. Raghunandan denies the competency of the former, Bhavdeo of the latter.

2265. It will thus be seen that even in this table the relations are grouped consonantly with their propinquity. The Sapindas are allowed to come before the *Sakulvas*, because undivided oblations are considered to be of higher spiritual value than divided ones; and the *Sakulyas* are in their turn preferred to the *Samnodikas*, because divided oblations are considered to be more valuable than libations of water. The members of the last class are not competent, it is true, to offer either oblations of food or libations of water; but even in their case the doctrine of spiritual benefit is not forgotten. Thus, for instance, the lowest amongst them, namely the learned Brahmin of the same village is allowed to come in upon the express ground that the virtue of the deceased proprietor is renewed by the acquisitions of fresh merit through the circumstance of his wealth devolving on a Brahmin. (1)

2266. Sapindas.—The question still remains who are the *sapindas*. The whole doctrine of *Sapinda* is contained in the following passage of the *Dayabhag*.

Dayabhag—Since the father and certain other ancestors partake of three oblations as participating in the offering of obsequies and since the son and other descendants to the number of three present oblations to the deceased (or to be shared by his manes) and he who while living presents an oblation to an ancestor partakes when deceased of oblations presented to the same person, therefore such being the case, the middlemost of seven who while living offered food to the manes of ancestors, and when dead partook of offerings made to them, became the object to which the oblations of his descendants were addressed in their life-time and shares with them when they are deceased the food which must be offered by the daughter's son (and other) descendants beyond the third degree. Hence those ancestors to whom he presented oblations, and those descendants who present oblations to him partake of an undivided offering in the form of (*pinda*) food at obsequies. Persons who partake of offerings are *Sapindas*. (2)

2267. It will be seen from this that if two Hindus are bound during the respective terms of their natural life to offer funeral oblations to a common ancestor, either of them would be entitled after his death to participate in the oblations offered by the survivor to that ancestor or ancestors and hence it is, the person who offers those oblations, the person to whom they are offered and the person who participates in them are recognized as *sapindas* of each other. (3)

2268. The *Sapindas* may thus be divided into three classes:—

- (1) The ancestors of a person to whom he is bound to offer a *pinda*.
- (2) His descendants who on his death will similarly offer a *pinda* to him.
- (3) Other relations who are bound to offer a *pinda* to the ancestors to whom he is similarly bound to offer a *pinda*.
- (4) Five female designated relations, *viz*:
 - (1) The widow.
 - (2) The daughter.
 - (3) The mother.
 - (4) The father's mother's mother.
 - (5) The father's father's father's mother.

2269. The relations who fall into the first class are his three immediate paternal and maternal father, grandfather and great grandfather, altogether 6 relations.

61 (1).

(1) *Dayabhag* XI-VI-26.

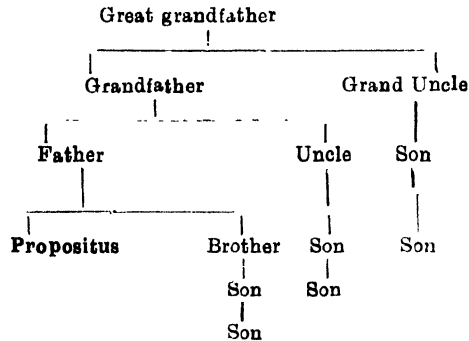
(2) *Dayabhag* XI-I-38.

(3) *Gooroo Gobind v. Anund Lal*, 13 W. R. 49 (60) F. B.

2270. Those who fall into the 2nd class are his son, grandson and great grandson and his daughter's son, son's daughter's son and grandson's daughter's son, altogether 6 relations.

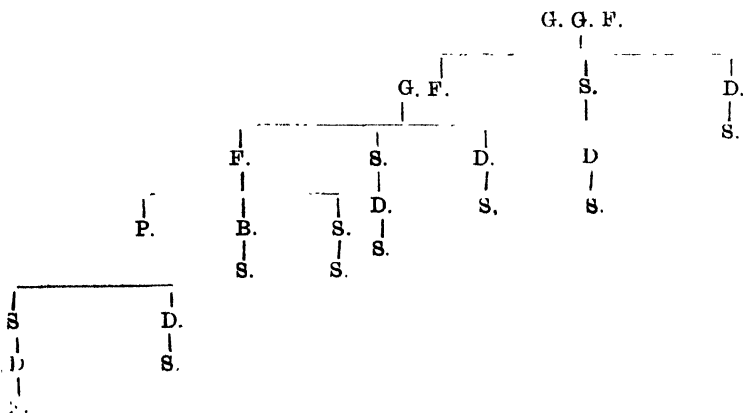
2271. The third class includes all collateral relations, who may be grouped as follows:—

Firstly.—The brother, brother's son, brother's son's son, paternal uncle, paternal uncle's son, paternal uncle's grandson, and paternal grand uncle's grandson, altogether 8 relations.



Of these the brother has to offer 3 pindas, one to each of the three paternal ancestors of the deceased who are also his paternal ancestors. The brother's son will however offer only 2 pindas, one to his grandfather, that is the father of the propositus and the other to his great grandfather that is P's grandfather. The uncle and the uncle's son will also offer 2 pindas one to each of the two paternal ancestors of P viz. G. F. and G. G. F who are equally their grandfather and great grandfather. The remaining relations offer only 1 pinda each, the brother's son's son to P's father (F) the uncle's son's son to grandfather (G. F.). In this case the paternal ancestors of P. are also the paternal ancestors of all the 9 relations.

Secondly.—Sister's son, father's sister's son, grandfather's sister's son, brother's daughter's son, brother's son's daughter's son, paternal uncle's daughter's son, paternal grand uncle's son's daughter's son, paternal grand-uncle's son's daughter's son-altogether 9 relations, shown in the next diagram.



2272. Here the uncle's son offers 3 pindas, one to each of the three paternal ancestors of the deceased, they being his own maternal ancestors. The father's sister's son, and the paternal uncle's daughter's son offer one pinda each to the two paternal ancestors of the deceased *viz.*, his grandfather and great grandfather, they being his maternal ancestors. The brother's daughter's son offers 2 pindas one to the father and the other to the grandfather of the deceased, they being their maternal ancestors. The remaining five relations offer each 1 pinda to one or other of the three paternal ancestors of the deceased, that ancestor being their maternal ancestor. All these are bandhus *ex-parte materna* of the Mitakshara school. They are Sapindas of the Dayabhag school.

2273. *Thirdly.*—Maternal uncle, maternal uncle's son, maternal uncle's grandson, maternal grand uncle, maternal grand uncle's son, maternal great grand uncle, maternal great grand uncle's son, maternal great grand uncle's grandson-altogether 9 relations.

The maternal uncle offers 3 pindas one to each of three maternal ancestors of the deceased, they being his paternal ancestors. The maternal uncle's son, the maternal grand uncle and the maternal grand uncle's son offer each 2 pindas to two out of the three maternal ancestors of the deceased, these ancestors being their paternal ancestors. The remaining five relations offer one pinda each to one or other of the three maternal ancestors of the deceased, that ancestor being their paternal ancestor. This is a case where some or all of the maternal ancestors of the deceased are the paternal ancestors of the 9 relations mentioned above. These are the bandhus *ex parte materna* of the Mitakshara school.

2274. *Fourthly.*—Maternal aunt's son, maternal grandaunt's sons, and maternal great grandaunt's son, maternal uncle's daughter's son, maternal uncle's son's daughter's son, maternal granduncle's son's daughter's son, maternal great grand uncle's daughter's son, maternal great grand uncle's son's daughter's son-altogether 9 relations.

Out of these the maternal aunt's son offers 3 pindas, one to each of the three maternal ancestors of the deceased being also his maternal ancestors. The maternal grandaunt's son, the maternal uncle's daughter's son, and the maternal grand uncle's daughter's son offer each 2 pindas to 2 out of the 3 maternal ancestors of the deceased, those ancestors being also their maternal ancestors. The remaining 5 relations offer each one Pinda to one or other of the 3 maternal ancestors of the deceased, that ancestor being their maternal ancestor. These relations are also the bandhus *ex parte materna* of the Mitakshara school.

2275. Female Sapindas:—The five before mentioned female relations are sapindas being mentioned in the Dayabhag as the direct heirs. (1)

The total number of Sapindas are thus 53 of whom the Dayabhag enumerates only 42. Of these the 5 relations specified in the clause are females and no less than 10, who though males, are mentioned as taking through females *i. e.*, 15 out of 42 enumerated heirs are themselves females or take directly through females.

(1) Dayabhag XI-1-II, IV; *Gooroo Gobind v. Anand Lall*, 18 W. R. 49 (52); F. B.

Now since such relations are classed as *bandhus* who take after all the agnatic kinsmen are exhausted, it follows that the Dayabhag gives precedence to *bandhus* by including them in the list of agnatic sapindas and as such so far as these relations are concerned the tables of succession of the two systems differ; otherwise they more or less agree though they approach the question from opposite stand points.

2276. Sakulyas.—After the Sapindas, the Sakulyas succeed. The term has been already defined in S. 224 as persons related to the deceased in an unbroken line of male descent in the 4th, 5th and 6th degree. This is a sub-division unknown to the Mitakshara which classes all agnatic relations up to the sixth degree as Sapindas.

The total number of Sakulyas is 33, as will be seen from the table of sapindas elsewhere given.

2277. Samanodaks.—Like the Sakulyas, the Samanodaks are also agnatic relations related to the deceased from the 7th to the 14th degree. This is also the Mitakshara conception of this term, with the slight difference not recognized by the Dayabhag that even relations beyond the 14th degree are deemed to be so related if the pedigree be clearly proved.

The Samanodaks number 147 as already stated.

251. The order of succession among Sapindas, Sakulyas and Samanodaks is governed by the following rules:—
 Order of Succession among Sapindas etc

(1) Except in the cases stated below, those who offer pindas to the deceased are preferred to those who offer them to any of his ancestors.

(2) And those who offer them to the deceased are preferred to those who accept them from the deceased.

(3) A person who offers pindas to a near ancestor is preferred to one offering pindas to an ancestor more remote, irrespective of the number of pindas offered by each of them.

(4) Those who offer oblations to both the paternal and maternal ancestors are preferred to those who only offer to the paternal ancestors.

(5) Those who are competent to offer pindas to the paternal ancestors of the propositus are preferred to those who are competent to offer them only to their maternal ancestors irrespective of the number of pindas offered.

(6) Agnatic Sapindas in any line are always preferred to the cognate Sapindas of the same line.

(7) Between an agnate Sapinda and a cognate Sapinda of equal degree of propinquity, the former is preferred to the latter

even though he offers more pindas in which the deceased would participate.

(8) Subject to the above, those who offer a larger number of pindas of a particular description are preferred to those who offer a less number of pindas.

(9) And where the number of such pindas is equal, those that offer to nearer ancestors are preferred to those offering to more distant ones.

Exception to Clause (1):—Nothing contained in clause (1) affects the priority of the sons, grandsons and daughter's sons of the propositus.

Synopsis.

- | | |
|---|---|
| (1) <i>Order of succession in Dayabhag law</i> (2278). | (11) <i>Daughter's son</i> (2295). |
| (2) <i>Tests of preference</i> (2279-2284). | (12) <i>Father</i> (2297). |
| (3) <i>Preference of agnates</i> (2283). | (13) <i>Mother</i> (2298). |
| (4) <i>Paternal preferred to maternal sapindas</i> (2284-2285). | (14) <i>Brother</i> (2299-2300). |
| (5) <i>Heir fixed by number of pindas offered</i> (2286). | (15) <i>Sister</i> (2301). |
| (6) <i>Exception to the rule</i> (2287). | (16) <i>Brother's son</i> (2302). |
| (7) <i>Order of heirs</i> (2288). | (17) <i>Brother's son's son</i> (2304). |
| (8) <i>Son, Son's son and son's son's son</i> (2288). | (18) <i>Sister's son</i> (2305). |
| (9) <i>Widow</i> (2289-2290). | (19) <i>Other Sapindas</i> (2306-2314). |
| (10) <i>Daughter</i> (2291-2294). | (20) <i>Sakulyas</i> (2315). |
| | (21) <i>Samanodakas</i> (2316). |
| | (22) <i>Other heirs</i> (2317). |
| | (23) <i>Hermut's heirs</i> (2318). |
| | (24) <i>Inheritance on re-union</i> (2319). |

2278. Analogous Law.—The rules regulating the order of succession though ostensibly based upon the doctrine of spiritual benefit do not ignore propinquity and in fact whenever they tend to divert succession from the natural line, other rules come in to check their course. Such are rules stated in clauses (2), and (5) which prefer males to females and nearer relations to more distant ones lineal to collateral and those directly related to those indirectly related to the propositus. As a matter of fact shorn of their religious mask, they result in designating the same heirs as the Mitakshara which fixed their order by a more rational process of reasoning.

All the clauses are drawn from the decided cases ⁽¹⁾ and their operation will now be examined.

Cl. (1)—*Gooroo Gobind v. Anand Lal*, 13 W. R. 49 (53) F. B.

Cl. (2)—*Gobind v. Mohesh*, 28 W. R. 117.

Cl. (3)—*Dayabhag* XI.VI. 5, 6; *Pran Nath v. Surrut Chunder*, 8 C. 460.

Cl. (4)—*Hari Das v. Bamachurn*, 15 C. 780 (790, 791).

Cl. (5)—8 Dig. 480; *Raj Kishore v. Gobind*,

1 C. 27; *Sheo Soondary v. Pirthee Singh*, L. R. 4 L. A. 147 (154).

Cl. (6)—*Ib.*

Cl. (7)—*Gooroo Gobind v. Anand Lal*, 13 W. R. 49 (5.)

Cl. (8)—*Gooroo Gobind v. Anand Lal*, 13 W. R. 49 (59) F. B.; *Gobind v. Mohesh*, 28 W. R. 117.

2279. Pindas to the deceased preferred.—The first caluse lays down a rule which simply means that a nearer relation is preferred to one more remote; since it is only the nearest relations

CI (1). that give such pindas. They are the son, grandson, and, great grandson of the deceased, his widow, daughter and daughter's son who all offer pindas to the deceased and are preferred to the father and the rest. But the son's daughter's son and the grandson's daughter's son are exceptions to this rule, being allotted a place amongst this class though they offer no pinda to the deceased.

2280. Another rule arising out of the last is that those who offer pindas to the deceased are preferred to those who accept them

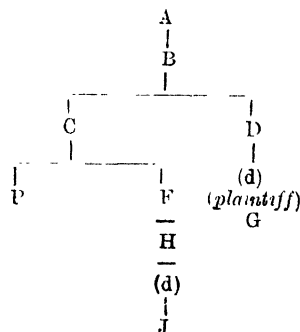
CI (2). from the deceased. Therefore, the son, grandson and great grandson who offer oblations to the deceased are preferred to the father, grandfather and great grandfather who receive them from the deceased, the former succeeding before the latter. As in the Mitakshara, the son, grandson and great grandson follow the rule of representation and all inherit as a single heir, this being justified on the spiritual theory that their offerings have an equal spiritual value.

2281. As a part of the same rule and indeed, as a necessary corollary thereof, is the rule stated in this clause that he who offers

CI (3). oblations to the father of the deceased is superior to one who offers such oblations only to the grandfather and great grand father of the deceased.

So in a case the family tree was as follows :—

On P's death the contest lay between J who was his brother's son's son's daughter's son and his uncle's daughter's son G and the Court upheld J's claim holding that he is scarcely to be distinguished from the brother's daughter's son included in the *Daya Krma* in the list of heirs and on the ground that he offered oblations only to his (P's) grandfather and great grandfather. (1) Even on the ground of propinquity J who is related to P through his father would be preferred to G who is related to him through his grand father.



2282. Then again, those who offer oblations to both the paternal and maternal ancestors are superior to those who offer only

CI (4). to the paternal ancestors. As such, a brother of the whole blood who presents six oblations to the ancestors of the deceased, three on the father's side and three on the mother's side, is preferred to a half brother who presents only three oblations to the common father (2) and not likewise to the common maternal ancestors of the deceased since his mother and the mother of the deceased were different persons.

The Dayabhag moreover expressly declares that the whole brother succeeds before the half brother.(3) But when there has been a separation, a half brother who becomes re-united acquires the rank of a full brother as in the line of

(1) *Pran Nath v. Surrit*, 8 C. 460.

Gobind, 1 C. 24 (84) F. B.

(2) *Dayabhag* XI-V-8, 12; *Rajkishore v.*

(3) *Dayabhag*, XI-V-11, 12.

succession which proves that the theory of spiritual benefit placed by Jimut Vahan is regulating the order of succession is not always an infallible guide and at times looks like placing the cart before the horse when he subordinates natural affinity to the so called religious efficacy.

2283. Preference of Agnates.—The preference of agnates over cognates

CL. (5) characteristic of the Mitakshara system extends even to the Dayabhag law. And the grounds for their preference are stated in clauses (3) and (4) drawn from the case in which Petharam, C. J., and Ghose, J., stated the rules as follows: "Between an agnate sapinda and a cognate sapinda of equal degree of propinquity, the former is preferred to the latter, although the latter is the giver of a larger number of cakes in which the deceased would participate than the former and also by the fact that agnate sapindas in any line are always preferred to the cognate Sapindas of the same line. For instance, the father's son's son (*i. e.*, a brother's son) of the deceased owner offers three *pindas*, one to his own father and the other two to the grandfather and great grandfather respectively of the deceased and which *two pindas* only the latter participates. The father's daughter's son (*i. e.*, a sister's son) offers three *pindas*, *viz.*, to the father, grandfather and great grandfather of the deceased, and in *all* which *pindas* the latter participates. And yet the brother's son is preferential heir to the sister's son. Then again, as between the father's great grandson (brother's grandson) and father's daughter's son (sister's son) the former is the preferential heir although he is more removed from the father of the deceased, and offers only one *pinda* (*i. e.*, to the father) in which the deceased participates, whereas the father's daughter's son offers a larger number of *pindas* in which the deceased participates." (1)

2284. Paternal preferred to maternal Sapindas.—Then again the

CL. (6). relations who offer *pindas* to the paternal ancestors to the deceased are preferred to those who offer them only of his maternal ancestors, irrespective of the number of *pindas* offered, because those who offered to the paternal ancestors are of superior religious efficacy in comparison with the latter. This is supported in the Dayabhag as follows:—"Now the Sapindas on the paternal line offer oblations to the paternal ancestors which the deceased was bound to offer and in which he participates, and the Sapindas in the maternal line offer oblations to the maternal ancestors which the deceased was bound to offer, but in which he does not participate; so that, while they both confer spiritual benefit on the deceased, the former benefit him doubly by enabling him to participate in the oblations offered by them and by discharging a duty that was incumbent on him of offering oblations to certain ancestors, and the latter benefit him only in one way, namely by offering certain oblations which he was bound to offer; and therefore, while both are entitled to inherit his estate, the latter succeed only on failure of the former". (2)

2285. So in a competition between the deceased's paternal grandfather's

CL. (7) great grandsons and his brother's daughter's sons the former were held entitled to succeed in preference to the latter because they offered an oblation to his grandfather and their great grandfather in which the deceased participated, whereas the latter offered oblations to them as their maternal ancestors, although they

(1) *Huri Das v. Bama Churn*, 15 C. 780 (791).

(2) *Dayabhag* XI-VI-18, 20; *Brajatal Jiban Krishna*, 26 C. 385 (391).

offered two oblations to the only one offered by the former.⁽¹⁾ For the same reason the father's brother's daughter's son⁽²⁾ and the great grandfather's daughter's son's daughter's son⁽³⁾ are preferred to the mother's brother's son, even though the latter is specifically mentioned in the Dayabhag as an heir, and the former is not. On the same principle, the grand uncle's daughter's son would succeed in preference to maternal uncle.⁽⁴⁾

2286. Heir fixed by the number of pindas offered.—The rule that he

Ol. (8) and (9).

who offers more pindas of the same description must be preferred to one who offers a less number of cakes of the same description which the deceased received or in which he participates, is subject to the preceding rules under which it has been seen that a person who offers one oblation to the father of the deceased is preferred to another who offers two oblations to the grandfather and great grandfather.⁽⁵⁾ But subject to the other rules Mitter, J., stated the two rules as follows:—"Those who offer a larger number of cakes of a particular description are invariably preferred to those who offer a less number of cakes of the same description and where the number of such cakes is equal, those that are offered to nearer ancestors are always preferred to those offered to more distant ones."⁽⁶⁾ This is another way of securing propinquity. Under the rule the brother comes before the uncle because the former offers three oblations to the paternal ancestors of the propositus, while the latter offers only two. The pindas offered by the brothers are greater in number and since the brother offers oblations to the father of the deceased while the uncle offers to his grandfather, he is preferable also under rule 3. The brother's son and the paternal uncle's son each offers to the father and grandfather of the deceased besides offering an oblation to his own father; while the other offers to the grandfather and great grandfather of the deceased in addition to offering to his own father. Hence though the number of pindas is the same in the two cases, still since the pindas offered by the brother's son are to the nearer ancestors of the deceased the brother's son is preferable to the uncle's son.

2287. The exception to rule 1 in favour of a son's and a grandson's daughter and the son of a brother's and of a nephew's

Exception to rule 1

daughter who claim succession in the order of proximity before the maternal grandfather, is justified on the ground of their special merit. Jagannath argues: "It must not be objected that, were it so, the son of a granddaughter would have a prior title, even though the father be living inasmuch as he gives a funeral cake to the deceased himself. The oblations presented to the maternal grandfather and the rest are secondary because they must follow funeral cakes offered to paternal ancestors; the son of a granddaughter can have no claim, while the giver or sharer of a principal oblation exists. Nor should it be objected as a consequence that the son of the late proprietor's daughter or of his father's daughter, and so forth could have no title, if any kinsmen within the degree of Sapinda were living. The Mahabharat showing that a daughter's son procures advantage even by his birth alone, it appears that he does confer important benefit. Shri Krishna Tarkalankar concedes this opinion."⁽⁷⁾

(1) *Gobind v. Mohesh*, 28 W. R. 117 (120) (479).
F. B.

(2) *Brajalal v. Jiban*, 26 C. 265.

(3) *Kailash v. Karuna*, 18 C. W. N. 477.

(4) *Kailash v. Karuna*, 18 C. W. N. 477

(5) *Pramath v. Surrut*, 8 C. 460.

(6) *Guru Gobind, v. Anand Lal*, 13 W. R.

49 (59) F. B.

(7) 8 Dig. 580.

- 2288.** The son, the son's son and the son's son's son take as one heir by representation as in the case of the Mitakshara sons in accordance with the following text :
- 1 Son. (1)**

Dayabhag—The rule of distribution among sons extends equally to them and to grands n in the male line. There is not here an order of succession following the order of proximity according to birth. For those three persons, the son grandson and great grandson, do not differ, in regard to the presenting of two oblations at solemn obsequies, one which it was incumbent on the ancestor to present, and the other which is to be tasted by his manes. (2)

In the Mitakshara country the illegitimate son of a Shudra can inherit. But not so in Bengal where an illegitimate son of no caste can inherit. The Dayabhag repeats the same texts in favour of the right of a *Dasi putra* to inherit, (3) but the courts have construed a *dasiputra* to mean the son by a female slave, which has become impossible since the abolition of the institution of slavery. The Dayabhag texts were examined by R. C. Mitter, J., (4) in a case in which it was held that it could not be broadly laid down that the illegitimate sons of a Shudra have a general right of inheritance to their father. All that could be said was that they may inherit in certain cases though they have a right to maintenance in all cases. (5) In later cases it was pointed out that the texts only warranted the claim of an illegitimate son begotten by a Shudra on a female slave, and that with the abolition of slavery the text had become obsolete. (6) The difference between the Mitakshara and the Dayabhag schools is thus not due to different texts but to the difference in construction, the Calcutta Court construing the term '*Dasi*' literally as meaning a "slave" while the other courts construe it liberally as meaning a mistress. But since the text is the same the difference in construction does not appear to be justified and it is submitted that the narrow view taken by the Calcutta Court requires re-consideration.

(2) Son's son (7) See (§ 2157) above

(3) Son's son's son (8) See (§ 2168) above

- 2289.** The widow obtains the estate as heir and not in view of maintenance :—
- (3) Widow (9)**

Dayabhag : By this text relating to the order of succession the right of the widow to succeed in the first instance is declared. It must not be alleged that the mention of the widow is intended merely for the assertion of her right to wealth sufficient for the subsistence. For it would be irrational to assume different meanings of the same term used only once by interpreting the word wealth as signifying the whole estate in respect of brothers and the rest, and not the whole estate in respect of the wife. Therefore the widow's right must be affirmed to extend to the whole estate.

The widow takes as the heiress of her husband being entitled, to all his interest whether joint or separate, and as regards all property whether moveable

(1) Dayabhag X-1 81

(2) Dayabhag III 1 18 ; Ib. XI 1-83.

(3) Ch. IX-33, 80 ; Colebrooke's translation corrected per R. C. Mitter, J in *Narain v. Rakhai* 1 C. 1 followed in *Kirpal v. Sukurmoni*, 19 C 94; *Ramsaran v. Tekchand*, 29 C. 194, 202.

(4) *Narain v. Rakhai*, 1 C. 1 (7).

(5) *Narain v. Rakhai*, 1 C. 1 (7).

(6) *Kirpal v. Sukurmoni*, 19 C. 91 ; *Ram*

Saran v. Tekchand, 28 C 194 208.

(7) Dayabhag, II -1 18; XI-1 81.

(8) *Ib.*, *Goorugobindo v. Huremadub*, 2 H.v 401

(9) Dayabhag, XI-1-6, 48; *Cassinant v. Hurroondry* 2 Morley's Dig. 198; *Mohun Lal v. Sirrammune* 2 B. S. R. 49; 6 I D (O. S.) 389 *Chunder Kant. v. Bungshoe* 6 W. R. 61; *Despo v. Gobinda* 16 W. R. 42; *Durga Nath v. Chintamani*, 81 C. 214.

or immoveable. (1) It is also well settled in Bengal that a widow obtaining by inheritance her husband's share in joint property is entitled to separate possession by partition with her coparceners unless there be a bar on equitable grounds. (2)

2290. The question whether the widow could be excluded from inheritance by custom was raised and decided against the widow in an old case decided in 1847 in which the widow's suit for possession was resisted on the ground of a peculiar family custom excluding childless widows from succession to the properties of her husband and father or grandfather as the case may be, and entitling her only to maintenance. (8)

It is clear that the widow in Bengal as well as elsewhere takes only a limited interest and that her interest is divested by the subsequent birth (4) or adoption of sons (S. 34.)

Where there are several widows they succeed jointly with the right of partition and survivorship *inter se* and in this respect their position is similar to the Mitakshara co-widows inheriting to their husband.

(5) **Daughter** **2291.** "Daughters confer no benefit, but they succeed because their sons do." (5) This is in accordance with the following text:

Dayabhag.—2. It is the daughter's son, who is the giver of a funeral oblation, not his son nor the daughter's daughter: for the funeral oblation ceases with him.

3. Therefore, the doctrine should be respected which Dikshit maintains: namely that a daughter who is mother of male issue, or who is likely to become so, is competent to inherit; nor one, who is a widow, or is barren, or fails in bringing male issue as bearing none but daughters, or from some other cause.

2292. By the law of Bengal, the unmarried daughter is first entitled to inherit if there be no maiden daughter, then the daughter who has and the daughter who is likely to have male issue are together entitled to the succession. Daughters who are barren, or widows, without male issue or mothers of daughters only can, under no circumstances inherit. (6)

Of daughters, then, only the following succeed:—

- (1) Unmarried daughter (7)
- (2) Daughter with son or who is likely to have male issue. (8)

Daughters who are

- (1) Barren, or

(1) *Dayabhag* XI.1; *Cassinault v. Hurroondary*, 2 Mor. Dig 198; *Thakoor Deyhee v. Baluk Rom*, 11 M. I. A. 189; *Bhugwandeen v. Myra Baee*, 11 M. I. A. 487; *Durga Nath v. Chintamani*, 81 C. 214 (218).

(2) *Scudamoney v. Jogesh Chunder*, 2 C. 262; *Janaki v. Mithura*, 9 C. 580; *Durga Nath v. Chintamani*, 81 C. 214 (218).

(8) *Sodomoney v. Jogesh Chunder*, 2 C. 262; *Janaki v. Mithura*, 9 C. 580; *Durga Nath v. Chintamani*, 81 C. 214 (218).

(4) *Russic Lal v. Purushmonee*, 8 B. S. D. A. 205; 9 I. D. (O. S.) 430.

(5) *Bamundoss v. Tarinee*, 7 M. I. A. 169 (188).

(6) Per R. C. Mitter, J. in *Gunga v. Shumbhonath* 22 W. R. 843 (894).

(7) *Benode Kumari, v. Puradhan*, 2 W. R. 176 (177).

(8) *Radha Kishen, v. Ram Mundul*, 6 W. R. 147.

(2) Widows or

(3) Without male issue, as mothers only of daughters, are altogether excluded from inheritance. A childless widow is excluded (1) even though she may remarry.

2293. Under the Widow's Re-marriage Act it is competent to a widowed daughter to marry and beget sons after the death of her father (2) but if she re-married and begot a son before her father's death, then the estate would vest in her and would not be devested by the subsequent death of her son. (3) So it has been held that the daughter would inherit the estate if she was a childless widow when the succession opened provided she was of marriageable age in which case she must be deemed to be likely to become the mother of male issue, because she could re-marry under the Act. But the Dayabhag did not contemplate, remarriage of widows such as has been legalized by the Act and an ancient text cannot be construed in the light of subsequent legislation.

2294. Every married daughter is presumed to be likely to beget male children. If therefore she was married and was not past the child bearing age she would inherit to her father. It is then immaterial that she becomes a widow or is barren since an estate once vested cannot be devested by subsequent disability. (4)

Daughters like co-widows take a joint estate with the right of partition and survivorship. When once an estate vests in the two daughters, their right of survivorship which is a vested right cannot be devested by one of the daughters becoming widowed or childless. (5)

(6) Daughter's son. **2295.** The daughter's son gives a funeral oblation to his maternal grandfather and is therefore his heir. (6)

Where testator left only two issues one a grandson through a predeceased daughter and another daughter, a childless widow, the former was held entitled to perform the religious ceremonies in preference to the daughter for the testator's spiritual benefit on the failure of the executor of the will to perform the same and to receive the income of the trust funds, though he could not appropriate the corpus. (7) The daughter's son's son is not an heir under the Dayabhag law though he is a *bandhu* under the Mitakahara. On the principle that those who offer *pinda*s directly to the deceased are preferred to those who make offerings in which the deceased merely participates, the next person to come in the list should be the son's daughter's son and the grandson's daughter's son and they have been assigned this place by Messrs Sarvadrikari and Ghose (8), while

(1) *Raj Chunder v. Dhumunee*, 8 B. C. R. 482; 6 I. D. (O.S.) 1088; *Taramonee v. Luckheemonee*, Marsh 29

(2) Hindu Widows Re-marriage Act (XV of 1856) s. 4 *M Kundu v. Mon Michini*, 19 C. W. N. 472.

(3) Hindu Widows Remarriage Act XV of 1856) S 8; *Binola v. Dangoo*, 19 W. R. 189.

(4) *Anurilal v. Rajonikant*, 28 W. R. 214 (217) P. C.

(5) *Strimuttu v. Dorasinga*, 6 M. H. C. R. 810; *Bridyanath v. Durga Churn*, cited in *Amrit Lal v. Rajonikant*, 28 W. R. 214 (218) P. C.

(6) Dayabhag XI II, 2.17-29; *Gunga Pershad v. Shumdhornath*, 21 W. R. 398

(7) *S B Chunder v. Tresorab Fulton*, 98; 1 I. D. (O.S.) 708.

(8) *Sarv Inb* 821; Ghose H. L. 8rd Ed. 185-186.

Mr. Sarcar places them after the mother's sister's son ⁽¹⁾ though the judicial decisions relegate them to a place below the paternal great grandfather's daughter's son. ⁽²⁾

2293. This exhausts the heritable descendants of the deceased. After them come the ascendant sapindas, agnates having precedence over the cognates in the following order:

(7) **The father.**

2297 The father's right is equally supported by an express text:

Dayabhag.—If there be no daughter's son, the succession devolves on the father and not on the mother (before the father) nor at once on both parents. For that is contrary to Vishnu's text. "If there be none, it belongs to the father; if he be dead, it appertains to the mother." (8)

3 This is a result too of reasoning. The father's right of succession should be after the daughter's son and before the mother; for the father offering two oblations of food to other manes in which the deceased participates is inferior to the daughters' son who presents one oblation to the deceased and two to other manes in which the deceased participates ⁽⁴⁾

The Mitakshara places the mother before the father and hence a long apologia in the Dayabhag for reversing the order of succession.

(8) **The mother.**

2298. The mother's claim is supported by the following text:

Dayabhag—If the father be not living the succession devolves on the mother: for immediately after propounding the father's right to the estate, Vishnu's text declares "If he be dead, it appertains to the mother."

2. This too is reasonable: for her claim properly precedes that of the brothers and the rest; since it is necessary to make a grateful return to her, for benefits which she has personally conferred by rearing the child in her womb and nurturing him during his infancy and also because she confers benefits on him by the birth of other sons who may offer funeral oblations in which he will participate. (5)

10. (XI VI-3) Nor can it be pretended that the step mother, grandmother and great grandmother take their places at the funeral repast, in consequence of [ancestors being deified with] their wives, for the terms "mother" and (grandmother and great grandmother)&c (in such texts as the following) bear their original sense of his own natural mother "father's natural mother" and "grandfather's natural mother" and it is by these terms that they are described as taking their places at the final repast. Thus it is said, "A mother takes with her husband the funeral repast consisting of oblations to the manes: and the paternal grandmother with her husband and the paternal great grandmother with hers. But the introduction of stepmothers and the rest to a place at the periodical obsequies is expressly forbidden (6)

It is thus clear that a step mother has no right of succession to her step son, and it has been so held. (7)

9. **Brothers.**

2299. The brother is expressly placed after the mother.

Dayabhag—If the mother be dead, the property devolves on the brother; for Vishnu having declared that "If the father be dead, it appertains to the mother" proceeds to say "on failure of her, it goes to the brothers."

(1) *Sar H. L.*; (4th Ed) 819, 820.

(2) *Gobind Prasad v. Mahesh Chunderi* 28 W R 117; *Pram Nath v. Surrut*, 8 C 460 (438, 464), *Huri Das v. Bamachurn*, 15 C. 780 (788); *Braja Lal v. Jiban Krishna*, 26 C. 285 (291).

(3) *Dayabhag* XI 111-1, 3.

(4) *Dayabhag* XI-IV-8 6.

(5) *Dayabhag* XI-IV-1, 2 (§§8-7 combat

the contrary view that she should have precedence over the father.)

(6) *Dayabhag* XI-VI 3

(7) *Lakhi Priya v. Bhairabchandra*, 5 B. S R 369; 7 I.D (O.S) 612. *Bhadracharya v. Nub Kissen*, 6 B. S R 61; 7 I. D. (O.S) 712; *Akhadmoni v. Gokoolmoni*, (1852) 8 B. D A. B. 568; 12 I. D. (O.S) 488.

8. That too is reasonable; for the brother confers benefits on the deceased owner by offering three funeral oblations to his father and his other ancestors in which the deceased participates; and he occupies his place as presenting three oblations to the maternal grandfather and the rest, which the deceased was bound to offer; and he is therefore superior to the brother's son, who has not the same qualifications. But deriving his origin from the mother, the brother, though he does possess these qualifications, is inferior to the mother; and his succession, therefore, very properly takes effect after her. (1)

9. Here again a brother of the whole blood has the first title under the following text (§ 10) and even under the general rule for the brother's succession. The meaning is that the whole brother shall inherit in the first place but if there be none, then the half brothers; for he also is signified by the word brother, being issue of the same father.

10. The passage alluded to (§9) is as follows. A reunited brother shall keep the share of his reunited [co-heir] who is deceased or shall deliver it to [a son subsequently] born

15. Therefore the half brother who is again associated in co-parcenary shall not take the succession exclusively; but the whole brother [shares it] though not associated. Such is the meaning; and consequently the whole brother, who is not reunited in parcenary and the half brother who is associated should divide the succession. (2)

2300. Thus both by the text and on general principle, a brother of the whole blood is preferred to a brother of half blood because the former offers oblations both to the paternal and maternal ancestors of the deceased whereas the latter offers them only to the paternal ancestors, his maternal ancestors being different. (3) The preference of one over the other has nothing to do with the property whether it is divided or undivided. (4)

A separated full brother is equal to a joint half brother and they inherit in equal shares. (5)

2301. It has been said before that the daughter is an heir not because she confers any spiritual benefit but because her son is an heir. (6) But the same argument does not bring in the sister whose son is an heir though she herself is never the heir of her brother (7) though in a case decided in 1830 it was held that a sister *enciente* of a son may take the heritage in trust for her son to the exclusion of her paternal uncle's son. (8) In so holding it was said "The sister is the source of production of daughter's sons to the father and the medium of their relation. If at the death of her brother Gorachand, no son of Chandra Mala existed, still (since the right of the father's daughter's son could not otherwise be established) she was entitled to enter on the succession and hold until production of her male issue. This too was analogous to the succession of the daughter to the estate of the father, who died leaving no male issue or widow. The sister's son and not the sister was entitled to the property; for he offered oblations (incompetent to the sister) at periodical obsequies." (9) Similar view was taken in another case decided in 1830 in which the sister was held entitled to hold possession as long as there was hope of her bearing a son. (10) But this

(1) Dayabhag XI-V.1,3.

(2) Dayabhag XI-V. 1,3,10,15.

(3) *Neelkisto v. Beer Chunder*, 12 M. I.A. 528 (58J.541); *Shoo Soondary v. Pirthee Singh*, L. R. 4 I. A. 147 (152) approving *Rajkishore v. Gobind*, 1 C. 27 F. B.

(4) *Ishen Chunder v. Bhurub Chunder*, 5 W. R. 21; *Raj Kishore v. Gobind*, 1 C. 27 F. B. approved in *Shoo Soondary v. Pirthee Singh*, L. R. 4 I. A. 147

(5) *Raj Kishore v. Gobind*, 1 C. 27 F. B.; *Shoo Soondary v. Pirthee Singh*, L. R. 4 I. A. 147 (152).

(6) Per R. C. Mitter, J, in *Gunga Pershad v. Shumbhoomath*, 22 W. R. 398.

(7) *Kirpa Mayee v. Damodur*, 7 B. S. R. 226; *Ram Dyal v. Maynee*, 1 W. R. 227; *Kalee Pershad v. Bhoirabee*, 2 W. R. 180; *Anund Chunder v. Teetooram*, 5 W. R. 215; *Rukmini v. Kadarnath*, 5 B. L. R. (App) 87.

(8) *Karuna v. Jai Chandra*, 5 B. S. R. 50.

(9) *Karuna v. Jai Chandra*, 5 B. S. R. 50 (54 55); 7 I. D. (O. S.) 371 (375, 376).

(10) *Sumbochunder v. Ram Durga*, 6 B. S. R. 291; 7 I. D. (O. S.) 885.

view was not acceded to in a later case ⁽¹⁾ in which however, it was held that if the sister's son was conceived at the time the succession opened he will succeed, but his mother had no right.

10. Brother's Son. **2302.** The right of the brother's son is provided by the following text :—

Dayabhag :—1. On failure of brothers, the brother's son is heir, for the text of Vishnu having declared "it goes to the brothers" proceeds, "After them it descends to the brother's sons."

2. Amongst these the succession devolves first on the son of a uterine or whole brother; but if there be none it passes to the son of the half brother. ⁽²⁾

Jagannath :—The son of an uterine brother has the first claim because he confers benefit on the mother of the late proprietor; for it appears from a text cited by Jimut Vahan, Raghunandan and the rest that the father's natural mother also shares with her husband the funeral cake offered by a son's son; but those benefits cannot be conferred by the son of half brothers. however on failure of other nephews, the son of a half brother may inherit. ⁽³⁾

2303. As in the case of the brother, so in the case of the brother's son, a joint nephew is preferred to one separate ⁽⁴⁾ and on the same principle, sons of brothers of the whole blood succeed before sons of brothers of the half blood, ⁽⁵⁾ and of two nephews of the whole blood a re-united nephew succeeds before the one separated and of the two nephews, one of the whole blood and the other of half blood, the latter though united succeeds equally with the former. ⁽⁶⁾ In other words *mutatis mutandis* the rules applicable to the brothers are equally applicable to the nephews, and it is so laid down in the Dayakram Sangrah :—

Dayakram Sangrah :—8. Among brother's sons associated and unassociated, all of the whole blood, the succession devolves on the associated brother's son.

4. In like manner, in the case of associated and unassociated brother's sons, all of the half blood, the succession devolves on the associated brother's son of the half blood.

5. But if the son of the whole brother were unassociated and the son of the half brother associated, then they both inherit together. ⁽⁷⁾

11. Brother's son's son. **2304.** The brother's grandson is preferred to the paternal uncle as explained in the following text :—

Dayabhag :—6. Accordingly (since superior benefits are conferred by such a successor) the brother's grandson excludes the paternal uncle; for he is a giver of oblations to the deceased owner's father who is the person principally considered.

7. But the brother's great grandson though a lineal descendant of the owner's father is excluded by the paternal uncle; for he is not a giver of oblations, since he is distant in the fifth degree. ⁽⁸⁾

In a competition between grand nephews of the whole and half blood and those re-united and separate, the principle of preference is the same as is applicable to the brothers and nephews (2303).

Though a grand nephew is an heir, a grand niece (brother's son's daughter) is not an heir. ⁽⁹⁾

(1) *Kesub Chunder v. Bishnu*, (1860) 2 B. S. D. A. 340; To the same effect *Kalee Pershad v. Bhoiraber*, 2 W. R. 180.

(2) *Dayabhag* XI-VI 1, 2.

(3) 8 Dig 519.

(4) *Jandub v. Benodebeharry*, 1 Hyde. 914; *Akshoy v. Haridas*, 85 C. 721 (724).

(5) *Dayabhag* XI-VI-2; *Kylash Chunder v. Gooroo Churn*, 8 W. R. 48 affirmed on

review *Gooroo Churn v. Kylash*, 6 W. R. 53.

(6) *Dayakram Sangrah*, 1-VIII 8-5 (Setlur) pp. 114, 115.

(7) *Dayakram Sangrah* 1-VIII 8-5 (Setlur), 114, 115.

(8) *Dayabhag* XI-VI-6, 7.

(9) *Radha v. Doorga*, 5 W. R. 131.

A brother's son's son's son being in the fifth degree is a Sakulya and not a Sapinda. As such he cannot inherit in preference to a brother's daughter's son who is a sapinda. (1)

2305. The father's daughter's son is expressly named in Dayabhag as an heir in the following text :—

Dayabhag :—8. But on failure of heirs of the father down to the great grandson it must be understood that the succession devolves on the father's daughter's son (in preference to the uncle) in like manner as it descends to the owner's daughter's son (on failure of the male issue) in preference to the brother. (2)

The position of the sister's son in the line of heirs is both textually recognized and judicially acknowledged. (3) As in the case of sons of brothers no distinction is made in the case of sons of sisters of the whole blood and those of the half blood, both being equally entitled to succeed as provided in the following text :—

Dayakram Sangrah :— According to Acharya Chudamani the son of the proprietor's own sister, and the son of his half sister have an equal right of inheritance.

Neither a sister's daughter nor a sister's daughter's son is an heir. (4)

2306. The brother's daughter's son, and the brother's son's daughter's son (5) are said to be next to inherit ; but judicial authority places them lower down after No. 26 post. (6)

- (13) Father's father.
- (14) Father's mother.
- (15) Father's father's son.
- (16) Father's father's son's son, (7)
- (17) Father's father's son's son's son.

2307. The grand father's great grandson is mentioned in the Dayabhag as an heir, but the brother's daughter's son is not so mentioned; and therefore the latter would be postponed to the former. (8)

- (18) Father's sister's son.
- He is also mentioned in the Dayabhag. (9)
- (19) Father's father's father. (10)
- (20) Father's father's mother.
- (21) Father's father's father's son.
- (22) His son. (11)
- (23) His son's son. (12)

(1) *Digumber v. M. tilal*, 9 C. 563 (567) following *Guru Gobind v. Anand Lal*, 18 W. R. 49 F. B. *contra* in *Kashee v. Raj Gobind*, 24 W. R. 229 in which a Sakulya was held preferable to a cognate Sapinda dissented from as inconsistent with the Full Bench Case in 13 W. R. 41.

(2) Dayabhag XI-VI-8.

(3) *Rajehunaser v. Genculchund*, 1 B. S. R. 56; 6 I. L. (O.S.) 42 *Katuna v. Jaichandra*, 5 B. S. R. 50; 7 I. D. (O.S.) 371; *Lakhi Praya v. Bhoirab Chandra*, 6 B. S. R. 869, 7 I. D. (O. S. 612; *Sumb chunder v. Gungachurn*, 6 B. S. R. 291; 1 I. D. (O.S.) 836; *Guru Gobind v. Anand Lal*, 18 W. R. 41 F. B. *Seeta Ram v. Fukeerchand*, 15 W. R. 438; *Ganesh v. Nilkumal* 22 W. R. 264

(4) *Kalee Pershad v. Bhoirabee*, 2 W. R.

180; *Krishna v. Secretary of State*, 85 C. 631.

(5) *Sarv. Inh* 822; *Bhatnagar v. H. L.* (2nd Ed.) 504.

(6) *Pranath v. Surrut Chunder*, 3 C. 460; 8 Dig. 530

(7) Dayabhag XI-VI-9, *Jugut Narain v. Collector*, 4 C. 418 N; *Oodoychurn*, 4 C. 411 418; *Gopal v. Haridas*, 11 C. 843.

(8) *Jugut Narain v. Collector*, 4 C. 418 N.

(9) Dayabhag XI VI 9

(10) *Sarv. Inh* 882 places before this the father's father's son's daughter's son, and the father's father's son's son's daughter's son.

(11) *Gopal Chunder v. Hari Das*, 11 C. 848.

(12) *Mahoda v. Kulcani*, 1 B. S. R. 82.

(24) Paternal great grandfather's daughter's son. ⁽¹⁾

2308. There is some conflict of views as to the order of the next following. ⁽²⁾

(25) Son's daughter's son.

(26) Son's son's daughter's son.

(27) Brother's daughter's son.

(28) Brother's son's daughter's son.

2309. As to these, Jagannath says "It should be remarked that the son of a son's and of a grandson's daughter, and the son of a brother's and of a nephew's daughter, and so forth, claim succession, in the order of proximity before the maternal grandfather; for they also confer benefits by the oblation of funeral cakes." ⁽³⁾

(29) Paternal uncle's daughter's son. ⁽⁴⁾

(30) do son's daughter's son.

(31) Paternal grand uncle's daughter's son ⁽⁵⁾.

(32) do son's daughter's son.

2310. It has been held that the great grandfather's son daughter's son is entitled to succeed in preference to the maternal uncle. ⁽⁶⁾ They present an oblation to the deceased's paternal great grandfather in which the deceased participates. ⁽⁷⁾

(33) The maternal grandfather.

Both the Dayabhag ⁽⁸⁾ and the Dayakram Sangrah places the maternal grandfather here. ⁽⁹⁾

(34) Mother's brother.

(35) Mother's brother's son. ⁽¹⁰⁾

(36) Mother's brother's son's son. ⁽¹¹⁾

2311. The last three are the agnate descendants of the maternal grandfather and as such relations in whose oblations the deceased participates. They are therefore preferred to the Sakulyas. ⁽¹²⁾

(37) Mother's sister's son.

2312. As the mother of the deceased and the mother of the heir were daughters of the same father and as the deceased left no nearer kinsmen vested with the right of offering the funeral oblations offered by the heir to his

(1) Dayabhag XI-VI 9; Sarv. Inh. 823 place here the great grandfather's son's daughter's son (No. 81) and the great great grandfather's grandson's daughter's son (No. 82).

(2) Sarv. Inh. places them earlier (Inh. 821); Sarkar places them after the maternal relations provisionally (H. L. 3rd Ed 307, 308) while Mr. Ghose places them as in the text (H. L. 3rd Ed 187, 198); Gobind Pershad v. Mohesh Chunder, 28 W. R. 117; Digumber v. Motilal, 9 C. 568; Huri Das v. Bama Churn, 15 C. 780.

(3) 3 Dig. 580

(4) Gobindo v. Woornesh, (1864) W. R. 176; Guru Gobind v. Anand Lal, 18 W. R. 49 F. B. Gopal v. Hari Das, 11 C. 848; Kedar v. Amrita Lal, 17 C. W. N. 492.

(5) Dayakram Sangrah, 1-X-13 (Setlur, 117).

(6) Kailash Chandra v. Karuna, 18 C. W. N. 477 followed in Kedar Nath v. Hari Das, 43 C. 1 (11).

(7) Daya Kram Sangrah, 1-X 13 (Setlur) 117.

(8) Dayabhag XI-VI-20.

(9) Dayakram Sangrah, 1-X-14 (Setlur) 117.

(10) Braja Lal v. Jiban Krishna, 26 C. 285.

(11) Dayakram Sangrah, 1-X-15 (Setlur) 117; Padmakumari v. Court of Wards, 8 C. 302 (810) P. C.

(12) Roopchurn v. Amundlal, 2 B.S. P. 45; 6 I. D. (O.S.) 592; Kassee v. Goluck Chunder, (1848) B. S. D. A. 28.

maternal grandfather, and as the deceased had no sapindas within 3 degrees, the mother's sister's son has the preference over lineal descendants from a common ancestor beyond the third degree. (1)

(38) The maternal great grandfather.

(39) His son.

(40) His son's son.

(41) His son's son's son.

(42) His daughter's son.

2313. Nos. 38 to 42 are supported by their enumeration in the same order in the Dayakram Sangrah. (2)

(43) The maternal great great grandfather.

(44) His son.

(45) His son's son.

(46) His son's son's son.

(47) His daughter's sons.

2314. This is in accordance with the express text of Dayakram Sangrah (8) which closed the list of Sapindas with the last. But the following are also Sapindas though not so included in that work.

(48) The maternal grandfather's son's daughters.

(49) Maternal grandfather's grandson's daughter's son.

(50) The maternal great grandfather's son's daughter's son.

(51) The maternal great grandfather's grand son's daughter's son.

(52) The maternal great great grandfather's son's daughter's son.

(53) The maternal great great grandfather's grandson's daughter's son.

2315. Sakulyas.—In default of all Sapindas, whether Gotraj or Bandhus, the inheritance goes to the Sakulyas in accordance with the following texts.

Dayabhag :—14. Accordingly since the succession devolves on heirs down to the maternal uncle and the rest, in the order of oblations in which the deceased may participate, or which he was bound to offer, Manu considering that purport as sufficiently indicated by the two passages above cited, "To the nearest Sapinda the inheritance next belongs," proceeds thus "Then on failure of such kindred, the distant kinsmen shall be the heir," or the spiritual preceptor or the pupil.

15. The distant kinsman (Sakulya) is the descendant of the paternal grand-father's grand-father or other remote ancestor. Such relatives are denominated Samanodaks. Their order of succession is in the series as exhibited. On failure of such heirs down to the Samanodaks, the succession devolves on the spiritual preceptor, the pupil, etc (4)

Dayakram Sangrah:—22. The Sakulyas or remote kindred, are of two descriptions, 1st descending and 2nd, ascending.

28. The first includes the great grandson's son, and the rest down to the 3rd degree in the descending line. The second includes the great grand-father's father and other ancestors up to the 3rd degree in the ascending line.

24. Here the distant kinsmen in the descending line first obtain the inheritance, according to their respective order, since the deceased owner partakes of the remainder of the oblations which they present.

(1) *Daynath v. Muthoor Nath*, 6 B. S. R. 80 ; 7 I. D. (OS) 688. According to Sarv. Inh. p. 828 Nos. 48 and 49 should next follow—but for the reason given in this case they should be postponed till after 47.

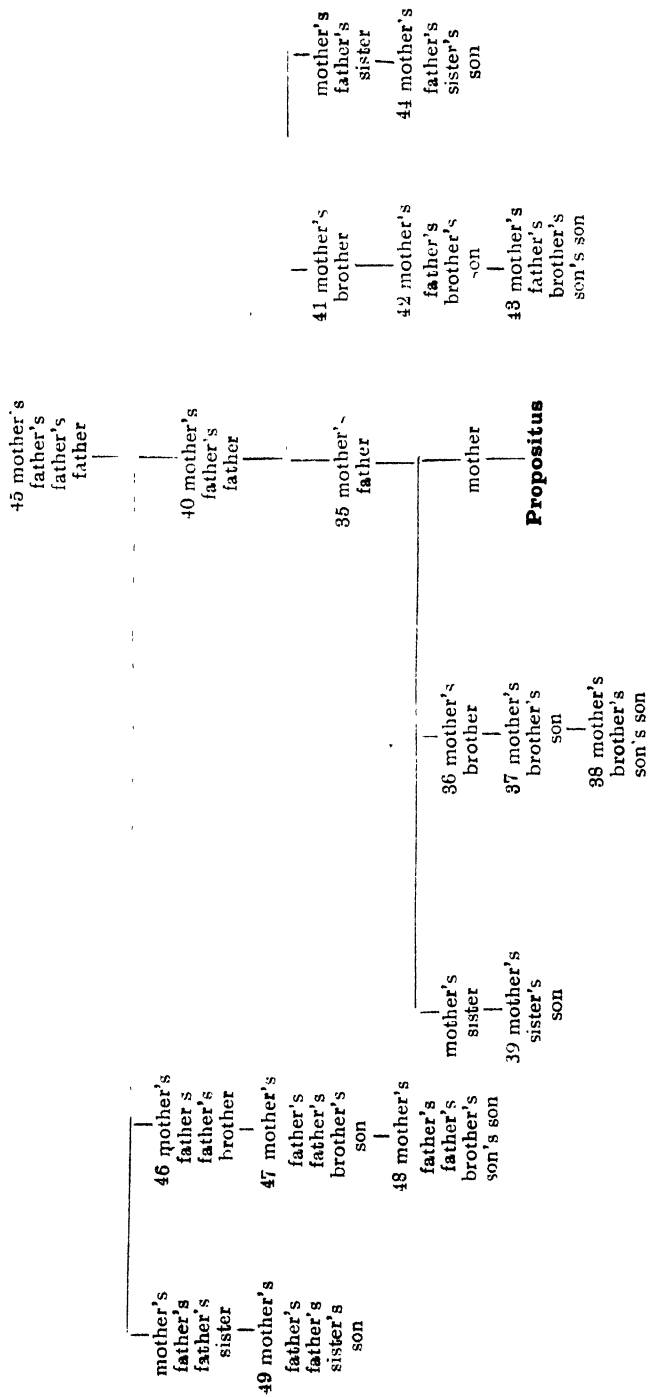
(2) *Dayakram Sangrah* I-X-17 18 (Setlur) 117 ; *Braja Kishore v. Radha Gobind*, 12 W

R. 389 ; Sarv. Inh. 823 places here Nos. 50 and 51.

(8) *Dayakram Sangrah* 1-X-19, 20 (Setlur) 117. Sarv. Inh. 828 places here Nos. 52 and 58.

(4) *Dayabhag* XI-VI-14, 15 ; *Dayakram Sangrah* I-X-21 (Setlur) 117.

[Maternal relations presenting oblations which the deceased was bound to offer.]



25. In their default the distant kindred as far as the third degrees in the ascending line inherits in due order. ⁽¹⁾

2316. Samanodaks :—In default of Sakulyas, the Samanodaks in the same order.

2317. Other heirs —The rest of the heirs here enumerated follow the order of the Mitakshara. In one case it was held that a priest may be the heir of his deceased disciple. ⁽²⁾

2318. Hermit's heir.—The heirs of hermits follow the Mitakshara text.

2319. Inheritance on reunion.—The rules of succession amongst re-united relations have already been stated in S. 152. There is no difference in this respect between the two schools, since even under the Dayabhag law "the reason for inheritance by a reunited co-parcener is not spiritual benefit, but a quasi-contractual relation and affection for each other." ⁽³⁾ Both the Smriti Chandrika ⁽⁴⁾ and the Virmitrodaya contains an exhaustive chapter on reunion ⁽⁵⁾ from which the following table of succession is drawn:—

- | | |
|---|-----------------------|
| (1) Reunited full brother. | |
| (2) Separated full brother | } both share equally. |
| (3) Reunited half brother | |
| (4) Reunited father. | |
| (5) Reunited uncle. | |
| (6) Separated half brother. | |
| (7) Separated father. | |
| (8) Separated mother. | |
| (9) Widow. | |
| (10) Sister. | |
| (11) Nearest Sapindas. ⁽⁶⁾ | |
| (12) Samanodaks and the rest, as in the case of ordinary succession. ⁽⁷⁾ | |

2320. The heir to the estate of a reunited person must maintain his wives and support his daughters till they are married as well as perform the ceremony of their marriage. ⁽⁸⁾

(1) Dayakaram Sangrah 1.-X 28-25; Setlur 117, 118

(2) *Jugdanand v. Kessubnund*, 1864 W. R. 146.

(3) *Akshoy v. Hari Das*, 85 C. 721 (726).

(4) Ch. XII (Setlur) Pp. 300, 307.

(5) Virmitrodaya Ch. 1 V (Setlur) P. 427, 438.

(6) Ib. (Setlur) 434, 435.

(7) Ib. (Setlur) 436.

(8) Virmitrodaya Ch. IV-18 (Setlur) 436.

CHAPTER XXIV.

WOMAN'S ESTATE.

2321. Topical Introduction :—Women's property is divisible into property over which she possesses the power of disposal at her discretion and that over which she possesses only a limited power of disposal. The former comprises property which is spoken of as her own peculium or Stridhan which will be the subject of another chapter, while the latter is the property which she acquires by inheritance or partition which is the subject of this chapter. It has been stated before that Hindu Law regards women as inherently incompetent to hold property. And such rights as are conceded to her bear the marks of the struggles which marked their course. To begin with, all Hindu females started as slaves in their husband's household. As such they had no rights of property. But in course of time they had to be conceded such rights by the force of usage. This has led to the adaptation of old texts to new conditions. The woman's rights at the present moment stand highest in Bombay and lowest in the orthodox Mitakshara country. Madras and Bengal take an intermediate place but the general rule that women take only a limited estate applies equally to all. But as their Lordships have pointed out, this does not mean that she is not the owner of her estate. All it means is that her power of alienation is limited.

2322. The conception of unqualified ownership with a limited power of alienation may not be consonant with the general law. But it is a necessary incident of a woman's estate. As such it has given rise to certain rights which the reversioner may enforce during the life-time of the female heir. What these rights are will be found set out in the sequel. This chapter deals with the rights of women over their property other than Stridhan.

The next chapter will deal with the rights of reversioners, while another chapter sets out women's rights over their stridhan and the law regulating its succession.

Restriction on woman's estate.

252. Except as otherwise provided, the rights of a woman in her property acquired by partition or inheritance, are limited as follows :—

(1) The estate is liable to be divested upon the subsequent birth or adoption of a son or upon her re-marriage but not for unchastity.

(2) She is not entitled to alienate the corpus except for legal necessity or benefit, as hereinafter provided but she is entitled to appropriate all its income and accumulations which she may dispose of at her discretion.

(3) On her death her estate devolves on the next heir of the last male owner.

Exception 1 :—Under the Mayukh law females who belong to the family of the propositus by birth take an absolute interest while those who come into it by marriage take only a limited estate.

Exception 2 :—A Jain widow has absolute power of disposal over the self-acquired property of her husband inherited by her.

Exception 3 .—Nothing in this section applies to an estate acquired by a woman by deed or devise which may confer on her an absolute estate.

Illustrations.

- (a) A inherits an impartible estate from her husband. She takes a limited estate. ⁽¹⁾
 (b) A, the mother, succeeds as heir to her son. A takes only a limited estate ⁽²⁾
 (c) A, the daughter, inherits her father's estate. A's estate is limited. ⁽³⁾
 (d) A, a sister, inherits her brother's estate in Bombay. A takes an absolute estate, though elsewhere her estate would be limited. ⁽⁴⁾

Synopsis.

- | | |
|--|---|
| (1) <i>Text on woman's inheritance</i> (2323). | (9) <i>Restriction on her powers of alienation</i> (2332). |
| (2) <i>Women inherit limited estates</i> (2324). | (10) <i>Reason of the rule</i> (2332). |
| (3) <i>Exception in Bombay</i> (2324). | (11) <i>Restriction applies to moveables</i> (2333). |
| (4) <i>Nature of her interest in property allotted on partition</i> (2325-2326). | (12) <i>Customary rights of widow in Mithila</i> (2335). |
| (5) <i>Legal position of woman inheriting an estate</i> (2327). | (13) <i>Power over income and accumulations</i> (2336-2337). |
| (6) <i>Widow's position that of owner, not of a trustee</i> (2328-2329). | (14) <i>Female owners in Bombay</i> (2334-2340). |
| (7) <i>Devesting of her estate</i> (2330). | (15) <i>Jain widow</i> (2341). |
| (8) <i>Forfeiture of estate on re-marriage</i> (2331). | (16) <i>Estate of widow taking under gift or devise</i> (2342). |

2323. Analogous Law.—The position of women is summed up in the two texts one from the Veda and another from Katyayan which are cited by all later commentators as the last word on woman's capacity and has rights:—

Baudhayan:—The Veda declares "therefore women are considered to be destitute of strength and of a portion."

Katyayan :—Let the childless widow, preserving unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the property until her death. After her death let the heirs take it. But she has not property therein to the extent of gift, mortgage or sale. (6)

Narad :—Women's business transactions are null and void, except in case of distress, especially the gift, pawning, or sale of a house or field. Women are not entitled to make a gift or sale; a woman can take only a life interest whilst she is living together with the rest of the family. Such transactions of women are valid where the husband has given her consent or, in, default of the husband the son, or, in default of husband and son, the King (7).

(1) *Muttu v. Dora Singha*, 3 M. 290 P. C., 406.
Venkayamma v. Venkata 25 M. 678 P. C.,

(2) *Vrijbhukan Das v. Parbati* 32 B. 26.

(3) *Chotaylal v. Chunoo Lal*, 14 B. L. R. 296 affirmed O. A. 4 C. 744 P. C.

(4) *Bhaskar v. Mahadeb* 6 B.H.C.R. (O.C.) 1

(5) 2 S.B.E. 9—15; *Viramitrodaya* (Setlur)

(6) Cited in *Daya Bhag* XI—1—56; *May IV-VIII—4* (Mandlik) 77; *Vivad Chintamani* (Setlur) 256; *Smriti Chand.* XII—1—28 (Setlur) 279; *Viramitrodaya* (Setlur) 406.

(7) *Narad* III—27—30.

Mitakshara :—(After briefly propounding the division of wealth left by the husband and wife), "But sons divide equally both the effects and the debts after the demise of their parents") The partition of a man's goods has been described at large. The author now intending to explain fully the distribution of a woman's property begins by setting forth the nature of it, "What was given to or received by her at the nuptial fire or presented to her on her husband's marriage to another wife, as also any other (1) separate acquisition is denominated a woman's property." (2).

Later texts emphasize her dependence and worthlessness except for the purpose of procreation. Her right of property has been of slow growth and the present law is as stated in the section.

2324. Women acquire a limited estate:—Women generally take a limited estate. It is immaterial whether she takes as widow (3) daughter (4) (except in Bombay) (5) mother, (6) or a grandmother (7) (except in Bombay) (8) it being immaterial whether the property is inherited from a male (9) or a female, (10) or whether the property is moveable or immoveable (11) partible or impartible (12)

(1) In original the word is आदि i.e. "or the like" so that the passage should more correctly read thus, "or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, or the like." So held in *Chotay Lal v. Churnoo Lal* 4 C. 744 (754) (P. C.)

(2) Mit. 1—XI—1.

(3) *Keerut Singh v. Koolahul Singh* 2 M.I.A. 529; *Thakoor Deybee v. Baluk Ram* 11 M. I. A. 189; *Bhugwandeem v. Myna Bae* 11 M. I. A. 487; *Moniram v. Kerri*, 5 C. 776 (789, 790) P. C.

(4) *Chotay Lal v. Churnoolal*, 14 B. L. R. 285 affirmed O. A. 4 C. 744 P. C. *Muttu v. Dorasinga* 8 M. 290 P. C. *Venkatamma v. Venkata* 25 M. 678 P. C.

(5) *Vinayek v. Luzumeebai*, 1 B. H. C. R. 117 affirmed O. A. 9 M. I. A. 520; *Bhaskar v. Mahadev*, 6 B. H. C. R. 1; *Haribhat v. Damoarbhat*, 3 B. 171; *Bharmangavda v. Rudragavda* 4 B. 181 (187); *Bulukhi Das v. Keshav Lal* 6 B. 85; *Jankibai v. Sundra* 14 B. 612; *Kindabai v. Anacha* 15 B. 206; *Madhavram v. Dave*, 21 B. 739 (745).

(6) *Vinayek v. Luzmee Bai*, 1 B. H. C. R. 117 affirmed O. A. 9 M. I. A. 520; *Shakharam v. Sitabai* 3 B. 353; *Bharmangavda v. Rudragavda* 4 B. 181 (187); *Tuljiram v. Mathura Das* 5 B. 662 (670); *Vrijbhukandas v. Parvati*, 32 B. 2; *Poorendra v. Hemangini* 36 C. 75 (84); *Pachiraju v. Venkatappada*, 2 M. H. C. R. 402; *Kutti v. Rada Krishna*, 8 M. H. C. R. 88; *Punchanund v. Lolshan* 3 W. R. 140 (Mithila case); *Bijya v. Unpoorna* 1 B. S. R. 215; 6 I. D. (O. S.) 159; *Nufur v. Ram Koomar*, 4 B. S. R. 898; 7 I. D. (O. S.) 293; *Hem Lutta v. Goluck Chunder* 7 B. S. R. 127; 8 I. D. (O. S.) 97; *Jillesur v. Uggur Roy* 9 C. 725; *Poorendra v. Hemangini*, 36 C. 75.

(7) *Pluhar v. Ranjit* 1 A. 661.

(8) *Gandhi v. Jaddab*, 24 B. 192; contra *Per Rade J. in Madhavram v. Dave*, 21 B. 739 (744).

(9) *Dayabhadg XI-1-56-61*; *Mayukh IV. VIII-4*; (Setlur) 97; *Virmirodaya III-1-8* (Setlur) 376-380 *Smriti Chandrika XI-1-28* (Setlur), 279 *VivadChintamani* (Setlur) 256 *Dayakram Sangrah I II-3-5* (Setlur) 110.; *VyavasthaDarpan* (2nd Ed) 124; *Keerut Singh v. Koolahul Singh*, 2 M.I.A. 331; *Collector v. Cavaly*, 8 M. I. A. 529; *Thakoor Deybee v. Baluk Ram* 11 M. I. A. 189; *Bhugwandeem v. Myna Bae*, 11 M. I. A. 487; *Moniram v. Kerry*, 5 C. 776 (789, 790) P. C. *Jamiyatram v. Jamma* 2 B. H. C. R. 10; *Lakshmi, Bai v. Ganpat* 4 B. H. C. R. (O. C.) 150 (163) *Bhaskar v. Mahadev*, 6 B. H. C. R. 1; *Bharmagavda v. Rudragavda*, 4 B. 181 (187); *Vrijbhukandas v. Parvati*, 32 B. 2; *Katama v. Dorasingar*, 6 M. H. C. R. 310; *Vasudevan v. Secretary of State*, 11 M. 157 (165); *Gurunath v. Krishnaji*, 4 B. 462; *Tulji Ram v. Mathuradas*, 5 B. 662; *Madhavram v. Dave*, 21 B. 739

(10) *Dayakram Sangrah II-III 6* *Thakoor Deybee v. Baluk Ram*, 11 M. I. A. 189 *Bhugwandeem v. Myna Bae*, 11 M. I. A. 487; *Sho Shankar v. Debi Sahai*, 25 A. 468 (P.C.) reversing O. A. *Debi Sahai v. Shoo Shankar* 22 A. 353, *Shoo Parbat v. Allahabad Bank* 25 A. 476 P. C.; *Chotay Lal v. Churnoo Lal*, 4 C. 744 affirmed O. A. 14 B. L. R. 285 (287); *Sengamalalammal v. Velayuda* 8 M. H. C. R. 312; *Venkata Rama v. Bhujanga*, 19 M. 107; *Virasomgappa v. Rudrappa*, 19 M. 110; *Raju v. Ammani*, 29 M. 358; *Prankishan v. Bhugwatee*, 1 B. S. R. 4; 6 I. D. (O. S.) S. *Bhobun v. Mudden* 1 Shome 8; *Prankissen v. Noyanmoney*, 5 C. 222; *Huri Dayal v. Grishchunder*, 17 C. 911; *Jagendra v. Phani Bhushan*, 43 C. 64; *Madhumala v. Lakshman*, 20 C. W. N. 627.

(11) *Thakoor Deybee v. Baluk Ram* 11 M. I. A. 189 (175); *Bhugwandeem v. Myna Bae* 11 M. I. A. 487; *Durga Nath v. Chintamani*, 43 C. 214. *Narasimha v. Venkata*, 8 M. 290.

(12) *Muttu v. Dorasingha*, 8 M. 290 P. C.

ancestral or self-acquired, (1) or whether it is acquired by partition (2) or inheritance. As Lord Hobhouse put it, "It is not necessary now to state in any detail how impossible it is, whether with regard to the authority of other commentators or to other parts of the Mitakshara itself, to construe this passage (3) as conferring upon a woman taking by inheritance from a male a stridhan estate transmissible to her own heirs. The point is now completely covered by authority. In the case of *Thakur Deybee v. Rai Baluk Ram* (4) such an interest was claimed on behalf of a widow in her husband's immoveable property. In the case of *Bhagwandeem Doobey v. Myna Baee* (5) such an interest was claimed on behalf of a widow in her husband's moveable property. In the case of *Chotailall v. Chunnoolall* (6) such an interest was claimed on behalf of a daughter in her father's property. All these cases were governed by the Mitakshara law. And in all it was held that the woman took only a restricted interest, and that on her death the property devolved on the line of the last male owner." (7)

2325. Share on partition.—Then as regards partition the share obtained by a female on partition is presumed to be allotted to her in lieu of her right to maintenance and is therefore subject to the same limitation incident to a woman's estate. This had been the subject of some conflicting decisions of the Indian Courts, for, while in some cases (8) this view was followed, there were cases (9) in which the courts held the female to take an absolute estate. The question was examined and decided by the Privy Council who held the rule applicable to the estate acquired by inheritance equally applicable to partition. "Of course, the members of a joint family effecting a partition may agree that a portion of the property shall be transferred to the widow by way of absolute gift, as part of her stridhan so as to constitute a provision for her stridhan heirs, but in the absence of any such intention, their Lordships do not feel justified in putting property acquired by a widow on partition of joint estate, upon a footing different from that on which property coming to her by way of inheritance has been placed." (10)

2326. This was a Mitakshara case but the same rule applies equally to Bengal. (11) As Wilson, J. said, "The nature of her i.e., mother's right in the share when allotted was long a subject of controversy. Writers of high authority maintained that it vested in her absolutely and passed after her death to her heirs as stridhan. It is now settled in Bengal that this is not so but that on her death it goes back in some sense to her husband's family."

(1) *Namasivaya v. Sivagami*, 1 M. H. C. R. 374.

(2) *Debi Mangal Prasad v. Mahadeo* 34 A 284 reversing O. A. 32 A. 253; also reversed *contra* in *Chhindu v. Nanbaw*, 24 A. 67; *Sripal v. Surajbali* Ib. 82.

(3) Mit. II. XI 2 cited for the appellant.

(4) 11 M. I. A. 189.

(5) 11 M. I. A. 487.

(6) 4 C. 744 P. C.

(7) *Muttu v. Dorasingha*, 3 M. 290 (801) P. C.

(8) *Baldeo v. Mahabir* 1 Agra 155 (157);

Judoonath v. Bishonath 9 W. R. 61; *Laljeet v. Raj Coomar* 20 W. R. 836; *Beni Pershad v. Puran Chand* 28 C. 262 (279).

(9) *Chhidu v. Nenbat* 24 A. 67; *Sri Pal v. Surajbali* ib p. 82.

(10) *Debi Mangal v. Mahadeo* 34 A. 284 (243) P. C. overruling O. A. 32 A. 253 and *contra* in *Chhindu v. Nenbat* 24 A. 67 (74 76); *Sri Pal v. Suraj Bali* ib 82.

(11) *Sheo Dyal v. Judoonath* 9 W. R. 61 (62); *Nobin Chunder v. Guru Persaud* 9 W. R. 505 *Unnopoomah* 15 C. 292 (307).

This branch of the law has now been settled by a long course of decisions which the Courts will not unsettle by any appeal to the original texts. ⁽¹⁾

2327. But though a woman takes a limited estate it is a proprietary estate in no way limited in interest ⁽²⁾ though it is limited in use. She does not hold in trust for her reversioners. ⁽³⁾ "Her right is of the nature of a right of property; her position is that of owner; her powers in that character are however, limited; but so long as she is alive no one has any vested interest in the succession" ⁽⁴⁾ The interest which her reversioners possess in her estate is contingent and a mere *spes successionis* which by relinquishment in her favour has not the effect of enlarging her estate by converting it into an absolute estate, ⁽⁵⁾ the reason being that her estate is limited because of her historical incompetence and not because of the necessity of safeguarding the rights of her reversioners. Consequently her estate is not enlarged by the fact that she has no reversioners, or that the crown does not claim her estate on her death by escheat. ⁽⁶⁾

2328. The widow is not in the position of a manager because she represents no one and is in possession of an estate which is her own, whereas the manager of a joint family is merely a co-parcener in an estate in which others are equally interested and of whom he is a representative. Whatever therefore he does, he does with the assent express or implied of the body of co-parceners. In the widow's case the co-parceners are reduced to herself and the estate centres in her. She can do what the body of co-parceners can do, subject always to the condition that she acts fairly to the expectant heirs. ⁽⁷⁾ But all the same she does not hold her estate for them. The latter do not get the estate through her. ⁽⁸⁾

2329. The whole estate for the time being vests in her; her reversioners having merely a contingent interest a mere *spes successionis* in her estate.

CL. 1.

2330. Devesting of her estate.—The estate which a Hindu woman takes cannot be devested by any subsequent event. The only case in which it is liable to be devested is the subsequent birth or adoption of a son. Even in the latter case where the husband is competent to make a valid bequest of his property as where he is subject to the Dayabhag school or is otherwise competent to dispose of his property by will, he may provide against

(1) *Chotay Lal v. Chunnoo Lal* 4 O. 744 (755, 756) P. C. affirming 14 B. L. R. 235 following *Gyan Coowur v. Dookhun* 4 B. S. R. 330; *Punamchand v. Lal Shan* 3 W. R. 140; *Deo Persad v. Lujoo* 14 B. L. R. 245 N; *Dowlut v. Burma Deo* 14 B. L. R. 246 N; *Katama Nachiar v. Dorasingha* 6. M. H. C. B. 310; *Vinayak v. Lakshmidai* 1 B. H. C. R. 117; (explaining *Contra Pranjiwan Das v. Devkumarbai* 1 B. H. C. R. 130 as based on local usage and in *Nevalram v. Nandkis hore* 1 B. H. C. R. 209; *Trimbak v. Mahadev* 6 B. H. C. H. R. 1; *Vijiarangam v. Lakshuman* 8 B. H. C. R. (O O) 244 as based on the Mayukh law).

(2) *Vasoji v. Chandabibi*, 37 A. 369, (378, 379), P. C.

(3) *Hurrydoss v. Upoornath* 6 M. I. A. 488.

(4) *Janaki v. Narayanasami* 39 M. 634 (637) P. C.

(5) *Hemchunder v. Saramoji* 22 O 354

(363); *Narasimham v. Nadhavaraduya* 13 M. L. J. 323; *Dhoorjeti, v. Dhoorjeti*, 30 M. 201; *Sham Sundar v. Acohan Kaur* 21 A. 71; *Hargawan, v. Baijnath* 32 A. 38 In *Olatt v. Varadarajulu*, 81 M. 474 (478) a release by a reversioner of his reversionary right was held as not obnoxious to the provisions of S. 7 (a) of the Transfer of Property Act. But it was a case of compromise. In *Kanuram v. Kashichandra*, 14 C. W. N. 226 2 I. C. 660, the reversioner had purchased half the estate from the daughter and relinquished his right on the other moiety which was upheld *inter partes* But such arrangement cannot, it is submitted; enlarge the female heirs limited estate by converting it into her *stridhan*.

(6) *Janardhan, v. Anu* 10 I. C. 51.

(7) *Chinnmaji, v. Dinkar* 11 B. 320 (324).

(8) *Shib Shankar v. Soni Ram* 32 A. 33 affirmed O. A. 35 A. 227 P. C.

the divesting of his widow's estate on adoption. As the Privy Council observed: "Under the Dayabhag, the testator has not only the power of authorizing his widow to adopt a son to him, and in case of the death of such adopted son, to make other adoptions in order to ensure the performance of those religious rites on which depend his salvation in after life, but he can attach to such authority a direction that her estate should not be interfered with or divested during her life, just as he can postpone the succession of his natural born son by interposing a life-estate." (1)

The estate of a Hindu widow is also divested on her re-marriage or retirement from the world, as by turning a bairagi, or the like (2) which amount to her civil death.

2331. Forfeiture of Estate on remarriage.—The rule that a woman forfeits her estate in consequence of her remarriage (3) applies *a fortiori* if she becomes a convert to another faith such as Mahomedanism and then remarries. (4) In the case of the widow her estate rests on the fiction that she is a surviving portion of her husband and as her remarriage destroys her identity with her husband she forfeits his estate. (5) The Hindu Widows Remarriage Act applies only to Hindus, but it is not exhaustive of the cases entailing forfeiture. The mere fact that she has become unchaste is however, not sufficient to divest her estate, as it is settled that an estate once vested in the widow cannot be divested by her subsequent unchastity, (6) for as observed by Wilson J., there is a very broad distinction between misconduct on the part of a widow as a widow, and her ceasing to be a widow. (7)

2332. Her alienation.—The right of female heirs is absolutely limited and not merely qualified by the existence of reversioners. Whether these do or do not exist the qualification remains because her estate is limited not by the rights of others but by the peculiar nature of her estate. If there are reversioners they may object because her act prejudices their right. But if she has left no heirs, and her estate escheats to the crown it has the same right. It was so held in the case of a Brahmin Zamindar on whose death the estate devolved upon his widow who having died without heirs, the estate escheated to the crown. (8) The widow had made certain alienations of the estate the propriety of which was disputed by the crown but the alienee contended that it was not open to the crown to contest the widow's alienation which none but her husband's heirs could control. The Madras court dismissed the suit of the crown holding that it had no right to question the alienation. In reversing this decree the Privy Council said: "It is clear that under the Hindu Law the widow, though she takes as heir, takes a special and qualified estate. Compared with any estate that passes under the English law by inheritance, it is an anomalous estate. It is a qualified proprietorship and it is only by the principles

(1) *Bhupendra v. Amarendra*, 43 C. 432 (489) P. C.

(2) *Ameena v. Radhabinode*, (1856) 12 S. D. A. B. 595 (602); 15 I. D. (O.S.) 78 (83, 84).

(3) *Mutungini v. Ram Rutton*, 19 C. 219 F. B. *Murugayi v. Viramakali*, 1 M. 226.

(4) *Mutungini v. Ram Rutton*, 19 C. 219 F. B. *Vitta v. Chatakondur*, 85 M. L. J. 817 F. B. overruling 14 I. C. 299 *Vithu v. Govinda*, 23 B. 321; *Rasul v. Ram Sarun*, 22 C. 589;

Abdul Aziz v. Nirnia, 1 M. 226.

(5) *Murugayi v. Viramakali*, 1 M. 226.

(6) *Moneram v. Keri*, 5 C. 776 P. C.

(7) *Mutungini v. Ram Rutton*, 19 C. 289 F. B.

(8) Two cases relating to this Zemindari went up to the Privy Council. The right of the crown to take by escheat and the question of improper alienations was decided in the first *Collector v. Cavalry* 8 M. I. A. 500; while in the second, the crown was held to hold the estate subject to all valid charges created by the widow. *Cavalry v. Collector*, 11 M. I. A. 619.

of Hindu Law, that the extent and nature of the qualifications can be determined. "It is admitted on all hands that if there be collateral heirs of the husband, the widow cannot of her own will alien the property except for special purposes."

"For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity. On the other hand it may be taken as established that an alienation by her which would not otherwise be legitimate may become so if made with the consent of her husband's kindred. But it surely is not the proposition that in the absence of collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper."⁽¹⁾ "Nor does it appear to their Lordships that the construction of Hindu law which is now contended for, can be put upon the principle of *Cessante ratione cessat ipse-et-lex*. It is not merely for the protection of the material interests of her husband's relations that the fetter on the widow's power is imposed. Numberless authorities from Manu downwards, may be cited to show that according to the principles of Hindu law, the state of every woman is one of tutelage; that they always require protection and are never fit for independence. Sir Thomas Strange⁽²⁾ cites the authority of Manu for the proposition that if a woman have no other Controller or protector, the King should control or protect her. Again, all the authorities concur in showing that according to the principles of Hindu law the life of a widow is to be one of ascetic privation.⁽³⁾ Hence probably it gave her a power of disposition for religious, which is denied to her for other purposes. These principles do not seem to be consistent with the doctrine that, on the failure of heirs, a widow becomes completely emancipated, perfectly uncontrolled in the disposal of her property, and free to squander her inherited wealth for the purposes of selfish enjoyment."⁽⁴⁾

2333. Restriction applies to moveables.—The restrictions placed upon a woman's estate apply equally whether the property she has inherited is moveable or immoveable. It has been so held by the Privy Council in a case in which they said. "The reasons for the restrictions which the Hindu law imposes on the Hindu widow's dominion over her inheritance from her husband whether founded on her natural dependance on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another are applicable to personal property invested so as to yield an income as they are to land. The more ancient texts importing the restrictions are general. It lies on those who assert that moveable property is not subject to the restriction, to establish the exception to the generality of the rule . . . Their Lordships therefore, have come to the conclusion that according to the law of the Benares school, notwithstanding the ambiguous passage in the Mitakshara, no part of the husband's estate, whether moveable or immoveable, to which a Hindu woman succeeds by her inheritance forms part of her *stridhan* or particular property; and that the text of Katyayan which is general in his terms and of which the authority is undoubted must be taken to determine first, that

(1) *Collector, v. Cavalry*, 8 M. I. A. 500 (550, 551).

(2) 1 H. L. 242.

(3) 2 Dig. 459.

(4) *Collector v. Cavalry*, 8 M. I. A. 500 (551, 552.)

her power of disposition over both is limited to certain purposes; and secondly, that on her death both pass to the next heir of her husband." (1) This case was decided in 1867 prior to which the courts in Bombay (2) and Madras had laid down the contrary. But in holding the contrary, their Lordships adverted to these cases and cited the Mayukh as laying down nothing different but on the other hand quoted a passage therefrom as supporting their view. (3)

This view has been held to apply to all women whether subject to the Mitakshara (4) or the Dayabhag law. (5)

2334. The question remains whether she has no larger power in the Mayukh country. The question was adverted to the Privy Council who said, "The result of the authorities seems to be that although according to the law of western school the widow may have a power of disposing of moveable property inherited from her husband which she has not under the law of Bengal, she is by the one law as by other restricted from alienating any immoveable property which she has so inherited and that on her death the immoveable property and the moveable, she has not otherwise disposed of it, pass to the next heirs of her husband. There is no trace of any distinction like that taken by the pandit between ancestral and acquired property. In some of the earlier cases cited the property was not acquired." (6) The Privy Council thus left the question open and it was considered by a full bench who had to consider her disposing power by will which it negated (7) though it is was recognized that the trend of cases in the presidency was conflicting for while in some she was held to take an absolute interest in the moveables (8) there were cases in which she was held to possess no power to devise them by will. (9) The Full Bench case deciding against the validity of her testamentary alienation of moveables left the question of her alienation by a transfer *inter vivos* untouched and this was considered and decided against her by a Bench in 1907 who saw no distinction between a gift *inter vivos* and a gift by will, (10) adding: "Seeing the enormous wealth which Hindus in India hold in the form of moveable property, eg. Government paper, stocks and shares, which was unknown to the ancient text writers and commentators, it is perhaps as well that the law should be as we hold it is, and that their widows should not have an uncontrolled power of disposition in respect thereof after the death of their husbands. Possibly with the spread of education

(1) *Bhagwandeem v. Myna Bai*, 11 M. I. A. 487 (513, 514).

(2) *Goolab v. Phool*, 1 Borr, 178 *Bechur v. Lukmee*, 1 B. H. C. R. 56; *Vinayak v. Luxumee Bai* 117; *Narsappa v. Sakharam* 6 B. H. C. R. (Ac) 215; *Nana v. Manobai* 7 B. H. C. R. (Ac) 153; *Balvantrao v. Purushottam*, 9 B. H. C. R.; *Tuljaram v. Mathura Das* 5 B. 662; *Harilal v. Pranvalabdas* 16 B. 229; *Gadadher v. Chandrabhagabai*, 17 B. 690 F. B.

(3) "Let not women on any account make waste of their husband's wealth" to which it adds, by way of explanation, "—Here waste means sale and gifts at their own choices," *Vivad Chintamani*, 256, 266; *Mayukh* 74, 78 cited in *Bhagwandeem v. Myna Bai*, 11 M. I. A. 487 (512).

(4) *Narasinha v. Venkatadhri*, 8 M. 290; *Buchi v. Jagapathy*, 8 M. 304.

(5) *Cossinuat v. Hurroosondery* 2 Mor. Dig. 198; *Durga Nath v. Chintamani* 81 C. 214.

(6) *Thakoor Deyhee v. Baluk Ram* 11 M. I.

A. 189 (175).

(7) *Gadadhar v. Chandrabhaga* 17 B. 690 (710, 711 F. B. *Chaman Lal v. Doshi* 28 B. 453.

(8) *Mayaram v. Motiram* 2 B. H. C. R. 313; *Chandrabhaga v. Kashi Nath* 2 B. H. C. R. 323; *Lakshmi Bai v. Ganpat*, 4 B. H. C. R. (Oc.) 162; *Beshar v. Lakshmi*, 1 B. H. C. R. (Ac) 56 *Vinayak v. Lakshmi Bai* 1 B. H. C. R. (Oc) 117 (124) *Pranjivan Das v. Dev Kuvorbai* 1 B. H. C. R. (Oc.) 180; *Vijaranga v. Lakshuman* 8 B. H. C. R. (Oc) 244 (260, 271) *Ball want Rao v. Purshotam* 19 B. H. C. R. (111) F. B. *Tuljiram v. Mathura Das* 5 B. 561, *Bhagirathi v. Kanhujirao*, 11 B. 285; *Harila v. Pranvalab Das* 16 B. 229; *Damodar v. Pur mandas* 7 B. 155.

(9) *Choomee Lal v. Jussoo* 1 Bor. 60; *Dhoo ludo v. Jeeves* 1 Bor. 75; *Umrooti v. Kuljandas* 1 Bor. 814.

(10) *Pandhari Nath v. Govind* 82 B. 59 (74)

amongst and the general emancipation of their women, they may be led to call in aid the relief of the legislature."⁽¹⁾

In this view a woman in Bombay is no exception to the general rule that women's estate in all inherited property whether moveable, or immoveable, partible or impartible, is qualified and limited.

In Sindh, however, which generally follows the view of the Bombay Court, a woman is still held to possess an unfettered power of disposal in such cases.⁽²⁾

2335. Mithila widow—Her customary rights.—Under the Mithila law a childless widow although she cannot alienate the immoveable property has an absolute right over the moveable property inherited from her husband and can alienate it in any manner she pleases and she has also an absolute power to dispose of the profits of the estate during her life-time.⁽³⁾

2336. Power over income and accumulations.—But though a Hindu heiress is not entitled to impair the corpus, she possesses absolute power over all accumulations and income of her inherited estate. This is so not because her estate is limited only to the personal enjoyment of the usufruct but because she has an estate vested in her for life and as such she is entitled to the absolute usufructuary enjoyment of the whole of such property.⁽⁴⁾ She has the right to assign or otherwise dispose of accumulations. As Sir Lawrence Peel, C. J. observed in an old case: "The Hindu authorities say that a widow ought to live a chaste and retired life, and her duty may be to spend no more than is necessary for her support in a state of seclusion. But if instead of living strictly as she should, she lives freely and expensively, her disposition cannot be questioned. As to the corpus of her husband's property, she cannot alienate it; but the income of it during her life forms no part of the husband's estate. If she received and spent it all, no one could call her in question. So if she has money in hand she may dispose of it as she pleases. Money in hand and the accumulations are not the same thing. We do not decide on the question as to whether accumulations belong to the husband's representatives, we only decide that the promovent has a sufficient interest, in the proceedings."⁽⁵⁾

2337. But accumulations from income made by her are distinguishable from accumulations which she has inherited as part of the corpus. As already stated, these being a part of her inherited estate she has no greater power of disposal over them as over the rest of her inherited estate.⁽⁶⁾ But the case is widely different when they are her own savings over which she doubtless possesses an absolute power of disposal. So where the executor of the will of the testator made over to the widow of the latter an aggregate sum consisting of accumulations of income accrued during eight years from her husband's death, undisposed of by his will, of which a greater part she invested and after a lapse of 20 years she disposed of it as her own, the Privy Council held the accumulations belonged to her as income derived from her widow's estate over which she had full power of disposal.⁽⁷⁾ The case would however, have been

(1) *Ib.* 75.

(2) *Halimav. Asibai* 4 S. L. R. 77 8 I. C 214; *Ratanse v. Amertabai* 9 I. C (8) 197.

(3) *Vivad Chint* (Tagore) 261, 262 followed in 3 Dig. 468; *Sreenarain v. Bhyas Jha* 2 B. S. R. 29, 6 I. D. (O S) 380 (384) *Doorga Dayee v. Poosun Dayee* 5 W. R. 141; *Birajun v. Luchmi*, 10 C. 392 (399).

(4) *Kamavadhani v. Joya* 3 M. H. C. R. 116

(5) *Kailasnath v. Biswanath* (1158) B. S.

C. C. reported in *Grose v. Amritamayi* 4 B. L. R. (OC) 1 (41 N).

(6) *Grose v. Amritamayi* 4 B. L. R. (OC) 1 (42) *Scorjeemoney v. Denobundoo* 9 M. I. A. 128; See these cases explained in *I Shri Dutt v. Hasbulla*, 10 C 324 (336 336) P. C.

(7) *Sadamini v. Administrator General*, 20 C. 433 (441) P. C. *Ramasami v. Mangai Karasu*, 18 M. 113 (119, 120); *Saminatha v. Manikasami* 22 M. 356.

different if the accumulation had been made under the will of her husband in which case it would have devolved upon her as a part of the corpus. The case was decided on the ground that on her husband's death the estate vested in her and that all income therefrom became hers which though it passed to her with the estate when it was reduced to possession, was nevertheless the income of her estate and as such her own property.

2338. As observed in another case, : "The very question is whether, having regard to the widow's freedom in enjoying her husband's property and to her established right to alienate her own interest in it, she has not a kind of property the nature of which must remain undecided till her disposal of it or her death. It is impossible to read Mr. Justice Ainslie's forcible argument without feeling that it is difficult to specify the point of time at which the widow loses her control over the unexpended portion of her income from her husband's estate. If she may spend or give away the whole, may she not put by some ? If she saves one year or month, may she not spend those savings the next year or month ? If she may save and spend again, may she not place her savings so as to get to some income from them. And so on through all the steps of the sorites." (1) So in another case where a simple money decree obtained against the husband was sought to be realized from rents accruing after his death, the court said : "There can be no doubt as we conceive the law to be in this country, that this lady as the widow of a sonless and separated Hindu, became in virtue of her widow's estate entitled upon the death of her husband to the rents which might accrue from the immoveable property. These rents if already received by her and put into her pocket could not be treated in law as assets of her husband. They were her assets in virtue of her widow's estate. It can make no difference if the rents which accrued after her husband's death had not been actually put into her pocket. She was entitled to them, not as representative of her late husband, but in the right of of her widow's estate." (2)

2339. The test in such cases would seem to be that any accumulation of income made after the estate vested in the widow still remains its accumulated income over which the widow has full power of disposal. But if on the other hand the accumulation was made before the estate vested in her, then it would be treated as a part of the corpus. This distinction was ignored in a case (3) animadverted upon by the Privy Council. (4).

2340. Female owners in Bombay :—The rule that female heiresses take only a limited estate is subject to an exception in favour of certain female heiresses in Bombay where they are held to take an absolute estate, the rule being that all females who belong to a family by birth take an absolute estate ; (5) while those who belong to it by marriage take only a limited estate. Consequently a mother (6) a grandmother (7)

(1) *Ishri Dutt v. Hansbutti*, 10 C 324 (384). P. C. distinguishing *contra*, *Bhabul Das v. Bholanath*, L.R. 2 I. A 256 as extra-judicial. *Ib.* p. 387 and overruling *Grose v. Amrit Moyi* 4 B. L. R. 1 (42).

(2) *Kanno Dai v. Lucy* 19 A. 235 (236) ; *Kilasha v. Bitto*, 16 I. C. (O) 471.

(3) *Irose v. Anuritamaji*, 4 B. L. R. 1 (42.).

(4) *Ishri Dutt v. Hansbutti* 10 C. 324 (384) P. C.

(5) *Bhau v. Raghunath*, 30 B 229; *Dhond v. Radhabai*, 36 B. 546.

(6) *Vinayek v. Lukmeebai*, 1 B. H. C. R. 117; *Narsappa v. Saktharam*, 6 B. H. C. R. (A.C.) 215, *Saktharam v. Sitabai* 3 B. 358; *Bhar mangavda v. Rudrappavda*, 4 B. 181 (187) *Tuljiram v. Malhuradas* 5 B. 662 (670); *Madhavram v. Dave*, 21 B. 789 (744); *Vrijbhukandas v. Parvati*, 32 B. 2.

(7) *Dhondi v. Radhabai*, 36 B. 546; *contra Gandhi v. Jadab* 24 B. 192

and a widow of the propositus, ⁽¹⁾ his daughter-in-law ⁽²⁾ and the wives of Gotraj Sapindas ⁽³⁾ take only a limited estate, whereas a daughter ⁽⁴⁾ a sister ⁽⁵⁾ a niece and grand niece and in fact any female relation born in the family of the propositus takes an absolute estate by inheritance to him, so as to become a fresh root of descent. This had been the long established rule in Bombay ascertained by the Court as far back as 1859 ⁽⁶⁾ and which the court will not now disturb on the principle of stare decisis. ⁽⁷⁾

2341. Jain widow.—Another exception to the rule is afforded by the Jain custom which vests in a childless Jain widow an absolute right in her husband's separate property. ⁽⁸⁾ But otherwise she takes the ordinary limited estate. ⁽⁹⁾

2342. Deed or devise excepted ;—The rule that a Hindu woman can only inherit a limited estate is not inconsistent with her otherwise acquiring an absolute estate. Indeed the incompetence of a woman by reason of her sex is held to be limited only to an estate acquired by ordinary succession and not to one acquired by compromise, ⁽¹⁰⁾ gift, will or by adverse possession. So where on the death of her husband his widow sued her husband's co-parceners for possession of his estate whereupon the co-parceners compromised the suit by executing in her favour a deed of gift as a matter of favour conveying to her certain properties, it was held that, though by suit she could only have obtained a life-estate, by the compromise she had obtained a larger estate which the language of the deed in her favour was susceptible of conveying. ⁽¹¹⁾ The question is one of construction. In this case the right of the widow was denied and the property was conveyed as a matter of favour which was held to distinguish cases in which the property was conveyed in settlement of her claim. ⁽¹²⁾ It has already been seen that it is open to a person to convey an absolute estate in favour of a female by gift or will though the presumption is that they take a limited estate. But the natural presumption may be displaced by the use of such apt expressions as suffice to convey a heritable estate. ⁽¹³⁾

Estate of Joint heirs.

253. (1) Under the Mitakshara two or more joint female heirs take as joint tenants with the right of survivorship *inter se*.

(1) *Janiyatram v. Jamna* 2 B. H. C. R. 10; *Lakshmi Bai v. Ganpat* 4 B. H. C. R. 160 (168); *Bhaskar v. Mahadeo* 6 B. H. C. R. (OC) 1; *Gurunath v. Krishnaji* 4 B. 462.

(2) *Gadgadhar v. Chandrabhaga*, 17 B. 690 F. B.

(8) *Tuljiram v. Mothuradas*, 5 B. 662; *Gangadhar v. Chandrabhaga*, 17 B. 690 F. B. *Dhondi v. Radha Bai* 36 B. 546 ;

(4) *Pranjan Dos v. Dev Kuar* 1 B. H. C. R. 180; *Navalram v. Nandkishor* 1 B. H. C. R. 209; *Janki Bai v. Sundra* 14 B. 612; *Bhan v. Raghunath* 30 B. 239 (236, 237); *Gulappa v. Tayava* 31 B. 458.

(5) *Vinayak v. Lakshmi* 1 B. H. C. R. 129; *Dhondus Gungabai* 8 B. 369; *Biru v. Kaimdu* 4 B. 214; *Bhagirathi v. Baya* 5 B. 264.

(6) *Pranjivandas v. Devkuwarbi* 1 B. H. C.

R 180 (138).

(7) *Dhondi v. Radhabai*, 36 B. 546 (548)

(8) *Harmabh v. Mandi*, 27 C. 379 390 (cases reviewed); *Sheo Singh v. Dakho*, 8 N. W. P. H. C. R. (382) (411) affirmed O. A. 1 A. 688 (705) P. C. *Shimbu v. Gayanchand* 16 A. 879; *Madani v. Tribhuvan*, 18 Bom. L. R. 1121.

(9) *Shimbu v. Gayan*, 16 A. 879

(10) *Sambasiva v. Venkataswara* 31 M. 179.

(11) *Sambasiva v. Visvam*. 30 M. 356 O. A. *Sambasiva v. Venkataswara*, 31 M. 179.

(12) *Rabutti v. Shibchunder*, 6 M. I. A., 1 (16); *Dino Nath v. Gopal*, 8 O. L. R. 571; *Gangal v. Ram Chunder*, 11 A. 296; explained in *Sambasiva v. Visvam*, 30 M. 356 (360)

(13) *Surajmani v. Rabi Nath* 30 A. 84 P. C.

(2) But those subject to the Mayukh and Dayabhag laws take as tenants-in common.

(3) Any alienation by the former must be made either jointly by all or with their express or implied consent.

(4) But an alienation by the latter may be made by any of the co-heiresses to the extent of her share.

Synopsis.

- (1) *Estate of Joint heiresses* (2343). (3) *Quasi-severalty in Dayabhaga and Mayukh* (2343).
(2) *Joint tenancy in Mitakshara Law* (2343).

2343. Analogous Law.—It has already been seen that one distinction between the Mitakshara and other schools is as to the interest taken by the heirs upon succession. Under the Mitakshara school which favours and strives for joint estates, female heirs on succession take as joint tenants⁽¹⁾ while those under the Mayukh⁽²⁾ and the Dayabhag⁽³⁾ take as tenants-in-common in *quasi* severalty. From the fact that the Mitakshara women inherit jointly it follows that the right of enjoyment and alienation must till partition, remain joint. Consequently one co-heiress cannot without the consent, of the other, convey the joint estate even for legal necessity.⁽⁴⁾ As was observed by the Privy Council, "They are, therefore, in the strictest sense, co-parceners and between the undivided co-parceners there can be no alienation by one without the consent of the other."⁽⁵⁾ But a co-heir may surrender her interest to the other heir in which case the latter would take as on survivorship.⁽⁶⁾

254. (1) Any accretion made by an heiress partakes of the nature of the estate to which it is added.

(2) The question whether any property is an accretion to the parent estate is one of intention to augment it by treating it as a part thereof.

(1) *Bhagwandeem v. Myna Bai* 11 M.I. A. 487 (515); *Radhamani v. Alakajeswari* 16 M. 1 (10) P.C. *Venkayamma v. Venkata* 25 M. 678 (585) P. C. *Bangbutiy v. Radha Kisson* Montr 814; *Jijoyiamba v. Kamakshi* 8 M.H.C.R. 424; *Gajapathi v. Gajapathi* 1 M. 290; *Kaihapermal v. Venkabar* 2 M. 194 (195); *Gurivi v. Chinnamma* 7 M. 98 (95); *Ariyaputri v. Alamelu* 11 M. 804 (806); *Ramakal v. Ramasami* 22 M. 522; *Balagobind v. Ram Kumar* 6A. 481 (486); *Ram Piyari v. Mulchand* 7 A. 114 (117); *Mula Bai v. Maharaj Singh* 2 C. P. L.R. 166; *Khulroo v. Saraswati* 5 O.P.L.R. 58; *Chander v. Murat Singh* 7 C. P. L. R. 158.

(2) *Bulakhi Das v. Keshav Lal* 6 B. 85 (88) *Bhagwati Bai v. Kanhurao* 11 B. 285; *Hari v. Vitai* 31 B. 550; *Vithappa v. Savitri* 84 B. 510; *Rukhmani v. Keshav Lal* 9 Bom L. R.

1293; *Chinnaku v. Utam* 2 S.L.R. 59.

(3) *Janaki v. Mothuranath* 9 C. 580 (585) F. B.

(4) *Ram Piyari v. Mulchand*, 7 A. 114; *Ramakal v. Ramasami*, 22 M. 522; *Kanni v. Ammakonnu* 28 M. 504 (509); *Vadali v. Kotipalli*, 26 M. 384; *Subbammal v. Avudaiyammal*, 30 M. 3 (6); *Kaliyana v. Subba*, 14 M. L. J. 189; *Chander v. Murat Singh*, 7 C. P. L. R. 158.

(5) *Bhagwandeem v. Myna Bai*, 11 M. I. A. 487 (515); *Gajapati v. Pusapati*, 16 M. 1. (10) P. C.

(6) *Ramakal v. Ramaswami*, 22 M. 522 (524), *Sudalai v. Gomathi*. (1912) 2 M. W. N. 911; *Judoobansee v. Asamn*, 14 W. R. 870.

(3) But in the absence of anything appearing to the contrary, any purchase made out of income of an estate may be presumed to be an accretion thereto.

Illustrations.

(a) A a female heiress receives the income of her husband's estate from the executor of his will who holds the estate in trust for her and his other heirs. A purchases property out of the income so received and devotes it to her own relation. A is entitled to do so since having no estate in possession there is no question of accretion. (1)

(b) A receives an estate by way of maintenance out of the profits of which she purchases a village B. B is A's stridhan at her absolute disposal. (2)

(c) A devises an estate to his widow B for life. Out of the profits of this estate, B purchases a property C. C is her stridhan at her absolute disposal. (3)

Synopsis.

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| (1) <i>Widow's interest in accumulations</i> (2344). | (5) <i>Presumption of accretion</i> (2356). |
| (2) <i>Accretion to the estate</i> (2345). | (6) <i>Evidence of accretion</i> (2349). |
| (3) <i>Question of accretion, one of intention</i> (2346). | (7) <i>Evidence against accretion</i> (2353). |
| (4) <i>Widow absolutely entitled to current income</i> (2344). | (8) <i>No accretion</i> (2353-2355). |
| | (9) <i>Widow's conduct and dispositions</i> (2359). |

2344. Analogous Law:—In dealing with the subject of accumulations it has been seen that the heiress is entitled to all accumulations from income made to her estate since the estate vested in her. These being in the nature of income are absolutely at her disposal. The subject of accumulations is allied to accretion and the reports teem with cases in which the question for decision was whether the property acquired by the widow is to be taken as incorporated into her heritage or is to be treated as her own. The whole question is one of intention. Did she intend to augment the estate or to benefit herself? It is settled that the heiress is entitled to appropriate and dispose of at her discretion the income from her estate, however large, from which it follows that whatever she may expend without let or hindrance she may also save or invest for her own use. This is also conceded. But then arises the question, suppose a widow comes into possession of the property of the husband, and receives the income, and does not spend it, but invests it in the purchase of other property, what is the presumption? Now the Hindu law presumes that a Hindu woman is incompetent to possess more than a limited estate—that she may possess an absolute estate is in the nature of an exception, and as regards the purchase out of the savings of her limited estate, law presumes that such purchase is impressed with the same incidents to which her main estate was subject. (4) But it is only a presumption which may be rebutted by evidence of intention showing that the purchaser intended to treat the acquisition as her own. This appears to be the trend of

(1) *Saodamini v. Administrator General*, 20 O. 488 (442) P. C.; *Subramania v. Arunachalam* 28 M. 1.

(2) *Subramaniam v. Arunachalam* 28 M. 1 (8).

(3) *Guru Prasad v. Nafar Das*, 3 B. L. R. (A.C.) 121.

(4) *Ishridutt v. Hansbutti*, 10 C. 894 P. C.

Sheelochun v. Sahab Singh, 14 O. 837 P. C.; *Saodamini v. Administrator General*, 20 O. 488 (448) P. C.; *Wahia Ali v. Tori Ram*, 36 A. 551 (554) *Upendra v. Noda Krishna*, 28 C. W. N. 64; 48 I. C. 998 contra *Akhanna v. Venkayya*, 25 M. 851; *Vikrama v. Vikrama*, 38 M. L. J. 665.

the leading cases on the subject, though at first blush, they do not all appear to be reconcilable. ⁽¹⁾

2345. In one case the widow had made such purchases from the profits of her estate. She gifted them to her daughter describing them as her self-acquired property. Her reversioners sued for a declaration that the gift conveyed nothing beyond the donor's limited estate but the suit was thrown out on the ground that the widow could treat the property as her own and the fact that she described it as her self-acquisition and conveyed it as such by a gift *inter vivos* was evidence that she did intend to treat as such. ⁽²⁾ In so holding Ainslie, J., said: "If a distinction is to be drawn between current income and accumulations, where is the line to be drawn? When does the surplus cease to be part of the current income. There is no rule requiring a widow to make up her accounts at stated intervals, and carry the unexpended balance to the credit of the husband's estate. How are we to say that up to 31st December she is free to spend the money in hand as she chooses, but on the 1st January it lapses like an unexpended assignment of public money at the close of the financial year. Who is to audit her accounts? If she is accountable to the heirs of her husband not only for the safe custody of his estate but for the expenditure of the income, then I can understand that she is not free to give away the moveable property purchased out of the surplus. I may say once for all that in speaking of surplus income I assume that it is a *bonafide* surplus, and that the expenditure of it will not involve any improper alienation of the *corpus* to meet charges which a widow is required to provide for; indeed, in such a case, I do not see how she is at liberty to give away, or squander any portion of the income, whether as cash or after it has been converted into property of any description."⁽³⁾ This case was reversed on facts by the Privy Council who, however, indorsed the above enunciation of principle, adding: "It is impossible to read Mr. Justice Ainslie's forcible argument without feeling that it is difficult to specify the point of time at which the widow loses her control over the unexpended portion of her income from her husband's estate." ⁽⁴⁾ They then added that it was not possible to lay down any sharp definition of the line which separates accretions to the husband's estate from income held in suspense in the hands of the widow as to which she has not determined whether or not she will spend it. ⁽⁵⁾

• **2346.** Their Lordships then addressed themselves to the facts of the case and found the following facts decisive of the question against the widow: (i)—The purchases were of shares of land in which the husband was a share-holder to a large extent, and which showed that the purchases were intended to make the estate compact. (ii)—Though they were purchased a short time after his death in 1857 no attempt to alienate them was made till 1873 *i. e.*, a period of 16 years. (iii)—The object of the alienation was not the need or the personal benefit of the widow, but a desire to change the succession and to give the inheritance to her own heir in preference to her husband's heirs. (iv)—Neither with reference to this object nor apparently in any other way, had the widow made any distinction between the original estate and

(1) *Bhagabati v. Sohodra*, 16 C. W. N. 884 18 I. C. 691.

(2) *Hansbutti v. Ishri Dutt*, 5 C. 512.

(3) *Hansbutti v. Ishri Dutt*, 5 C. 512 (524); reversed *O. A. Ishri Dutt v. Hansbutti*,

10 C. 824 (884) P. C.

(4) Per Lord Hobhouse in *Ishri Dutt v. Hansbutti*, 10 C. 824 (884) P. C.

(5) *Ib.* 387.

the after purchases. "These are circumstances which in their Lordship's opinion, clearly establish accretion to the original estate and make the after purchases inalienable by the widow for any purpose which would not justify alienation of that original estate." (1)

2347. Another case in which the widow's power of absolute disposal was upheld by the same high tribunal arose on the following facts. The wife had inherited her husband's estate under his will, the accumulations of which amounting to Rs. 2,890,00 since her husband's death were made over to her in 1866 most of which she soon afterwards invested in Government paper which 20 years later she assigned to the Advocate-General and made a will. The question was whether she had the power to dispose of this sum absolutely by will. Her husband's heirs conceded that the question was one of intention but contended that her intention was clearly shown by her having invested it and thus capitalized it and that in any case the presumption was against accretion which had not been rebutted. The courts in India held against accretion and this view was affirmed by the Privy Council (2) who said; "The appellant's counsel contended that the savings of a Hindu widow must be presumed to have been made for the benefit of her husband's estate. Without examining the precise result of the decisions it is sufficient to say that in this case there is no room for any such presumption, for the corpus of the estate never came to the widow but was taken by Shamcharan Mullick under the will, and the income to which the widow succeeded was separated from it, and became and was dealt with as an entirely separate fund. There was no estate of her husband's in her hands for her to augment. She did nothing to indicate an intention to make the fund received, or the interest on it, part of her husband's estate which was in other hands, or to justify the inference that she wished it to revert to her husband's heirs. It was said she had placed it in investments of a permanent nature. Had she done so, it does not appear to their Lordships that this circumstance alone would have added the fund to the estate devolving on her husband's heirs. But the fact is that, having received the money in currency notes which yielded no return, and the keeping of which was attended with much risk, she at once placed it as any prudent person would do in securities, investing it in Government promissory notes yielding regular interest but which were negotiable instruments transmissible by mere indorsement. It is important also to observe that the other funds which she received from Shamcharan Mullick (the executor) were invested precisely in the same way and at the same time and that for purposes of investments therefore, the fund in dispute was not kept separate but was mingled with her general personal means and she seems to have used the interest and income of the whole indiscriminately for her maintenance and spent the greater part of it." (3) Reference was also made to the fact that she described the securities as her absolute property "for my own benefit and without any intention or desire to make the same or any part thereof, accumulations to the estate of Babu Nobo Kumar Mullick (her husband)." Upon these facts their Lordships concluded that the notes were her absolute property "and further that she never indicated any intention to make the same part of her husband's estate for the benefit of his heirs." (4)

(1) *Ieri Dutt v. Hunsbutti*, 10 C. 824 (887).

(2) *Gajish Chunder v. Broughton*, 14 C. 861 ; affirmed O. A. ; *Saodamini v. Broughton*, 16 C. 574 ; affirmed O. A. ; *Saodamini v. Admini-*

stator-General, 20 C 498 (P.O.).

(3) *Saodamini v. Administrator-General*, 20 C. 488 (448) P. O.

(4) *Ib.* 448.

2348. What is the difference in principle between this case and the last, it may be asked? The difference is clear. Since while in the one case the corpus was in the hands of the widow the corpus was in the other case in the hands of the executor of which only the income was made over to the widow. Again the nature of the investment in the one case gave a clear indication of augmenting the estate whereas the investment in the other case was such as "any prudent person" would make of his savings. These two cases are therefore instructive in that they show what is an accretion and what is not.

2349. In some cases the courts were inclined to the view that whatever acquisitions were undisposed of by the widow must be taken to have been left as an accretion to the estate. (1) But the Privy Council reversed this decision upon other grounds without going into the legal question. It is often a question of some nicety to determine in each individual case whether the property in dispute is in the nature of accumulation or is merely a saving held in suspense by the widow with intent to be appropriated for her personal use later on.

2350. Evidence of accretion.—The question being then one of intention, evidence of such intention must be found in the circumstances of each case. Where, for instance, the widow constructed a house out of her savings upon land which she had inherited from her husband it is a clear indication of her intention to treat the house as an accretion to the land. (2) The same presumption might arise where the widow purchases a share of land of which she held a major portion as inherited from her husband which would indicate an intention that the acquisition was made with the view of improving her estate by making it more compact and convenient for management. (3) So where a howdah (seat on an elephant) which was originally a part of the estate of the husband had been sold to a stranger in execution of a money-decree against the estate, but the widow re-purchased it, the Court held the inference irresistible that she intended to treat it as a part of her husband's estate. (4) So where the widow makes no distinction between the original estate and the after purchase, the *prima facie* presumption is that it has been her intention to keep the estate one and entire and that the after purchases are an increment to the original estate.

2351. This was the view taken in a case in which the widow having made purchases out of the savings of her husband's estate had gifted the whole estate including the after purchases by a single deed "for the preservation of the *Riasat* and name of her husband, for the worship of the Thakur and for her husband's shradh." The court held that upon this deed of gift there was no doubt that the widow regarded herself as equally entitled to the two properties and in the same right as her husband's widow, which was only consistent with the after purchases being treated by her as accretions to the original estate. "The transaction appears to indicate that her intention was not to create separate estates, one to go in one way, and another in another, but to keep the whole as one entire property." (5) So there is a presumption that all unappropriated profits of the estate pass with the corpus to her reversioners. As Ainslie, J., said, "The fact that unappropriated profits do not pass as *Stridhan* is to be explained on the theory that when the widow has left money accumu-

(1) *Bhola Nath v. Bhagabatti*, 7 B. L. R. 98 reversed O. A.; *Bhagabatti v. Bhola Nath*, 24 W. R. 168 P. C.

(2) *Fakira v. Gopilal*, 6 C. L. R. 66 (68); *Venkata v. Venkata*, 81 M. 321.

(3) *Isri Dutt v. Hunsbutti*, 10 C. 324 (354) P. C.; reversing *Hunsbutti v. Isri Dutt*, 5 C.

512.

(4) *Bhagabati v. Sahodra*, 16 C. W. N. 884; 18 I. C. 691.

(5) *Sheolochun v. Sahab Singh*, 14 C. 887 (893, 894) P. C.; following *Isri Dutt v. Hunsbutti*, 10 C. 324 P. C.

lated, it was her intention to add such money to the estate and to abstain from exercising her full rights over them." (1)

2352. But this presumption can only arise where the female takes by inheritance and not by devise. In the latter case as grantee of the rents and profits for life they vest in her absolutely as her own stridhan and on her death will go to her own heirs and not to the reversioner. (2)

2353. In one case the widow being in possession of her husband's estate sued for and obtained a decree for pre-emption whereupon the land so acquired was by reason of the mode of acquisition held to become an accretion to her inherited estate. (3) But the mere facts that her right of pre-emption arose by reason of her inheritance and the pre-emption money was paid out of the income of her inherited estate do not seem to be any evidence of her intention to treat her new acquisition as an accretion to the main estate. A case for accretion would, however, arise where the widow after her possession of her husband's estate for over fifty years suffers it to be sold in execution of a money decree and repurchases it herself out of the income of her husband's estate. Here it may be safely presumed that after the lapse of so long a period the debt could not have been the debt of her husband and the sale of the property was, therefore, a sale in a decree not binding on the estate and its repurchase was presumably intended to restore the status *quo ante*. (4)

There can be no question but that the enlargement of the widow's estate from an inferior proprietary tenure to a full proprietary tenure would not alter its incidents to the derogation of other persons interested in the reversion. (5)

The fact that a property though purchased by the widow was described as of the estate of her husband shows the intention to treat it as an accretion. (6)

2354. No accretion.—There can be no question of accretion where the heiress is in possession of no estate (7) nor where being in possession, she holds it otherwise than as an heiress. It is only when she owns it as such that any question of accumulation and accretion can arise. Even then since the question of accretion is one of intention, it follows that the heiress possesses the unfettered power of disposal over purchases made by her during her life-time. (8) She may in fact by her express declaration act or conduct, show that she does not intend to incorporate her acquisitions with her inherited estate. (9) It is only when her act or conduct is equivocal that any question of presumption or of intention can arise. If she disposes of her acquisition by a transfer *inter vivos* the question of intention is reduced to the question of construction of the deed, and if it is unambiguous her power cannot be questioned. (10)

2355. Properties purchased on the credit of the husband's estate do not necessarily become accretions though it is equitable that he who takes them must pay the charge. (11) So again where a female is granted for her life the rents and profits of an estate by will, they vest in her absolutely by way of assignment and

(1) *Hansbutti v. Ishri Dutt*, 5 C.512 (525). followed in *Rivett Carnac v. Jivi Bai*, 10 B: 478 (482); *Bhngabati v. Sahodra*, 16 C.W.N. 884; 18 I. C. 691.

(2) *Guru Prassad v. Nafar Das*, 8 B. L. R (A.C.) 121 (128).

(3) *Chela Ram v. Ishar Das*, (1916) P.W.R 41; 32 I. C. 881.

(4) *Niranjan v. Shib Prasad*, 41 I. C. (C) 870.

(5) S. 90 Trusts Act; *Kashi Prasad v. Indar Kunwar*, 80 A. 490 (495, 496).

(6) *Upendra v. Noby Kishore*, 28 C. W. N. 86; 48 I. C. 993 (1002).

(7) *Saodamini v. Administrator-General*, 20 C. 488 (442) P. C.

(8) *Wahid Ali v. Tori Ram*, 35 A. 551; *Jokhan v. Dulari*, 11 O. C. 810.

(9) *Saodamini v. Administrator General* 20 C. 488 (448) P. C.

(10) *Isri Dat v. Hansbutti*, 10 C. 824 (887) P. C.

(11) *Oodey Singh v. Phool Chund*, 5 N.W.P. H.C.R. 197.

whether they are collected or not, they pass on her death to the heirs of her stridhan.⁽¹⁾ Such case is distinguishable from a maintenance grant in which case all arrear is treated as a debt due to her which her stridhan heirs can recover and to whom consequently pass all properties purchased out of her grant.⁽²⁾

2356. Where the widow who had inherited her husband's house rebuilt it and sold it during her life-time it was held that it must be presumed that she rebuilt it out of her own money over which she had full control and the resale by her was evidence of her intention that she did not intend to treat it as an accretion to her inherited estate.⁽³⁾

After the title had vested in the widow her reversioner took wrongful possession of her estate. She sued him and obtained a decree for mesne profits which she assigned to another and then died. The assignee sued out execution against the reversioner in whom the estate became subsequently vested and he contested the widow's right to alien her decree for mesne profits so as to enure beyond her life-time; but the court held that the decree for profits was a decree for her income which she was competent to assign and that as there was no evidence that she had treated the decree as an accretion to the estate the assignee was entitled to recover.⁽⁴⁾

The fact that the purchase was made benami is clear indication of an intention to keep the purchases separate from the inherited estate.⁽⁵⁾

2357. Presumption of accretion.—It has already been stated before, that

all additions made by a female to her limited estate out of its savings would *prima facie* be deemed to be accretions unless there is anything to prove the contrary. But on this point two views are possible and both have the support of cases. The one view is that since a limited estate is the rule and an absolute estate an exception, all acquisitions must be presumed to partake of the character of the limited estate till the contrary is shown.⁽⁶⁾ The other view is that the woman's incompetence only applies to her inherited estate but has no reference to an estate acquired *aliunde*. Since a woman is not incompetent to acquire an absolute estate or title by deed, devise and adverse possession, there is no reason why any presumption should be made against her capacity to acquire an absolute estate out of savings over which she possesses the absolute power of disposal.⁽⁷⁾

2358. Referring to this question the Privy Council said: "Where a widow comes into possession of the property of the husband and receives the income and does not spend it but invests it in the purchase of other property, their Lordships think that *prima facie* it is the intention of the widow to keep the estate of the husband as an entire estate and that the property purchased would *prima facie* be intended to be accretions to the estate. There may be no doubt, circumstances which would show that the widow had no such intention, that she intended to appropriate the savings in another way."⁽⁸⁾ This case is then an

(1) *Guru Prasad v. Nafar Das*, 8 B. L. R. (A.C.) 121(123); *Bhagbutti v. Bholanath*, 1C. 104 P. C.; *Hansbutti v. Ishridutt*, 5 C. 512 (521); (reversed on facts O. A.; *Isridutt v. Hansbutti*, 10 C 324 P. C.); *Shih Saran v. Kesho Prasad*, (1918) Pat. 86; 42 I.C. 122 (126).

(2) *Subramanian v. Arunachalam*, 28 M. 1 (8).

(3) *Ram Dayal v. Sumer Singh*, 2 O. L. J. 466; 32 I. C. 856.

(4) *Saminatha v. Manikkasami*, 22 M. 356.

(5) *Upendra v. Nabo Kishore*, 23 C.W.N. 86; 48 I. C. 988 (1002).

(6) *Gonda Keer v. Oodey Singh*, 14 B. L. R. 159; *Bhagbutti v. Bholanath*, 24 W. R. 168 P. C.; *Isridutt v. Hansbutti*, 10 C. 324 P. C.; *Sheo Lochun v. Sahab Singh*, 14 C 387 P. C.; *Saodamini v. Administrator-General*, 20 C. 438 P. C.; *Ramanand v. Ramsaran*, 7 I. C. (C) 28 (29); *Wahid Ali v. Tori Ram*, 35 A. 551 (554).

(7) *Akkanna v. Venkayya*, 25 M. 351 (359, 360) dissented from in *Ramanand v. Ramsaran*, 7 I. C. (c) 28 (29).

(8) *Sheo Lochun v. Sahab Singh*, 14 C. (387, 398, 394) P. C.

authority that a purchase out of savings is presumably an accretion. The contrary was contended by the appellant in another case which their Lordships did not concede. "It has been argued" they said "that, assuming the purchases to have been made by the widow out of the proceeds of her husband's estate, nevertheless they do not form an increment to that estate but belong to the widow absolutely and are at her absolute disposal, either by gift in her life-time or by will. It has been further argued that, even if the presumption be that such purchases are an increment to the husband's estate, it may be rebutted by clear proof of her intention to sever them from that estate and to treat them as made in her own right, whereupon she acquires the power to dispose of them and that such intention is proved in this case In the present case their Lordships are of opinion that Khushal Kuar, who always maintained the validity of her son's adoption as heir to her deceased husband and treated him as entitled to succeed to her husband's property must be presumed to have intended to make her purchases an accretion to that property; nor do they see any evidence to rebut this presumption." (1)

2359. In another case the question of presumption being raised, the same high tribunal said: "The appellant's counsel contend that the savings of a Hindu widow must be presumed to have been made for the benefit of her husband's estate. Without examining the precise result of the decisions it is sufficient to say that in this case there is no room for any such presumption." (2)

2360. But there are cases on the other side of the line in one of which it was said: "The acquirer of property intends to retain dominion over it and in the case of a Hindu widow the presumption is none the less so when the fund with which the property is acquired is one which, though derived from her husband's property, was at her absolute disposal. In the case of property inherited from the husband it is not by reason of her intention but by reason of the limited nature of a widow's estate under the Hindu Law, that she has only a limited power of disposition. But her absolute power of disposition over the income derived from such limited estate being now fully recognized, it is only reasonable that in the absence of an indication of her intention to the contrary she must be presumed to retain the same control over the investment of such income. The mere fact that properties thus acquired by her are managed and enjoyed by her without any distinction along with properties inherited from her husband can in no way affect this presumption. She is the sole and separate owner of the two sets of properties so long as she enjoys the same, and is absolutely entitled to the income derived from both sets of properties." (3) The cogency of this reasoning was admitted by the Calcutta High Court who however felt constrained to hold that the subject was concluded the other way by authority. (4) It should be noted that the presumption will only arise when it is proved or admitted that the after acquisitions were made with the savings of the inherited estate. There is no presumption that anything in the possession of the widow belongs to her husband and he who claims the property as heir of the husband must show that any property so claimed by him belonged to him. (5)

(1) *Gonda Kuar v. Oodley Singh*, 14 B. L. R. 169 (164, 165) P. C. distinguishing *Soorjemoney v. Denobundoo*, 9 M.I.A. 128 P. C.

(2) *Seodamini v. Administrator-General* 20 C. 488 (442) P. C.

(3) *Akkanna v. Venkayya*, 25 M. 351 (359,

360).

(4) *Ramanand v. Ramsaran*, 7 I. C. (C) 28 (39).

(5) *Bajai Bahadur v. Indarpal*, 26 C. 371 (373) P. C.; *Jadunath v. Ramnarain*, 11 I. C. 434.

Testamentary incapacity.

255. A woman has no power (even with the consent of reversioners) to dispose of by will either of her limited estate or its accumulations.

Synopsis.

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|---|---|
| (1) <i>Testamentary incapacity of heiress</i> (2360). | (2) <i>Effectual</i> (2360). |
| (2) <i>Consent of reversioner, in-</i> | (3) <i>Power over accumulations</i> (2360). |

2361. Analogous Law.—The law of wills is as previously remarked, a development of the law of gifts. And as a woman, has no power to make a gift except to relations when supported by religious necessity, it follows that she can have no power to make a will of her limited estate, which does not survive her death. (1) This is manifest. But it has been held that though she has an absolute power of disposal over her income in her life-time, (2) she cannot, except in Madras (8) dispose of it by will (4) even with the consent of her reversioners. (5)

256. Except as otherwise provided by any law for the time being in force the incidents of a woman's estate. woman's inherited estate are as follows:—

- (1) She is entitled to absolute possession of the estate which vests in her by right of inheritance.
- (2) She is entitled to its beneficial enjoyment.
- (3) She may grant leases and do other acts in the ordinary course of management.
- (4) She may transfer all or any portion of the estate for her life or until her estate is determined earlier, as by her re-marriage.
- (5) Her interest therein may be seized and sold in execution of a decree against her.

Synopsis.

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|---|---|
| (1) <i>Incidents of a woman's estate</i> (2362). | (4) <i>Right to beneficial enjoyment</i> (2365). |
| (2) <i>Widow as executrix or administratrix not subject to the restrictions on a woman's estate</i> (2363). | (5) <i>Power to grant leases</i> (2367). |
| (3) <i>Right to possession of estate</i> (2364). | (6) <i>Improvident leases voidable by reversioner</i> (2369). |
| | (7) <i>Transfer of estate good for life</i> (2371). |
| | (8) <i>Interest attachable</i> (2372). |

2362. Analogous Law.—From what has been stated before it is obvious that a woman is like any other heir the owner of the estate which she acquires by inheritance, but with this difference that being a woman, her rights over her property are necessarily limited. This section lays down the extent of her rights. The next section will define the extent of her powers.

(1) *Gobardhan v. Onoop Roy*, 8 W. R. 105.
 (2) *Sadamini v. Administrator-General*, 20 C. 488.
 (3) *Vikrama v. Vikrama*, 38 M.L. J. 665;
 (4) *Akanna v. Venkayya*, 25 M. 851.
 (5) *Nihalkhan v. Hur Churn*, 1 Agra 219.
 (6) *Durga Sundari v. Ram Krishna*, 12 I. C. 591.

2363. Except as otherwise provided.—Under S. 90 of the Probate and Administration Act ⁽¹⁾ an executor or administrator has, subject to the provisions of that section, power to dispose as he thinks fit, of all or any of the property for the time being vested in him under S. 4. As such the court may permit him to dispose of any such immoveable property by mortgage or sale and without such permission he may not lease it for a term exceeding five years. As a woman may be appointed an executor or administrator under the provisions of this Act, she is competent to make an absolute alienation under S. 90 irrespective of the existence of legal necessity. ⁽²⁾ As administratrix a Hindu female has the same power as any administrator under the law and the fact that her powers are circumscribed by her personal law does not stand in the way of her exercising her statutory powers.

2364. Entitled to possession.—Possession is the first right of ownership, and being an owner the heiress is entitled to possession.

Cl. (1).

In other words, she owns and possesses the estate. ⁽³⁾

“Her absolute right to the fullest beneficial life-interest appears long to have been recognized. She takes as heir a proprietary estate in the land, absolutely for some purposes, although in some respects subject to special qualifications.” ⁽⁴⁾ Her reversioners have no vested interest in her estate. All they have is a *spes successionis*. ⁽⁵⁾

2365. Entitled to beneficial enjoyment.—From the fact that she is the

C. (2).

owner of her estate it follows that she is entitled to its beneficial enjoyment and except in the case of spoliation

and waste destructive of the corpus, she cannot be restrained if in the ordinary course of her enjoyment the property diminishes in value. The mere fact that her operation was novel does not show that it was an improper act destructive of the estate. She is entitled to make the most profitable use of her land, being entitled to it to her own advantage in the manner and for the purposes to which it is naturally best suited. She is entitled to lease all or any portion of the estate for her life and in permanency if justified by necessity. As such the widow had in one case leased out two of her villages in which a Railway company quarried stones and paid Rs. 5,000 as compensation to the lessees. The reversioners sued for this money on the ground that there had been a virtual conversion of a part of the corpus of the estate from land into money to which they were entitled as the ultimate owners of the estate. But the Court threw out their suit holding that the villages belonged not to them but to the widow who had the right to lease them out which she did and that the compensation paid to the widow's lessees was in the nature of profits from the lawful use of the land rather than the proceeds of the conversion of the landed heritage into money. ⁽⁶⁾

2366. On the same principle there can be no doubt that the widow would be entitled to extract minerals, cut down timber or make such other reasonable use of the estate as is not in consistent with her beneficial enjoyment.

(1) Act V of 1881.

(2) *Kamukhya v. Hari*, 26 C. 607. The law was the same under Act XXVII of 1860; *Bhugwan v. Luchmee*, 2 W. R. (M. A.) 19; *Loganada v. Ramaswami*, 1 M. H. C. R. 2 84.

(3) *Karimuddin v. Gobind*, 81 A. 497 P.C. reversing, O. A. 25 A. 516.

(4) *Venkata v. Narasingappa*, 8 M. H. C.

R. 116 (117) citing *Collector v. Kavally*, 8 M. I. A. 550; *The Shivaganga case* 9 M.I.A. 604.

(5) *Anandi Bai v. Rajaram*, 22 B. 984; *Janaki v. Narayanasami*, 39 M. 684 (889) P. C.

(6) *Subba Reddi v. Chengalamma*, 22 M. 126 (181).

2367. Right to grant leases.—As such she has the right to grant leases
 cl. (3). for such term as may be reasonable or prudent, and in any
 case for her own life. (1) The court has upheld a patni lease
 granted by her (2) but in each case the question is one of prudence or necessity
 (3) and general benefit. (4)

2368. A Hindu widow has not less power to grant leases than the manager of an infant-heir (5) and it will not be set aside if it is found to be for the benefit of the estate and one by which the reversioners are found to have been benefited. (6) The same principle applies alike to all qualified owners of property, whether a female heiress, a Mitakshara father or the manager of an infant or the Shebait of an idol. As the Privy Council observed: "Their Lordships in no degree depart from the principles laid down in the case of *Hannoo-man Pershad Pandey v. Mt. Babooee Munraj Koonwaree* (7) which has been so often cited. They have applied these principles in recent cases not only to the case of a manager for an infant, which was the case there, but to transactions on all fours with the present, namely, alienations by a widow and to transactions in which a father, in derogation of the rights of his son under the Mitakshara law has made an alienation of ancestral family estate." (8)

2369. Even a lease in excess of her powers is only voidable and not void; (9) that is to say, it is good till it is avoided. "If it was *ipso facto* void it could not, of course, be confirmed, and the acceptance of rent would be evidence only of the creation of a new tenancy. A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is in fact, nothing for the court to set aside or cancel as a condition precedent to the right of action of the reversionary heir." (10)

2370. The article in the schedule to the Limitation Act applicable to such suit is Art. 141 (11) that is to say, the suit may be brought any time within 12 years of the death of the limited owner.

2371. Transfer good for life:—Being the owner entitled to possession for her life, the heiress is entitled to transfer her right of possession to another at her discretion without reference to her reversioners (12) upon which transfer the transferee

(1) *Palaniappa v. Devasikamony*, 40 M 709 (720) P. C.; (case of Shebait whose rights are similar) *Mohunkoomar v. Zoramun*, 1 Hay 272; *Raichurn v. Suroopchunder*, 9 W. R. 698.

(2) *Madhusudan v. Roake*, 25 C. 1 (7) P. C.

(3) *Sankar v. Bejoy*, 18 C. W. N. 201; *Felaram v. Begalanand*, 14 C. W. N. 895.

(4) *Dayamani v. Srinibash*, 38 C. 842.

(5) *Dayamani v. Srinibash*, 38 C. 842.

(6) *Dayamani v. Srinibash*, 38 C. 842 (845).

(7) 6 M. L. A. 393.

(8) *Kameswar v. Run Bahadur*, 6 C. 843 P. C.

(9) *Madhu Sudan v. Roake*, 25 C., P. C. explained in *Sadai v. Serai*, 28 C. 582 (589); followed in *Bijoy v. Nil Ratan*, 30 C. 990 reversed O.A. (on the question of limitation); *Bijoy v. Krishna*, 34 C. 329 (333) P. C.

(10) *Bijoy v. Krishna*, 34 C. 329 (333) P. C.

(11) *Bijoy v. Krishna*, 34 C. 329 (333) P. C.

(12) *Venkata v. Narasingappa*, 3 M. H. C. R. 116; *Moni Ram v. Kerry*, 5 C. 776 P. C.

acquires a good title for the term of her life, unless her estate is forfeited earlier by her re-marriage, (1) or abandonment of the world. (2)

2372. Her Interest Attachable.— From the fact that she is entitled to transfer her estate for life it follows that what she may voluntarily do she may equally be coerced into doing by the process of law. (3) On such sale her own heirs will be entitled to represent her and recover the surplus. (4)

When heiress ward of Court.

257. Where the Court of Wards or any other guardian is in possession of a woman's estate its power of alienation is equally subject to the provisions of S. 258.

2373. Analogous Law.—The Court of Wards or any other guardian of the female heir can only possess the power which she could exercise if she were competent to contract. As her powers of alienation are those stated in S. 258 her guardian possesses no greater power.

258. (1) A woman may alienate her estate so as to bind the reversioners for legal necessity or for its benefit.

(2) In particular, and without prejudice to the generality of the foregoing principle such alienation may be made for any of the purposes or objects stated in the next following clauses :

(3) For performance of Shradh of the last full owner and of his ancestors which he was bound to perform when living.

(4) For the performance of such other religious ceremonies as constitute a spiritual necessity of the last full owner provided that the immoveable property alienated is in every case reasonable and of moderate extent.

(5) For the payment of the debts of the last full owner even though barred by time.

(6) The payment of Government Revenue and all other public charges accruing due in respect thereof and any arrears of rent in default of payment of which the property may be summarily sold.

(7) Cost of obtaining letters of administration or a succession certificate of the property of the last full owner.

(8) Costs of litigation necessary for preserving and defending the estate.

(1) *Moniram v. Kerry*, 5 C. 776 P.C.; *Sohodra v. Roy Jung*, 8 C. 224 P.C.; *Matungini v. Ram Rutton*, 19 C. 289 (291) F. B.; *Rastu v. Ram Sarun*, 22 C. 589 (595). *Murgayi v. Virama*, 1 M. 226; *Koduthio v. Medu*, 7 M. 821; *Sreeramulu v. Kristamma*,

26 M. 148; *Vithu v. Govinda*, 22 B. 891 (881).

(2) *Habsnoonissav. Pulury* (1853) B.S.D.A. 595.

(3) S. 60 (1) Civil Procedure Code 1908; *Kanri v. Ammakannu*, 28 M. 504.

(4) *Chooney v. Ram Kinkur*, 28 C. 155.

(9) Costs of its preservation and repairs.

(10) Maintenance of herself and those whom the last full owner was bound to maintain.

(11) Marriage of female relations of the last full owner whom he was bound to marry such as his sister, daughter, son's and grandson's daughter, and the like.

(12) Customary ceremonial gifts to a reasonable extent on the occasion of marriage of such relations.

(13) Customary small gifts on other ceremonial occasions.

Legal necessity—S. 96. Benefit—S. 97

Synopsis.

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|---|--|
| (1) <i>Alienation of estate by female heir</i> (2374). | (11) <i>Who are competent to perform obsequial rites</i> (2384). |
| (2) <i>Alienations, when proper</i> (2374). | (12) <i>Religious and pious gifts</i> (2391-2394). |
| (3) <i>Legal necessity</i> (2375). | (13) <i>Payment of debts</i> (2395-2398). |
| (4) <i>Spiritual necessity</i> (2388-2390). | (14) <i>Payment of public charges</i> (2399-2400). |
| (5) <i>Necessity for worldly purposes</i> (2378). | (15) <i>Cost of litigation</i> (2401). |
| (6) <i>Larger power of alienation for husband's religious benefit</i> (2376). | (16) <i>Preservation and repairs of estate</i> (2402). |
| (7) <i>Reasonable latitude in management</i> (2378). | (17) <i>Self-maintenance</i> (2403-2405). |
| (8) <i>Alienations for benefit</i> (2380). | (18) <i>Maintenance of dependants</i> (2406). |
| (9) <i>Shradhs a necessity</i> (2381-2383). | (19) <i>Marriage gifts</i> (2407). |
| (10) <i>Funeral obsequies</i> (2382). | (20) <i>Other ceremonial gifts</i> (2408). |

2374. Analogous Law.—The leading principle applicable to female heirs applies alike to all qualified owners, whether male or female, to the guardian of infant-heirs, the Shebait of an idol or temple, and to trustees generally. (1) The only difference between them is one of degree, but the cardinal principle is in each case identical. As such they are all entitled to alienate the corpus of the estate owned or managed by them for legal necessity or benefit. But these terms must necessarily vary with the nature and purpose of the obligation and of the property and the character of the control. For instance, an elephant may be a prime necessity to an idol but it would be voted a cumbrous luxury in the hands of a widow. Similarly the widow is justified in charging the estate for an act done in discharge of the religious and pious obligation to her deceased husband which would not be justified in any other relation. Subject to the necessary variations to be presently considered, her liability is generally on a par with those of other limited owners of property.

2375. Women's legal necessity.—The subject of legal necessity with reference to a woman's estate must not be understood as forming a class apart from the general law of necessity which justifies an alienation of his estate by a limited owner, the general

(1) *Sahu Ram v. Bhup Singh*, 39 A. 487 (448) P. C.

principles of which have already been set out. (S. 96) The same principles equally govern all transactions by a female heiress, only modified by the peculiar religious obligations which Hindu Law casts on the female relations both as regards their pious duty to the deceased as also the mode of life enjoined on them in their widowhood. The question of legal necessity must moreover largely depend both upon the nature and extent of the estate taken by the heiress and the nature and extent of disposition. As Giffard, L. J., said it is absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes, because it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such disposition. (1)

2376. The law of legal necessity may be divided into two classes. In the first spiritual necessity. The necessity for worldly purposes falls into the other class. It is only in cases falling into the former class that the widow possesses larger powers. As observed by Turner, L. J. "The widow cannot of her own will alien the property, except for special purposes. For religious and charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity" (2) But in one sense both are cases of legal necessity (3) since both are recognized by and subject to the control of law, though the term legal necessity when applied to worldly purposes doubtless involves some pressure from without, necessitating the raising of money for the protection or class would fall those religious acts which are recognized and designated as preservation of the estate. (4) But this is rather the test of its legality, since all expenditure is not necessary and all necessary expenditure is not legal. To be legal it must receive the sanction of law.

2377. Now law recognizes and sanctions certain heads of expenditure whether because it is incurred on religious or charitable objects, or because it is incurred for worldly purposes. In each case it is subject to the general rule that it must be moderate and reasonable, and incurred *bona fide* on the objects permitted by law. Law does not tolerate extravagance in the name of religion or piety. "The test in cases of this description, where a deed by a limited owner with a qualified power of alienation is impeached, is, whether the purposes for which the alienation was made are proper or legitimate . . . The test is, is the transaction fair and proper, lawful and valid and justified by Hindu Law. Necessity is only one of the phases of the test of propriety." (5) There is however one difference between necessity which is spiritual and that which is secular, since in the one case no pressure on the estate need be proved to justify the alienation. All that has to be proved is its validity. The purposes which constitute such necessity are enumerated in clauses 3 and 4. The remaining clauses deal with secular necessity, though some of them as for instance, the case of marriage and customary ceremonial gifts, are other instances of religious necessity.

(1) *Cossinaut v. Hurrosoondry*, 2 Mor. Dig. 198; cited in *Khub Lal v. Ajodhya*, 48 C. 574 (584).

(2) *Collector v. Cavalry*, 8 M. I. A. 529.

(3) *Basangauda v. Basangauda*, 39 B. 87

(98-99).

(4) *Ganap v. Subbi*, 32 B. 577.

(5) *Khublal v. Ajodhya*, 48 C. 574 (584-585).

2378. It has been laid down by the Privy Council that a widow entering upon her husband's estate as his heir has, as regards the management of his estate not less powers than the manager of an infant estate ⁽¹⁾ and referring to this *dictum* Sergeant, C.J., said: "A widow, like a manager of the family, must be allowed a reasonable latitude in the exercise of her powers provided she acts fairly to her expectant heirs. ⁽²⁾ For example she may pay off a mortgage before it is due ⁽³⁾ and sell a portion of the estate rather than mortgage the whole though the latter course might be more beneficial to her reversioners and though it would be prejudicial to her by reducing her income, since "she does not hold the property for the benefit of the reversioners nor is she bound to raise money on her personal security." ⁽⁴⁾ As Peacock, C. J., said: "If a widow elects to sell when it would be more beneficial to mortgage, the sale could not be set aside as against the purchaser, if the widow and the purchaser are both acting honestly." ⁽⁵⁾ If there is a necessity, it is for the widow to decide how to act and there is no rule of law which obliges the widow to proceed in any particular way and the only question for the Court to consider is whether she has exceeded her power and these are always to be measured by the necessities of the case. ⁽⁶⁾ Moreover a sale is at times more advisable than a mortgage ⁽⁷⁾ and it is no blot on the sale that the widow having to raise Rs. 670 sold the property for Rs. 995. ⁽⁸⁾ The case is otherwise where the property is mortgaged as she is not bound to borrow more than her actual wants ⁽⁹⁾ and in this matter though she should not anticipate her wants, still, it does not mean that she must let the wolf in before she turns him off the door. It is merely a dictate of prudence, and she will be so judged.

2379. An alienation made by the widow as guardian of her adopted son will be held valid against her if the adoption is found to be invalid. ⁽¹⁰⁾

2380 Benefit.—An alienation by an heiress for the "benefit" of the estate is subject to the general principles set out in section 97, with the modification that the heiress having no co-parceners and being the sole proprietor of her estate, the only benefit she has to study is that of the estate and of her reversioners. ⁽¹¹⁾ The Privy Council have held the principle applicable to the manager of an infant equally applicable to alienations by a widow. ⁽¹²⁾ The title to her husband's estate having vested in his widow, she was dispossessed by her reversioner with whom she effected a compromise granting a lease of some of her properties to one of them for 60 years. On her death the next reversioner sued to eject the lessee but the Privy Council upheld the lease as made for the benefit of the estate and intended to injure no one. ⁽¹³⁾

(1) *Kameswar v. Run Bahadur*, 6 C. 848

P. C.

(2) *Venkaji v. Vishnu*, 18 B 534 (536).

(3) *Ib.*

(4) *Singam v. Draupadi*, 81 M. 153 (155).

(5) *Phool Chand v. Rughobhans*, 9 W. R.

108.

(6) *Naba Kumar v. Bhabasundari*, 8 B.L.

R. 375.

(7) *Kamikhaprasad v. Jagadamba*, 5 B.

L. R. 508 (530).

(8) *Chaitranarayan v. Uba*, 1 B. L. R. 201

(202); *Felaram v. Bagalenand*, 14 C.W.N. 895.

(9) *Lalit Pandey v. Sridhar*, 5 B. L. R.

176.

(10) *Parbhu Lai v. Mylne*, 14 C. 401 (418).

(11) *Dayamani v. Shrinidash*, 38 C. 842

(845).

(12) *Kameswar v. Run Bahadur*, 6 C. 848

P. C.

(13) *Bijoy v. Nal Ratan*, 30 C. 990; re-

manded *O. A. Bijoy v. Krishna*, 34 C. 329

P. C.; *O. A. after remand Bijoy v. Girindra*,

41 C. 798 P. C.

2381. Shradh: In the first place she is entitled to charge or alienate her inherited estate for the performance of religious rites which are conducive to the spiritual welfare of the deceased. (1) As the Privy Council said: "For religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity." (2) But there must be necessity in any case. If the late owner has left sufficient funds out of which his spiritual wants could have been met it will not justify an alienation of the estate, merely because the proceeds were spent on his *Shradh*.

Assuming, however that the heiress has no inherited funds for that purpose, the questions then arise: (i) What are the religious purposes which justify the alienation of his estate and (ii) to what extent is it justifiable.

2382. First as regards the religious purpose. On this point the Dayabag says "Even a gift or other alienation is permitted for the completion of her husband's funeral rites. (3) The order in which these rites are performed are as follows: Upon the death of a person his body is, as is well-known, consigned to the flames. At this time gifts have to be made to a Maha Brahmin, that is to say, a Brahmin of a lower order who receives only funeral offerings. The nature of the gifts vary, but they consist of all such things as a man requires below—house, cattle, cots and clothes, ornaments and food. Those who are brought up within the pale of the orthodox creed know too well the exactions of these priests.

On cremation of the body the ashes are collected and required to be thrown into the Ganges. This is called the Gangajali ceremony and may take place on the 13th day of death or any time later as convenient. It is a religious necessity. (4)

The relation who goes to the Ganges to commit to its holy waters the last remains of their departed relation, is enjoined to proceed to Gya a place where special merit attaches to the performance of Shradh, the feeding of Brahmins and gifts to the Gayawal priests. (6)

2383. In the Maratha country a similar sanctity attaches to a Shradh performed at Pandharpur (7) while Rajahamandry serves the same purpose to the people of the Dravid country. (8) While Sethu is mentioned as a place endowed with sanctity (9) a pilgrimage to Benares is not conducive to the spiritual welfare of any one but the pilgrim, and is therefore, not a head of a justifiable necessity. (10) And as regards Gya while a feast given there is necessary, a feast

(1) Dayabag X1.1-61; *Collector v. Canaly* 8 M.I.A. 529 (551); *Junmejoy v. Russomoyee* 10 W.R. 809; *Raj Lukhee v. Gokool Chunder*, 12 W.R. 47 P.C. *Chumun Lall v. Gunpat Lall*, 16 W.R. 52; *Gunpat Lall v. Toorun*, 16 W.R. 52; *Muteeram v. Gopal*, 20 W.R. 187; *Lakshminarayana v. Dasu*, 11 M. 288; *Tatayya v. Ramakrishna*, 34 M. 288 (290).

(2) *Collector v. Canaly*, 8 M.I. A. 529 (551).

(3) Dayabag X1.1-61.

(4) *Nanak Singh v. Sant Singh*, (1907) P. W. R. 19.

(5) *Mahomed Ashruf v. Brijessuree*, 19 W. R. 426; *Tarini v. Bholanath*, 21 C. 190 N (191); *Udaichunder v. Ashutosh*, 21 C. 190; *Mahadev v. Neelamani*, 20 M. 269 (272).

(6) *Bisen Dayal v. Jaiseri*, (1918) Pat. 328; 48 I. C. 748; cf. *Puran v. Jai Narain*, 4 A. 482 (484).

(7) *Gunpat v. Tulisram*, 36 B. 88.

(8) *Vuppuluri v. Garimilla*, 34 M. 288.

(9) *Tatayya v. Rama Krishnamma*, 34 M. 288 (291).

(10) *Hari v. Bajrang*, 18 C. W. N. 544 (547).

given upon one's return home has no religious significance and cannot be justified on the ground of necessity. (1)

2384. It is not every relation that can perform these obsequial rites. The duty to perform them devolves on the following relations in their order :—

- (1) The son—of sons the eldest, and next to him the youngest, are most eligible.
- (2) The widow—or co-widows, one and all are equally entitled.
- (3) The daughter (2)—who is entitled to perform the *Shradh* of both her father and mother.
- (4) Daughter's son.
- (5) Younger brother—uterine brother and his sons being preferred to brothers of half-blood and the next younger brother to one older than the deceased.
- (6) Sister's son.
- (7) The father.
- (8) The mother.
- (9) Elder brother. The elder brother should do so especially at Gaya.
- (10) Daughter-in-law.
- (11) Sister—Amongst sisters the rule applicable is the same as in the case of brothers.
- (12) Any other Sapinda.
- (13) Samanodak.
- (14) Sapinda of the mother.
- (15) Samanodak of the mother.
- (16) Sagotras.
- (17) Disciple.
- (18) Ritwik.
- (19) Preceptor.
- (20) Son-in-law. (3)
- (21) Any friend.

2385. Where a person is unable to perform the *Shradh* personally he may do so vicariously through another who must, however, be eligible to perform it (4), though, amongst the Uriyas, a custom was proved to appoint a Brahmin to perform these rites. (5)

2386. It is equally obligatory on the heiress not only to perform the *Shradh* of the last owner but also the *Shradh* of his other relations. So the widow must perform the *Shradh* of not only her husband but also the *Shradh* of his mother. (6)

(1) *Makhanlal v. Gayan Singh*, 33 A. 255. Contra *Dinonath v. Harish*, 18 C. W. N. 1808; 24 I. C. 670.

(2) *Puppuluri v. Garimilla*, 84 M. 288.

(3) *Vaidyanath Dikshityam*, (Setlur) App. B 671-695.

(4) *Tatayya v. Ramakrishnamma*, 34 M. 281 (291).

(5) *Lakshminarayana v. Dasu*, 11 M. 288 (289).

(6) *Junmejy v. Russomoyee*, 11 B. L. R. 420 N; *Srimohan v. Brij Behari*, 36 C. 753,

The widow is equally under a duty to perform the funeral rites of her husband's other relations, such as for instance his grandfather, great-grandfather, mother, paternal aunt, brother's wife and other relations whose maintenance was charged on his estate.

2387. The next question, and one of some moment is the amount of such expenditure. It is evident that the amount must be reasonable and must not disappoint the just claims of other claimants and creditors. As observed by the Privy Council: "No case has gone the length of holding that the power of disposition for pious and religious purposes is unqualified." (1) In one case out of the income of Rs. 6,000 a year the court allowed about a year's income for the performance of all these ceremonies. (2) But the tendency of the courts is to check extravagance and reduce all such expenditure to a minimum and it is apparent that if in the last case Rs. 6,000 had been the value instead of the income of the estate, the court would not have tolerated its annihilation for the spiritual benefit of the deceased.

2388. Spiritual necessity.—Spiritual necessity often spoken of as the spiritual benefit of the husband is another head of necessity which justifies the alienation of inherited immoveable property. On this point the Mitakshara is silent but the Mayukh contains the following text.

Mayukh.—The prohibition of sale or other disposition of immoveable property by a widow, without the consent of takers of the heritage is given on [the authority of] Madhav. As for the text of Katyayan "After the death of the husband, the widow preserving [the honour of the family] should obtain the share of her husband so long as she lives; but she has no ownership there in respect of [its] gift, mortgage, or sale" that is a prohibition of gift of money to the *bandi* bards *charan* triflers and the like. Gifts for religious or spiritual objects and mortgage, and the like for that purpose, are of course permitted; as is plain from the aforementioned text of Prajapati, commencing with *Sthavaram Jagaman* etc., and from the text of Katyayan—"A widow always engaged in meritorious observances and fasts constant in the duties of celibacy intent upon restraining her passions and making holy gifts, shall reach the heavenly abodes even if she has no son." (3)

2389. It has been held that this text does not authorize the giving away of the bulk of the inherited estate to a Brahmin for the spiritual benefit of the deceased, and that "while the widow has wider powers of disposition over property inherited from her husband in making gifts for religious purposes which are calculated to benefit her husband spiritually, those powers must be exercised within the proper and reasonable limits in dealing with the immoveable property of her husband." (4) It is also pertinent to observe that the term "Spiritual necessity" must be strictly limited to purposes which the law recognizes as warranting such alienation. Any gift out of a religious or pious motive is not a gift constituting a spiritual necessity. Where the gift is of an inconsiderable portion of the estate the court will not be too strict in examining the purpose, but where it forms a considerable portion of the estate the gift cannot be

(1) *Collector v. Cavalry*, 8 M. I. A. 529 (551).

(2) *Dalal Kumbhar v. Ambika Parlap*, 25 A. 266 (371).

(3) *Mayukh* (Mandlik) 77, 78, cited and

explained in *Panachand v. Manohar Lal*, 42 B. 186 (143, 144, 152).

(4) *Panachand v. Manoharlal*, 42 B 186 (154); *Kubal v. Ajojdya*, 43 C. 574 (580);

justified unless it is brought strictly within the rule of spiritual necessity. ⁽¹⁾ In some of these cases, a distinction is drawn between acts of which the religious merit is solely acquired by the female heir, and acts of which the religious merit accrues to the deceased or is shared by the female heir with him. But this distinction is not supported by the text and the sole ground which justifies the heiress to alienate any portion of the inherited estate is the spiritual necessity of the last owner. ⁽²⁾ In other cases the alienation may be good if supported by legal necessity but it cannot be supported under this head.

2390. The question then arises what acts constitute the spiritual necessity of the deceased owner. The performance of his *shraddh* and its attendant obsequial rites are doubtless such necessity. They are in fact a recognized head of necessity and have been dealt with in clause 3. But over and beyond these objects there are other items of expenditure which though not treated as of the same degree of urgency are nevertheless regarded as bordering on necessity. Such was held to be the excavation of a tank to complete the equipment of a temple which the deceased died leaving incomplete. His widow raised Rs. 520 by the grant of two perpetual leases with a view to complete the walls of the temple buildings and to excavate and consecrate a tank in connection with the temple. The court held these leases to be supported by necessity holding that excavation of the tank was itself a meritorious act ⁽³⁾ which it is submitted did not justify alienation of that estate apart from its utility to the estate. ⁽⁴⁾

2391. Religious and pious gifts :—While the performance of *Shraddh* and *Sapindikarm* are directly conducive to a man's spiritual benefit, Hindu Law does not require that such ceremonies should be accompanied by a gift of land to the priests. But where the performer of *Shraddh* delivered as gift an inconsiderable portion of land the court upheld it as a disposition or expenditure which was reasonable or proper according to the common notions of the Hindus. ⁽⁵⁾

The question is one of custom. For instance it is customary amongst the *Uriya Zamindars* to appoint a Brahmin to perform funeral and annual ceremonies. The Brahmin so appointed is styled a "Puo Brahmin." As such the widows of a *Zamindar conveyed* a small piece of land to him on a rent of Rs. 1-8 per annum. It was conceded that the gift was made rather for future than for past services. The court upheld the gift as supported by an indispensable religious necessity. But the fact that the land was only small in extent was also emphasized. ⁽⁶⁾ But all the same there can be no doubt that the powers of an heiress to alienate property for the spiritual benefit of the last owner cannot be weighed in golden scales. As was observed in a case, "It is unquestionable then that the widow has a larger power of disposition for religious or charitable

(1) *Mukhoda v. Kulkarni*, 1 B.S.R. 82 6 I; D. (O.S.) 62; *Ram Chunder v. Ganqa Gobind*, 4 B.S.R. 7; I.D. (O.S.) 110; *Kartik Chunder v. Gur Mohun*, 1 W.R. 48; *Runjeet v. Mhd. Waris*, 21 W.R. 49; *Ram Kaval v. Ram Kishore*, 23 C. 506; *Churaman v. Gopi*, 37 C. 1; *Harmanage v. Ram Gopal*, 17 C.W.N. 782; *Khub Lal v. Ajodhya*, 43 C. 574 (581); *Jagiban v. Deo Shankar*, 1 Bor. 394; *Kupur v. Sebak Ram*, 1 Bor. 405 (448); *Chunilal v. Jussao*, 1 Bor. 55 (60); *Bhaskar v. Mahadev*, 6 B.H.C.R. (OO) 1; *Panchchand v. Manohar Lal*, 42 B. 136 (150, 151); *Gopalla v. Narayana*, (1850) M.S.D.A. 74; *Rama v. Ranga*, 8 M. 552;

Lashmanarayana v. Dasu, 11 M. 288; *Vuppuluri v. Garimalla* 34 M. 288; *Gudimetta v. Bollosu*, 28 M.L.J. 233; *Puran v. Jai Narain*, 4 A. 482.

(2) *Khub Lal v. Ajodhya*, 43 C. 574 (581, 583); *Ram Kaval v. Ram Kishore*, 22 C. 506; *Puran v. Jai Narain*, 4 A. 482.

(3) *Khub Lal v. Ajodhya*, 43 C. 574 (584).

(4) *Runjeet v. Mhd. Waris*, 2 W.R. 49; *Makhanlal v. Gayansingh*, 33 A. 255.

(5) *Tatayya v. Ramakrishnamma*, 34 M. 288 (291); *Khublal v. Ajodhya*, 43 C. 574

(6) *Lakshminarayana v. Dasu*, 11 M. 288.

purposes or for purposes which are supposed to conduce to the spiritual welfare of her husband than that which she possesses for purely worldly purposes. An exhaustive enumeration of these religious or charitable purposes is neither possible nor necessary." (1)

2392. In one case (2) the pandits consulted, defined religious purposes somewhat loosely, as including "dowry to a daughter, building temples for religious worship, digging tanks and the like." It is submitted that these and similar meritorious acts could not easily be brought under the category of religious or spiritual necessity. But this is probably the extreme limit. Ordinarily the gift tolerated by law must be one supported by spiritual necessity and not merely conducive to the spiritual benefit of the deceased. As was observed, "the pilgrimages and sacrifices performed by her are no doubt pious acts which might indirectly be beneficial to her husband, but they were not ceremonies which were indispensable for his spiritual benefit, such as his funeral obsequies and the periodical ceremonies incidental to those obsequies.." (3)

2393. Apart from such ceremonies the heiress is incompetent to make any gift out of the corpus, however conducive they might be to her only spiritual welfare (4) as distinct from spiritual necessity. (5) For example she cannot make a gift of land to an idol (6) not established by the full owner but by his mother for which the husband had not in his lifetime made any provision for its maintenance, and of which the dedication was *prima facie* one more for the widow's own spiritual welfare than for that of her husband. (7)

So an act however meritorious does not justify alienation of the estate. The digging of a tank is one such act.

2394. It was implied in the last case and it is the law that if the last owner authorizes an act, the heir would be entitled to execute the power. For instance where the testator authorized his wife to build a house, establish therein the god Mahadev, the widow was held entitled to carry out his wishes and any alienation made of the *corpus* would be within her power and one which the reversioner could not avoid on her death. (8) As previously stated in carrying out the behests of a testator the donee of the power acts as an agent of the donor and as such his power is not his own, but that of the testator who authorized him.

2395. Payment of debts.—The payments of debts of the last owner is another recognized head of justifiable necessity for which the heiress may alienate the corpus. She is not bound to pay them out of its current income which she has the right to appropriate to her own use. (9) But she cannot alienate the estate if she has received sufficient other property wherewith to discharge them.

(1) *Khulal v. Ajodhya*, 43 C. 574 (550).

(2) *Cossinault v. Hurrosondry*, 2 Mor Dig. 198.

(3) *Rama v. Ranga* 8 M. 552 (558).

(4) *Puran Dai v. Jai Narain* 4 A. 482 (484); *Rama v. Ranga*, 8 M. 552; *Ram Kaval v. Ram Kishore*, 22 C. 506.

(5) *Rama v. Ranga*, 8 M. 552; *Puran Dai v. Jai Narain* 4 A. 482 (484); *Ram Kaval v.*

Ram Kishore, 22 C. 506; (509, 510)

(6) *Puran Dai v. Jai Narain*, 4 A. 482 (484).

(7) *Ram Kaval v. Ram Kishore*, 22 C. 506 (510).

(8) *Hari Kumari v. Mohun Chandra*, 12 C. W.N. 412; *Biswanath v. Durga*, 11 C. (C) 260.

(9) *Boddu v. Goli*, (1918) M.W.N. 275; 18 I. C. 959; *Ramasami v. Mangaikarasu*, 18 M. 118.

2396. In the case of the heiress whether the heiress is the widow or daughter-in-law ⁽¹⁾ or mother ⁽²⁾ of the last owner, it is a pious obligation which she is bound to discharge even though the debt be bared by time ⁽³⁾ or released by any enactment such as the Deccan Agriculturist Relief Act. ⁽⁴⁾ Even she is not bound to pay debts which the deceased owner had repudiated before his death ⁽⁵⁾ or which had been agreed to be discharged by a third party. ⁽⁶⁾ In other words her liability must in each case be existing and legal though the creditor's remedy for its enforcement may have been lost by reason of the law of limitation. ⁽⁷⁾

Nor can she pay interest in excess of the principal in the area subject to the rule of Damdupat. ⁽⁸⁾

2397. It has been seen that manager of a joint family is not competent to revive or pay a time barred debt (§§ 1172-1175.) In this respect the female heir has a greater liability by reason of her pious duty ; which, however, only arises *qua* heir ⁽⁹⁾ and on the death of the last owner, and never in his life-time. ⁽¹⁰⁾ Any payment made by the wife of the debt of her husband during his life-time is a voluntary payment and the husband's property cannot be made liable for payment of such debts after his death. ⁽¹¹⁾

Even where the wife takes the estate as a devisee under her husband's will she may charge his estate if he has directed that she should pay his debts out of his estate. ⁽¹²⁾ As already remarked the trade debts of a joint family stand on the same footing and the heiress is entitled to alienate the estate for the purpose of discharging them. ⁽¹³⁾ (S. 111)

2398. The duty of the wife to pay her husband's debts rests upon the broad equity that he who takes the benefit must also bear the burden. ⁽¹⁴⁾ As observed in a Bombay case, "She took the estate as an aggregate, assets and debts together. Her first duty was to pay her deceased husband's debts and to pay them as far as she could, equally, according to the obligation with which the succession had devolved on her. She may be regarded as in some degree a trustee, or at any rate under a legal obligation for this purpose, and not at liberty to deal capriciously with the estate which she may alienate at all only for some special purposes indicated by the law. She ought not in performing the duty cast upon her, to prefer one valid claim to

(1) *Bhau v. Gopala*, 11 B. 325.

(2) *Rustam v. Moti Singh*, 18 A. 474 ;

**Ramasami v. Vengidusami*, 22 M. 113.

(3) *Khojendra v. Narain*, 22 I. C. (C) 669.

(4) *Bhau v. Gopala*, 11 B. 325.

(5) *Lukmeeram v. Khooshalee*, 1 Borr. 412
Bhala v. Parbhu, 2 B. 67; *Lakshman v. Satyabhamabai*, 2 B. 494 (499); *Chimnaji v. Dinkar*, 11 B. 320; *Bhau v. Gopala* 11 B. 325; *Bhagwat v. Nivrutti*, 39 B. 113 *contra Melgirappa v. Shivappa*, 6 B. H. C. R. 270; *Hemchand v. Tara*, 1 B. S. R. 481; *Tibech v. Phoolman*, 7 W. R. 450; *Udaichunder v. Ashutosh*, 21 C. 190; *Tarini v. Bholanath*, 21 C. 190 N; *Mahesh v. Ratnasingh*, 23 C. 766; *P. O. Debidayal v. Bhanpartap*, 31 C. 483; *Felaram v. Bagalanand*, 14 C. W. N. 895; *Soorjoo v. Krishnan*, 1 N. W. P. H. C. R. 46; *Kalkasing v. Sheoraj Singh*, 40 C. 347; *Kondappa v. Subba*, 13 M. 189; *Subbammal v. Avudayanmal*, 30 M. 3; *Kandasami v. Rajagopalasami*, 7 M. L. T. 363, 5 I. C. 382.

(3) *Nathu v. Tulsha*, 16 A. L. J. 443; 45 I. C. 728; *Bhawani v. Himmat Bahadur*, 33 A. 342 P. C.

(7) *Kandasami v. Raja Gopalasami*, 7 M. L. T. 363; 5 I. C. 382; *Kondappa v. Subba*, 13 M. 189.

(8) *Ramachandra v. Radha*, 10 N. L. R. 91; 26 I. C. 598.

(9) *Namasivaya v. Sivagami*, 1 M. H. C. R. 374.

(10) *Himmat Bahadur v. Bhawani*, 30 A. 352 affirmed O. A. *Bhawani v. Himmat Bahadur*, 33 A. 342 P. C.

(11) *Himmat Bahadur v. Bhawani*, 30 A. 352 affirmed O. A. *Bhawani v. Himmat Bahadur*, 33 A. 342 P. C.

(12) *Punamchand v. Narayan*, (1894) B. P. J. 167.

(13) *Gagarnath v. Jaikishun*, (1916) 1 P. L. J. 16; 34 I. C. 375.

(14) *Karimudin v. Gobind*, 81 A. 497 (506) P. C.

another as her husband might have done, because from him the favoured creditor could have obtained as much by his diligence. On the widow, no pressure could be exercised, except through the estate, and she was bound, pressure, or no pressure to distribute amongst the creditors. There could not here have been a legal necessity, such as is prescribed as an indispensable consideration by the Judicial committee. (1) A purchaser from a widow must see that she exercises her power of sale strictly (2) or at least satisfy himself by reasonable enquiry that a sufficient cause for alienation exists." (3)

2399. Payment of Public charges.—The payment of land revenue cesses and other public charges is a case of general necessity, (4) (§ 1074) and arises out of the very necessity of preserving the estate from forfeiture and sale; since such payments are ordinarily the first charge on the land and their non-payment renders the estate itself liable to extinguishment. As the Privy Council observed, "The preservation of the estate and the costs of litigation for that purpose are objects which justify a widow in incurring debt and alienating a sufficient amount of the property to discharge it". (5) Where however, the amount of cess creates only a personal liability as it does under the Public Demands Recovery Act in Benga (6) its payment would nevertheless be a justifiable necessity, (7) the more so if a decree is passed against the heiress as representing the estate. (8)

2400. It is immaterial that with better management the Government revenue need not have threatened the very existence of the estate. (9) All that is necessary is that there should be some pressure on the estate and a danger to be averted. (10) The validity of sales for non-payment of revenue is not affected by any rule of Hindu law (11) and it is the duty of the heiress to sell a portion to save the rest. But she must not anticipate her wants. Necessity implies pressure such as an attachment of the property or at least the presence of a decree or other coercive process of law making the alienation inheritable (12) and the alienation must of course be *bona fide* but not a devise to defeat or deceive the reversioner. (13) Since the public charges are primarily payable out of current income it is the duty of the heiress to pay therefrom. (14) She cannot save the income of the estate for her own benefit and charge it for assessment. If this were allowed many an estate would never reach the hands of the reversioner.

(1) *Raj Lukhee v. Gokool Chunder*, 13 M. I. A. 209; *Goolab Singh v. Kurun Singh*, 14 M. I. A. 176.

(2) *Rajchunder v. Buboram*, 1 Full. 133;

(3) *Rangilbhai v. Vinayak*, 11 B. 666 (679).

(4) S. 96 (2) ante.

(5) *Karimuddin v. Govind*, 31 A. 497 (506) P. C. reversing O. A. *Govind v. Abdul Qayyum*, 25 A. 546; *Srimohan v. Brijbehary*, 86 C. 753 (757).

(6) *Srikant Hosain v. Sasi Kar*, 19 C. 783; *Mahanund v. Banimadhub*, 24 C. 27; *Rup Ram v. Iswar*, 6 C. W. N. 362.

(7) *Sri Mohan v. Brij Behary*, 36 C. 753 (757).

(8) *Karimuddin v. Gobind*, 31 A. 497 P. C.

(9) *Hunoomanpersad v. Mt. Baboos*, 6 M.

I. A. 393 (423).

(10) *Horonath v. Indra*, (1859) S. D. A. B. 207; *Sreenath v. Ruttun*, (1859) S. D. A. B. 421; *Hurry Mohan v. Gonesh*, 10 C. 823 (837) F. B.; *Hurronath v. Randhir*, 18 C. 311 (315) P. C.; *Sri Mohan v. Brij Behary*, 36 C. 753; *Indar Kuar v. Lalla Prasad*, 4 A. 582; *Dhiraj Singh v. Mangaram*, 19 A. 300 (302); *Ghansham v. Badiya*, 24 A. 547.

(11) *Anundomoyee v. Mohendra*, 15 W. R. 364.

(12) *Gopaul v. Gour Monee*, 6 W. R. 53; *Bajjnath v. Bissen*, 19 W. R. 79.

(13) *Phul Chand v. Jodha*, 6 A. L. J. 547.

(14) *Verabadra v. Marudaga*, (1910) M. W. N. 799; *Ramanand v. Ram Saran*, 7 I. C. (C) 27.

2401. Costs of Litigation.—The cost of necessary litigation is another head of legal necessity but the litigation must be necessary and the cost reasonable, for, as Sir Lawrence Jenkins, C. J. observed, though “costs of litigation are a recognized head of legal necessity, that does not mean that a widow engaged in a litigation has an unlimited power of borrowing.” (1)

The heiress is entitled to alienate the estate for defraying the cost of obtaining the Succession Certificate or Letters of Administration (2) and reasonable cost of litigation (3) in recovering or preserving the estate or in defending her title. (4)

It would not justify a sale of land to embark on a speculative suit which the deceased owner had given up as lost (5) though the case might be different where the reversioner had entered upon a litigation for which he was responsible (6)

This aspect of the subject has been already considered (§§. 1080—1082)

2402. Preservation and Repairs.—The obligation of a person in possession of an estate to protect and preserve it is cast even on mortgagees and trustees. As such she has the right and is subject to the duty of alienating the estate only when it is necessary for its preservation and repairs. She cannot charge the estate for the purpose of improving it (7) or of constructing a new house unless it was a necessity. She may, of course, construct such a house out of her current income and may even charge her future income; but if she charges the estate she must show that it was necessary to shelter the household as that the old house had become uninhabitable or the like. (8) Apart from such or similar pressing necessity she cannot alienate the estate for the purpose of building costly houses and excavating tanks or wells unless they were necessary for irrigation or were proved to be otherwise beneficial to the estate. (9)

The question must in each case depend upon its own circumstances. (10)

2403. Self-maintenance.—Maintenance of the heiress herself and other dependent members of the family whom the deceased owner was bound to maintain is another head of legal necessity generally explained elsewhere. (11) Primarily she must maintain herself out of its profits and if her interest therein is so limited, she cannot alienate the corpus in any case. (12) Otherwise if the income is insufficient, she is entitled to sell the estate for her own maintenance. (13)

Her right to sell the estate depends upon the right in which she holds the estate. If she is entitled only to the rents and profits she cannot charge or

(1) *Bhimareddi v. Bhaskar*, 6 Bom. L. R. 628; followed in *Radha v. Naurabin* 8 Pat. L. J. 522; 46 I. C. 627.

(2) *Sri Mohan v. Brij Behary*, 86 C. 758.

(3) *Bimaraddi v. Bhaskar*, 6 Bom. L. R. 628

(4) *Karimuddin v. Gobind*, 81 A. 497 (506)

P. O. *Pannalal v. Bamasundari*, 6 B. L. R. 782; *Phool Coer v. Dabee Pershad* 12 W. R. 187 *RamGoomar v. Ichamayi* 60. 86; *Amjad Ali v. Moniram* 12 C. 52; *Debi Dayal v. Bhan Pertap*, 81 C. 488 (441)

(5) *Indar Kuar v. Lalta Prasad*, 4 A. 582.

(6) *Arjan Singh v. Indar Singh*, (1911) P. L. R. 288; 12 I. C. 429.

(7) *Ganapa v. Subi Sanna*, 32 B. 577.

(8) *Bhogaraju v. Addepalli*, 35 M. 560.

(9) *Makhan Lal v. Gayan Singh*, 33 A. 255.

(10) *Bejoy v. Girindra*, 13 C. W. N. 236; 8 C. L. J. 458.

(11) S. 96 (8) ante.

(12) *Gobind Dass v. Ranchord*, 3 N. W. P. H. C. R. 824; *Jagat Ram v. Mahesh* (1882, A. W. N. 57.

(13) *Sakharam v. Janikibai*, (1878) B. P. J. 139; *Nellaikumar v. Marakathammal*, 1 M. 166; *Soorjoo v. Krishnan*, 1 N. W. P. H. C. R. 46.

alienate the corpus. But if she has the woman's estate then she is entitled to alienate it for all those purposes which law recognizes as legally necessary, amongst which her own maintenance is one such purpose. The fact that she was living with another man who presumably maintained her does not curtail her right to find her own maintenance in her heritage since the estate having once vested in her, subsequent unchastity cannot curtail her right to its enjoyment. Of course the fact that she was in the keeping of another man who maintained her might be proved as a fact to establish the absence of necessity. (1)

2404. The question of alienation raises the question of the quantum of maintenance. That the widow is entitled to maintain herself in a fair degree of comfort has been already seen (S. 81). The same rule applies to all female heiresses. The term maintenance not only comprises the bare cost of living but also the cost incurred in the performance of such religious rites as are usual or might be customary. Such are for instance the performance of the annual Shradh, the distribution of charities and the observance of fasts and festivals and in fact compliance with all such caste usages as might be reasonably expected from the heiress in her position. (2) The rule applies to all female heirs whether a widow succeeding to her husband or daughter inheriting to her father. (3) The heiress must not forecast her wants, but this does not imply that she cannot alienate the estate except for her past maintenance. All it means is that she must not alienate it except when there is urgent necessity in the near future. (4)

2405. If the purpose is obvious the means adopted by the widow may not be of the best. But they should not be too narrowly scrutinized. So where the widow could not maintain herself because she had no means to cultivate the land, she was held justified in mortgaging it so as to enable her to resume cultivation and so maintain herself. (5)

2406. Maintenance of dependents.—The heiress is not bound to pay for the maintenance and the marriage of relations of the last owner out of the current income of the estate for which the estate is legally chargeable. (7) Section 73 specifies the persons whom a person is personally liable to maintain. On his death the liability to maintain them continues chargeable to his estate and the heiress is entitled to alienate the estate for that purpose. So it has been held that the expenses incurred by the widow for the marriage of a daughter are recoverable from the father's estate (§ 1080). The maintenance of the grandsons is also a moral though not a legal obligation for which the heiress may alienate the estate. (8)

A man is not either legally or morally bound to maintain his mother-in-law. No more is his widow who is not justified in alienating her husband's estate in order to maintain her. (9)

(1) *Amjad Ali v. Moniram*, 12 C. 52.

(2) *Bafansi v. Umerbai*, 9 I. C. (S.) 997.

(3) *Gnalimetta v. Bollosu*, 23 M. L. J. 233; 16 I. C. 189.

(4) *Vellappa*, (1912) 1 M. W. N. 196; 13 I. C. (M) 640.

(5) *Oadey Singh v. Phoolchand*, 5 N. W. P. H. C. R. 197 (200).

(6) *Hurry Mohun v. Ganesh*, 10 C. 828; *Amiad Ali v. Moniram*, 12 C. 52; *Debi Dayal*

v. Bhan Pertap, 81 C. 498 (448).

(7) *Prasaj Narain v. Ajodhya Pershad*, 7 B. S. R. 602; 8 I. D. (OS) 456; *Chumnilal v. Gunput Lal* 16 W. R. 52 (58); *Chudammal v. Nadamuni*, 6 M. L. T. 158; 8 I. C. 77; *Rustam v. Motising*, 18 A. 474.

(8) *Chumnilal v. Gunput Lal*, 16 W. R. 52; *Makhan Lal v. Gayan Singh*, 38 A. 255.

(9) *Arjan Singh v. Indar Singh*, (1911) P. L. R. 288; 12 I. C. 429.

2407. Marriage gifts.—The marriage of unmarried daughters and sisters
 Cl. (11), (12.) is an obligation which would constitute legal necessity in
 the hands of the heiress (§§ 921, 922).

Customary presents such as the gift of a reasonable portion of the immoveable property to the daughter ⁽¹⁾ or to the son-in-law ⁽²⁾ on the occasion of their marriage or *Gowna* or *Dwiragaman* or second marriage ⁽³⁾ and the like, are other examples of necessity already set out (§§ 1080-1082).

Gifts on these occasions are supported not on the ground of their spiritual necessity but as customary and common. ⁽⁴⁾

The term marriage in this connection includes betrothal, ⁽⁵⁾ marriage ⁽⁶⁾ and the *Gowna* ⁽⁷⁾ and all the ceremonies antecedent and subsequent which attend it.

But the expenses of the marriage of a daughter's daughter ⁽⁸⁾ or a nephew ⁽⁹⁾ is not a legal necessity.

2408. Other ceremonial gifts.—Small customary gifts on other ceremonial occasions are sanctioned by the usages of all communities. Such is the gift of a small area of land on the occasion of the father's ⁽¹⁰⁾ or the performance of the mother's *S'radh*. ⁽¹¹⁾

259. (1) The heiress may surrender her entire interest to the next reversioner, or to any one or more of such reversioners with the consent of the rest, provided that where the next reversioner is a female it may be surrendered to the male reversioner next in order with her consent.

(2) Such surrender does not affect the validity of her prior alienations.

Synopsis.

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|---|--|
| (1) <i>Right of heiress to relinquish or surrender her estate</i> (2409). | not affected (2413). |
| (2) <i>Requirements of a valid surrender</i> (2409-2401). | (7) <i>Surrender and re-conveyance, effect of</i> (2413). |
| (3) <i>Surrender must relate to entire interest in inherited estate</i> (2411). | (8) <i>Surrender for consideration</i> (2414-2417). |
| (4) <i>Prior dispositions by heiress not affected</i> (2412). | (9) <i>Surrender must be in favour of next reversioner or in favour of remote reversioner with the consent of intermediate reversioners</i> (2418-2419). |
| (5) <i>Position of heiress after surrender</i> (2413). | |
| (6) <i>Right to her own absolute property</i> | |

(1) *Churaman v. Gopi*, 13 C. W. N. 99. (598).

(2) *Ramasami v. Vengidusami*, 22 M. 113.

(3) *Damodur v. Senabuttu*, 8 C. 537.

(4) *Tatayya v. Ram Krishnamma*, 31 M. 288 (291).

(5) *Ganpat v. Tulasi*, 86 B 88.

(6) *Damodur v. Sanabuttu*, 8 C. 537.

(7) *Churaman v. Gopi*, 37 C 1.

(8) *Narainbati v. Ramdhari*, 20 C. W. N. (Pat) 734.

(9) *Bhura v. Ramrao*, 8 N. L. R. 154; 17 I. C 866.

(10) *Vupuluri v. Garimilla*, 34 M. 288; but see *Narainbati v. Ramdhari* 20 C. W. N. (Pat) 734; 1 Pat. L. J. 81.

(11). *Srimohan v. Bribeary* 86 C 758.

2409. Analogous Law.—It had been held in a long series of cases of the Calcutta High Court ⁽¹⁾ that it was competent to an heiress to relinquish, resign or surrender her estate in favour of her next reversioner. This view was challenged in other cases of the same and other courts on the ground that a Hindu widow could not by uniting with one of many others having identical interests in expectancy on the happening of a certain event anticipate that event and convert such individual expectancy into an immediate estate of full proprietorship. If this were permissible, it would virtually confer upon a Hindu widow the right of directing the succession to her husband's property in her life-time when in law it only happens upon her death. ⁽²⁾ But the Privy Council preferred to follow the majority of the Calcutta cases and said, "It may be accepted that, according to Hindu Law the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life-estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life-estate, is a practical check on the frequency of such conveyances."⁽³⁾

2410. In other words there can be no surrender unless it relates to be whole interest in the whole estate. ⁽⁴⁾ The effect of such surrender is to vest it in the next heir the inheritance which he would take if she at the time were to die. ⁽⁵⁾ A surrender by a widow to those who are entitled to the estate is looked upon in the Hindu law as meritorious, since it restores the property in its natural channel. ⁽⁶⁾ A surrender is not an alienation ⁽⁷⁾ and it does not require the presence of consideration or legal necessity to support it. ⁽⁸⁾

The various requirements of such surrender are noted in the section but require to be more particularly emphasized.

2411. Surrender must relate to the entire interest.—In the first place the surrender must relate to the entire interest then vested in the heir. It can-

(1) *Pratap v. Joy Monas*, 1 W. R. 98; *Shama Soonduree v. Shurut Chunder*, 8 W. R. 500; *Kishen Gir v. Busgeet*, 14 W. R. 379; *Gunga Pershad v. Shumbonath*, 22 W. R. 898; *Noferdoss v. Modhu Sundari*, 5 C. 792; *Hemchunder v. Sarnomoyi*, 22 C. 354 (351); *Mona v. Balaji*, 19 B. 809 (820); *Pium v. Babaji*, 84 B. 165; *Basanganda v. Basanganda*, 39 B. 87; *Moti v. Lal Das*, 41 B. 98; *Bhupal v. Lachman*, 11 A. 253; *Bakhtawar v. Bhagwana*, 32 A. 176; *Sham Rathi v. Jaichha*, 39 A. 520.

(2) *Ramphal v. Tula Kuari*, 6 A. 116 F. B. To the same effect *Madan Mohan v. Puran Mal*, ib. 288; *Duli Singh v. Sundar Singh*, 14 A. 377; *Raj Kishore v. Durga Charan Lal*, 29 A. 71 (75); *Humsaraj v. Monghibai*, 7 Bom. L. R. 622; *Jadumani v. Saroda*, 1 Boul. 120; *Shama Soonduree v. Shurut Chunder*, 8 W. R. 500; *Noferdoss v. Modhu Sundari*, 5 C. 792; *Gopeenath v. Kally Dass*, 9 C. 225; *Ram Chunder v. Hari Nath*, 9 C. 163; *Nobo Kishore v. Hari Nath*, 10 C. 1102 F. B. (but the decision was rested on precedents favouring the rule) *Hemchunder v. Surnamoyi*, 22 C. 453;

Ananda v. Indra Bhusan, 12 C. W. N. 49 all which must be now taken as overruled by the Privy Council in *Behari Lal v. Madho Lal*, 19 C. 286 P. C.; *Bajrangi v. Manokarnika*, 30 A. 1 P. C.

(3) *Beharilal v. Madholal*, 19 C. 286 (241) P. C.; *Bajrangi v. Manokarnika*, 30 A. 1 P. C.

(4) *Narudamuthu v. Srinivasan*, 21 M. 128 F. B. *Rangasami v. Nachiappa*, 23 C. W. N. 777 (808); 42 M. 523 (586) P. C.; *Debi Prasad v. Golap*, 40 C. 721 F. B.

(5) *Noferdoss v. Modhu Soondari*, 5 C. 782 (785, 736).

(6) Per Jackson, J. argued in *Noferdoss v. Modhu Soondari*, 5 C. 792 (784); *Moti v. Lal Das*, 41 B. 98 (103); *Nachiappa v. Rangasami*, 28 M. L. J. 1 (8); 26 I. C. 757; *Chinnaswami v. Appuswami*, 42 M. 25.

(7) *Mulugu v. Mudigonda*, 81 M. L. J. 406; 86 I. C. 407; *Munugarra v. Munugarra*, 84 M. L. J. 229; 42 I. C. 989.

(8) *Moti v. Lal Das*, 41 B. 98 (105); *Sham Rathi v. Jaichha*, 39 A. 520.

not be made reserving any portion by the widow. (1) As observed by the Privy Council this is some security to the widow from whom no reversioner can obtain the estate piecemeal. Of course, the fact that the heiress cannot surrender any but the whole estate does not limit her right of alienation. So where a widow sold half the estate to the then reversioner and he executed an instrument giving her the other half of the property, the court upheld the transaction by which each obtained absolutely a moiety of the estate. (2) But it is submitted that whatever might be the effect of such transfer *inter partes*, it could not affect the ultimate reversioner or alter the heiress's estate into an absolute estate. Though the doctrine of acceleration of the inheritance by surrender by the widow primarily refers to a male, it makes no exception against a female reversioner and the widow may consequently surrender her estate to her daughter, in the form of a gift (3) or otherwise, provided it conforms to the rule here stated. But this does not preclude her from stipulating for and reserving some property for her own maintenance. (4)

2412. Prior dispositions unaffected.—It goes without saying that surrender takes effect as from the moment it is made and has no retrospective effect upon any prior alienation made by the heiress.

The questions of surrender and alienation have in fact to be regarded from two entirely different standpoints. The question in the one case is—was it the surrender of the entire interest in the entire estate to the nearest reversioner, in which case the question of necessity is immaterial: while the question in the other case is—was the alienation justified by necessity, it being immaterial who the alienee was and whether the property alienated was the whole or only a part of the woman's estate (5).

2413. Position of the heiress after surrender.—The doctrine of surrender owes its origin to the desire to relieve women of the management of property. (6) The surrendering heiress is sometimes spoken of as having committed suicide, or as being civilly dead. These are mere figures of speech and do not involve the assumption that the heiress has thenceforward no civil rights, or that she was ever in the position of one who suffers civil death, as by her remarriage, or abandonment of worldly pursuits. "A woman who surrenders is clearly not civilly dead for any other purpose than for the purpose of bringing in the next reversioner as heir at once to her husband's estate. She continues to own her own stridhan and the obligation of all persons who take her husband's estate to maintain her which is an absolute obligation thrown by the Hindu law, cannot be destroyed by her surrender thereof. She does not become a Sanyasi, because she surrenders her husband's estate. She is entitled to acquire properties, to retain her stridhan and to bring suits and she remains competent to enter into contractual and other legal obligations" (7)

(1) *Behari Lal v. Madho Lal*, 19 C. 286 P. C.; *Nobo Kishore v. Hari Nath*, 10 C. 1102 F. B.; *Kanu Ram v. Kashi Chandra*, 14 C. W. N. 226; 2 I. C. 660; *Mohananda v. Baikantha*, 45 I. C. (C) 872; *Rangappa v. Kampti*, 31 M. 866 (869, 870); *Mulugu v. Mudigonda*, 31 M. L. J. 406; 96 I. C. 407; *Rangasami v. Nachiappa*, 42 M. 523 (P. C.) *Janaki v. Debi Prasad*, 2 Pat. L. J. 490.
(2) *Kanu Ram v. Kashi Chandra*, 14 C. W. N. 226; 2 I. C. 660.

(3) *Rup Ram v. Rewti*, 32 A 582; *Gowri v. Gopal* 25 I. C. 508.

(4) *Chinnaswami v. Appaswami*, 35 M. L. J. 512; *Kareti v. Kareti*, 24 M. L. J. 533; *Challa v. Palery*, 31 M. L. J. 446.

(5) *Rangasami v. Nachiappa*, 42 M. 523 (P. C.)

(6) *Nachiappa v. Rangasami*, 28 M. L. J. 1 (8); 26 I. C. 757.

(7) *Chinnaswami v. Appaswami*, 42 M. 25.

In this case the surrender by the widow and a reconveyance of the moiety were made on the same day and it was not pleaded, though sought to be argued for the first time in appeal, that they were parts of the same transaction, which the court did not permit. But it is clear that the two contemporaneous deeds could not be treated as independent transactions. When it is so, there is nothing to prevent the reversioner from conveying an absolute estate to the heiress but of property surrendered to him. ⁽¹⁾ And even where he conveys it as a part of the same transaction both he and his legal representative claiming through him would be equally estopped. ⁽²⁾ The principle of this case has been carried even further in another case in which it has been held that where a widow conveys the whole of her limited estate to the next reversioner in consideration of an undertaking by such reversioner that he would reconvey a portion of such property to a person named by the widow, the conveyance is valid and is not vitiated by such agreement; and other reversioners cannot impeach the title of such reversioner and that of the person to whom the property is thus conveyed. ⁽³⁾ This view is supported on the ground that the title having vested in the reversioner, it was open to him to convey any portion of his estate to any person he liked and the fact that he had previously agreed to convey it to the widow's nominee as a consideration for his own surrender did not vitiate his conveyance.

The rule that the surrender must comprise the entire estate does not mean surrender of all interest in some of the estate though in favour of the whole body of the reversioners. ⁽⁴⁾

2414. Surrender for consideration.—It has already been seen that no consideration is required to support this surrender. But the question remains whether the payment of consideration vitiates it. It has been held not, provided it is not a device to divide the estate with the reversioner. ⁽⁵⁾ As Shankaran Nair, J., said: "I am unable to agree with the view that the validity of the surrender of her interest or title to the reversioner depends upon the motive of the widow or upon any question of any benefit that may accrue to her or to any other person. Such might have been the case if the widow were holding the property in trust for any purpose or for the benefit of the actual reversioner at the time of her death." ⁽⁶⁾ In other words, the estate is her own and there is nothing to prevent her from surrendering it upon terms. For instance, there is nothing wrong in her surrendering the estate subject to her maintenance being charged on the estate so that it is enforceable even when the estate has passed to a transferee. ⁽⁷⁾ By surrender she may convert his estate into an annuity ⁽⁸⁾ in which case subject to the payment of an annuity the transferee would acquire an absolute interest. ⁽⁹⁾

2415. This is the inevitable result of the concession of such power. As observed by Garth, C. J., who even doubted the rule: "But there is no concealing the fact that although such a relinquishment may be made by a

(1) *Hem Chunder v. Sarnamoyi*, 22 C. 354; *Rangappa v. Kamti*, 31 M. 866 F. B.

(2) *Rangappa v. Kamti*, 31 M. 866 F. E.

(3) *Challa v. Palury*, 81 M. 446.

(4) *Debi Prasad v. Golap*, 40 C. 721 F. B. *Suresur v. Mohesh*, 20 C. W. N. 142; *Marudamuthu v. Srinivasa*, 21 M. 128 (162); *Rangappa v. Kamti*, 31 M. 866 (870); *Rangasami v. Machiappa*, 28 C. W. N. 777 (809) P. C.; *Corira Kanuram v. Kashi*, 14 C. W. N. 226. Must be considered as overruled by the

Privy Council in the last cited case.

(5) *Rangasami v. Nachiappa* 28 C. W. N. 777 (809) P. C.

(6) *Challa v. Palury*, 81 M. 446 (450).

(7) *Chamaru v. Sonakoer*, 14 C. L. J. 808; 11 I. C. (C) 801 and cases cited; *Chinnaswamy v. Appaswamy*, 42 M. 25.

(8) *Bejoy v. Girindra*, 8 C. L. J. 458.

(9) *Hem Chunder v. Sarnamoyi*, 22 C. 354 (861).

widow in perfect good faith and even under such circumstances as to be a meritorious self-sacrifice, it is nevertheless possible, and indeed it not unfrequently happens that a widow who is anxious to turn her husband's estate into money may arrange with the next heir of her husband for the time being to alienate the estate to some third person for their mutual benefit. They may both share in the profits of such transaction, and it sometimes happens that in this way the estate is alienated from the husband's family so that the person who would be the next male heir at the widow's death is virtually deprived of his rights. But if it is once established as a matter of law that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation which the widow and the next heir may thus agree to make. And it seems equally impossible to deny that for a long series of years this court has treated and considered such alienations as lawful. (1)

2416. It then follows that any contract between the heir and the reversioner for the reservation or transfer of any property or benefit is not illegal, and where the transferee assigns any land to the heir the right in which and the terms whereupon she would take the lands must depend upon the terms of the transfer. If they convey to her an absolute estate, she will take it in that right. (2)

2417. But there are obvious limits to this rule. The surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner. (3) The position whether it is the one or the other must depend upon the quantum of consideration and other circumstances of each case.

2418. It must be in favour of the next reversioner.—Secondly, such surrender can only be made in favour of the next reversioner and not in favour of any of the reversioners near or remote (4) except that there is no objection to her surrendering her estate in favour of the second reversioner with the consent of the first reversioner. (5) The position is the same as if the heiress had surrendered in favour of the first reversioner and he in his turn had assigned his interest in favour of the second reversioner. So a gift to the daughter's son with the consent of the daughter has been upheld. (6) But the contrary has been laid down by the same court in several cases (7) in some of which the language used is fatal to her very right. (8) The question was considered by the Calcutta High Court who held the rule to be well established that "the widow may convey to the next reversioner, or to a third party with the consent of the next reversioner, the whole or any portion of the estate, and the transferee will acquire an absolute interest." (9)

So it has been held in Madras that the surrender need not be definitely to the next heir if that next heir agrees to be passed over. (10)

(1) *Nolo Kishore v. Hari Nath*, 10 C. 1102 (1108) P. C.

(2) *Suresur v. Mohesh*, 20 C. W. N. 142.

(3) *Rangasami v. Nachiappa* 28 C. W. N. 777 (809) P. C.

(4) *Hem Chunder v. Sarnamayi*, 22 C. 354.

(5) *Pratapchunder v. Joy Monoo*, 1 W. R. 98; *Basangavda v. Basangavda*, 89 B. 87 (99).

(6) *Raja Dei v. Umed Singh*, 84 A. 237; *Chinnaswamy v. Appaswami*, 42 M. 25.

(7) *Ramphal v. Tulakuari*, 6 A. 116 F. B.; *Mada Abdulla v. Iram Lal*, 84 A. 129 (surren-

der in favour of sister's son with the consent of the next reversioner void) but the same bench contra in *Raja Dei v. Umed Singh*, ib. 207.

(8) *Ramphal v. Tula Kuari*, 6 A. 116 (120) F. B.; *Madan Mohan v. Puran Mal*, ib. 282.

(9) *Hem Chunder v. Sarnamayi*, 22 C. 354 (861); *Ananda v. Indra Bhusan*, 12 C. W. N. 49.

(10) *Mulugu v. Mudigonda*, 31 M. L. J. 406; 36 I. C. 407; *Satyalakshmi v. Jagannadham*, 84 M. L. J. 229; 48 I. C. 989; *Chinnaswami v. Appaswami*, 42 M. 25.

2419. At any rate since the surrender in favour of the next reversioner is unobjectionable there is nothing to prevent the surrender being made in favour of a female reversioner, such as the daughter. ⁽¹⁾

260. (1) An alienation for value or otherwise supported by legal necessity of any property made by the heiress with the consent of the next male reversioner will be presumed to be valid and supported by legal necessity.

(2) But where the alienation relates to her entire interest in the estate and is consented to by all her next reversioners it will be conclusive against the actual reversioners when the succession opens.

Explanation :—(1) Such consent may be express or implied and may be given contemporaneously with or subsequently to the transaction.

(2) No consent is valid —

- (a) if it is given without full knowledge of the nature and effect of the transaction,
- (b) if it is given or obtained collusively or fraudulently with intent to defeat the claims of a future reversioner;
- (c) or if it is not given in good faith with intent to confirm the transaction.

Synopsis.

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|--|---|
| (1) <i>Proof of legal necessity</i> (2420). | (11) <i>Recitals as evidence of representation in old alienations</i> (2429). |
| (2) <i>Consent of reversioner, effect of</i> (2421-2423). | (12) <i>Power to consent, not to be delegated</i> (2432). |
| (3) <i>Whose consent necessary ?</i> (2420). | (13) <i>Gift by widow, not validated by consent</i> (2433). |
| (4) <i>Presumption of necessity from consent of reversioner</i> (2423). | (14) <i>Consent of female reversioner immaterial</i> (2435). |
| (5) <i>Surrender of estate</i> (2424). | (15) <i>Consent of guardian of minor reversioner</i> (2436). |
| (6) <i>Consent and ratification</i> (2425). | (16) <i>Alienation otherwise valid, not vitiated by absence of proper consent</i> (2437). |
| (7) <i>Consent to be intelligent</i> (2426). | (17) <i>Estoppel by consent</i> (2438). |
| (8) <i>Bona-fide consent required</i> (2430). | |
| (9) <i>No presumption from consent when next reversioner is himself the transferee</i> (2431). | |
| (10) <i>Value of recitals in deeds</i> (2429). | |

2420. Analogous Law.—This section lays down a rule, which after

some deviations, has now become settled. It rests on the principle universally recognized ⁽¹⁾ that since a widow is entitled to relinquish her estate to the next male reversioner, it follows as a necessary corollary, that whatever she may validly relinquish in his favour she may equally alienate with his consent. ⁽²⁾ And so in a case decided in 1861 the Privy Council said: "It may be taken as established that an alienation by her (the widow) which would not otherwise be legitimate may become so if made with the consent of her husband's kindred."⁽³⁾ Referring to this rule in another case they said "Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu Law."⁽⁴⁾ In a later case this was explained to require "that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained. though there may be cases in which special circumstances may render the strict enforcement of this rule impossible."⁽⁵⁾ In another case the value of such consent was held to lie in raising merely presumption in favour of the validity of the transaction. "The law relating to the dealings of a Hindu widow with her husband's estate which devolves on her in default of issue is now too well settled to need a prolonged consideration. To be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow or an alienation effected by her can be supported only by proof *aliunde* that such debt was contracted or such alienation was made for valid and legal necessity and the onus of establishing such necessity rests heavily on the person who claims the benefit of transactions with a Hindu widow or other females taking similar estates. The requirement of the law may however, be fulfilled by proving the consent or concurrence of the reversioners to or in the transactions."⁽⁶⁾ This view was reiterated in another case in which they said: "As against them (*i.e.*, the reversioners) it is a fair inference from their conduct that they believed that the arrangement had been made in good faith and under such circumstances of necessity as would give it validity according to Hindu law and it has always been a feature of Hindu Law as administered by this Board to attach great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman as affording evidence that the alienation was under circumstances which rendered it lawful and valid"⁽⁷⁾.

(1) *Biyya v. Unpeorna*, 1 B.S.R. 215; 6 I.D. (O.S.) 159; *Nundkoomar v. Rainiduranaraoen*, 1 B.S.R. 849; 6 I.D. (O.S.) 256. *Bhuvani v. Solukhan*, 1 B.S.R. 481; 6 I.D. (O.S.) 815. *Hemchund v. Tara*, 1 B.S.R. 481; 6 I.D. (O.S.) 853; *Mohun Lal v. Siramunnee*, 2 B.S.R. 40; 6 I.D. (O.S.) 989; *Roopchurn v. Anundlal*, 2 B.S.R. 45, 6 I.D. (O.S.) 892; *Gocul Chund v. Rajrao*, 2 B.S.R. 218, 6 I.D. (O.S.) 521; *Brindaban v. Bishun Chand*, 4 B.S.R. 180, 7 I.D. (O.S.) 184; *Hafzoomissa v. Radha bindo* (1856) S. D. A. B. 595; *Jodomoney v. Sadaprosomo*, 1 Boul 120; 8 I.D. (O.S.) 72; *Raj-kristo v. Kishoree Mohun*, 3 W.R. 14 (17) cases cited; *Kishan Gir v. Busgeet*, 14 W. R.

379; *Noferdose v. Modhu Scondari*, 5 C. 782; *Nobokishore v. Harimath*, 10 C. 1102; F. B; *Parbhu Lal v. Mylne*, 14 C. 401 (418).

(2) *Rangasami v. Nachiappa* 28 C. W. N. 777 (807) P. C.

(3) *Collector v. Cavalry*, 8 M. L. A. 599 (551)

(4) *Raj Lukhee v. Gokool*, 18 M. L. A. 209 (228).

(5) *Bajrangji v. Manokarnika*, 30 A. 1 (21) P. C.

(6) *Hari Kishen v. Kashi Pershad*, 42 C. 876 (885).

(7) *Bijoy Gopal v. Girindra*, 43 C. 798 (805) P. C.

2421. In another case they formulated the following proposition :—When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then if the necessity is not proved *aliunde* and the alienee does not prove enquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to question the transaction will be held to afford a presumptive proof which if not rebutted by contrary, proof will validate the transaction as a right and proper one.⁽¹⁾ This case now settles that the consent need not be of all reversioners, but of only the presumptive reversioners. A consent of a remote reversioner creates no presumption of propriety.⁽²⁾ The alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender.

2422. In no case have the Privy Council insisted that the alienation should extend to the entire estate, or that the consent of reversioners is conclusive of its validity. All that they have laid down is that it is a strong *prima facie* evidence of its validity but that the strength of it must vary according to the circumstances of each case.

2423. That the presumption so raised may be rebutted was laid down by a Full Bench of the Calcutta Court who held that "the alienation by way of mortgage by a Hindu widow as heiress of a portion of the estate of her deceased husband, without proof either of legal necessity or of reasonable enquiry, and honest belief as to its existence, but with the consent of the next reversioner, for the time being, will be valid and binding on the actual reversioner if the presumption of legal necessity or of reasonable enquiry and honest belief raised by such consent is not rebutted by more cogent evidence."⁽ⁱ⁾ And on the question of alienations generally Sir Lawrence Jenkins, C. J., summed up the law as follows :—"To uphold an alienation by a widow of her deceased husband's estate where she is his heir, it should be shown (i) that there was legal necessity ; or (ii) that the alienee after reasonable enquiry as to the necessity acted honestly in the belief that it existed, or (iii) that there was such consent of the next heirs as would raise a presumption, either of the existence of necessity, or of reasonable inquiry, and honest belief as to its existence, or (iv) that there was a consent of the next heirs to an alienation capable of being supported by reference to the theory of the relinquishment of the widow's entire interest and consequent acceleration of the interest of the consenting heirs. Where any one amongst the first three positions is established, the alienation may be of the whole or any part of the husband's estate but where the fourth alone is proved then the alienation must be of the whole.⁽⁴⁾ This view is in accord with many of the previous cases of the same⁽⁵⁾ and of other Courts.⁽⁶⁾

(1) *Rangaswami v. Nachiappa*, 23 C. W. N. 777 (809) P. C.

(2) *Gur Narayan v. Sheolai*, 36 M. L. J. 68 P. C.

(3) *Debi Prasad v. Golap*, 40 C. 721 (753) F. B. Approved in *Rangasami v. Nachiappa*, 23 C. W. N. 779 (809) P. C.

(4) *Id* pp. 752, 753.

(5) *Hem Chunder v. Surnamoyi*, 22 C. 354; *Pulin Chandra v. Bolai*, 35 C. 939;

Debi Prasad v. Golap, 40 C. 721 F. B. . . .

(6) *Moro v. Balaji*, 19 B. 809 (820); *Pile v. Babaji*, 34 B. 165; *Basangavda v. Basangavda*, 39 B. 87; *Moti v. Laldas*, 41 B. 93; *Bhupal v. Lachman*, 11 A. 253; *Bakhwar v. Bhagwana*, 32 A. 176; *Sham Raihi v. Jaichha*, 39 A. 520; *Hunraj v. Moghibai*, 7 Bom. L. R. 622; *Ramulu v. Andalammal*, 30 M. 145 (149); *Rangappa v. Kamli*, 31 M. 366 (379); *Chinnaswami v. Appaswami*, 42 M. 25.

2424. Surrender of estate.—The rule stated in clause (1) is now settled

CI. (2)

by the Privy Council, that in this clause is supported by a Full Bench decision of the Calcutta High Court. (1) The difference between the two classes is the difference of degree. The alienation if partial and consented to by only some of the reversioners, would be presumed to be valid but the presumption is one of fact and as such rebuttable and may be rebutted by showing the contrary. On the other hand where the alienation relates to the entire estate and is consented to by all the reversioners the presumption is then one of law and becomes conclusive not only against the consenting reversioners but also those who are the next reversioners when the estate falls in. It may be asked why should not the same rule apply to a partial alienation if consented to by all the reversioners. The reason given is that such a relinquishment must relate to the entire estate and this derivative rule cannot relate to anything less.

2425. Consent and ratification.—The consent requisite to create the presumption or to validate the transfer may be express or implied; and given at the time of the transfer or the same may be ratified by any subsequent act or acquiescence *omnis ratihabitio retrotrahitur et mandato priori acquiparatur.* (2) The question of consent is one of fact and one which depends upon the circumstances of each case. Such consent may be given by the reversioner joining in the conveyance as a consenting party (3) or he may execute an independent consent deed (4) or by attesting the deed noting thereon that he approved of the transfer (5) or by other evidence showing that the reversioner being aware of the transfer, had either consented to or acquiesced in it.

The mere fact that the reversioner has attested the deed is held by the Privy Council to be no proof of consent, since it is no proof that the attester knew of the contents of the deed (6).

2426. Intelligent consent.—Since the reversioner's consent dispenses

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with the proof of legal necessity it follows that in order to have that effect his consent must be given after full knowledge of the facts and an intelligent appreciation of its nature and effect upon his own right. A person who is too young (7) or too old (8) to appreciate the nature and effect of his consent is naturally out of the question. So the Privy Council said "In order to raise such a presumption the consent of the deceased's kindred to his widow's or daughter's alienation must be shown to be given with a knowledge of the effect of what they were doing and an intelligent intention to consent to such effect." (9) The facts of the case in which this passage occurs were these. One Khairati Lal died leaving

(1) *Debi Prasad v. Golap* 40 C. 721 F. B.

(2) "A subsequent ratification (or confirmation) has a retrospective effect and is equivalent to a prior command" cited and followed in *Bajrangi v. Manokarnika*, 30 A. 1 (21) P. C.; *Narayana v. Rama*, 38 M 886 (402).

(3) *Kissen Geer v. Busgeet Roy*, 14 W. R. 379.

(4) *Mohan Lal v. Siromonee*, 2 B.S.R. 401; *Bajrangi v. Manokarnika*, 30 A. 1 P. C.

(5) *Madhu Sudan v. Mohendra*, 2 Bol. 40.

(6) *Hari Kishen v. Kashi Pershad*, 42 C. 876 P. C.; *Banga Chandra v. Jagat Kishore*,

44 C. 186 (199) P. C.

(7) *Sham Sundar v. Achan Kuar*, 17 A. 125; O. A. 21 A. 71 P. C.

(8) *Deputy Commissioner v. Anseri*, 9 O.C. 104 (An alienation by a widow aged 40 with the consent of the next reversioner aged 85 held to be worth nothing).

(9) *Achan Kuar v. Thakurdas* 17 A. 125 affirmed O. A.; *Sham Sundar v. Achan Kunwar*, 21 A. 71 (18) P. C.; *Hari Kishen v. Kashi Pershad*, 42 C. 876, 886 P. C.

him surviving his daughter Achan Kuar and her son Inayat. Achan succeeded to her father's estate which her husband Lalji managed for her and otherwise represented her under a power of attorney executed in his favour.

As such, Achan, her mother Hulas Kuar and her son Inayat joined with the husband in executing one mortgage for Rs. 10,000 on the 2nd December 1877 and the same party except Hulas Kuar executed another mortgage on 1st April 1881 for Rs. 20,000 on foot of which the mortgagee sued the daughter and her son's whose execution was relied on to raise a presumption in favour of their validity. The Privy Council found that Achan Kuar was a pardanashin and Inayat just of age who was alleged to have signed the deeds because filial duty prevented him from disobeying his father's order. Their Lordships held that Inayat's signature was given when he had not sufficient maturity of understanding to judge of the nature of his act, that Achan was a pardanashin and it was on the plaintiff mortgagee to prove that the mortgage was executed for legal necessity. He relied on the presumption which had failed and apart from it he had given no evidence. The plaintiff contended that the question of legal necessity was not raised or put in issue but their Lordships observed that it was for the plaintiff who claimed from a limited owner to plead and prove all circumstances legalising his mortgage and that he had failed to prove either that the pardanashin mortgagor had executed them after the appreciation of their effect or that they were supported by legal necessity.

2427. This case then shows that the presumption arising under the rule is only one which the court may make due regard being had to all the circumstances of the case and that where it appears that the executant was a pardanashin and the consenting reversioner a man just come of age and not free to form an independent judgment it will refuse to act on the presumption and call upon the alienee to establish his case by proof of legal necessity. As their Lordships observed in another case, "when a stringent equity arising out of an alleged consent by the reversioner is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature or the dealings they concurred in binding their interest and that such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony". (1)

2428. In this case the estate of one Shyamlalsingh was inherited by his widow Nawab Kumari who mortgaged them by two deeds to one Bhagat who obtained a decree in execution of which he purchased them. The plaintiffs who were Shyamlal's brother's sons and as such Nawab Kumari's reversioners sued the mortgagee purchaser for possession of the properties on the ground that the mortgagor had no right to alien them beyond her own lifetime. The defence was legal necessity and consent by the reversioners. As to the latter, the only fact relied on was that some of Shyamlal's nephews had purchased the stamp and wrote out the mortgagor Nawab Kumari's name and that two of them were attesting witnesses to the deed. But the nearest reversioner at the time was Shyamlal's brother Raghubir and the acts of the nephews were held to be insufficient to create the presumption of legal necessity as there was no act done by the nephews from which their intelligent concurrence could be inferred

(1) *Hari Kishen v. Kashi Pershad*, 42 C. 876 (886) P. C.

(1) But the case would probably have been differently decided if the nephews were the next reversioners.

2429. Value of recitals. Recitals in deeds are by themselves not sufficient evidence of legal necessity, though they are evidence as between the parties to the conveyance and those who claim under them. If they remain unchallenged for a long time by persons whose interest is adversely affected by them they would furnish evidence upon which the court may find the fact as more consistent with probability. (2) Such was the case of one Brij Narain who died childless in 1845 leaving him surviving his two widows G and J. G died in June 1890 and J in 1902. During their lives they disposed of all the properties inherited by them from their husbands by deeds executed at intervals which all contained recitals of facts which if true justified the sales. On the death of J the plaintiff a remote reversioner sued for possession of the estate challenging the sales, two of which he had himself attested, as unsupported by legal necessity of which the recitals were the only material evidence. Referring to them the Lord Chancellor said: "But in such a case as the present their Lordships do not think that these recitals can be disregarded, nor, on the other hand, can any fixed and inflexible rule be laid down as to the proper weight which they are entitled to receive. If the deeds were challenged at the time, or near the date of their execution so that independent evidence would be available, the recitals would deserve but slight consideration and certainly should not be accepted as proof of the facts. But as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant facts have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance and cannot lightly be set aside; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction perfectly honest and legitimate when it took place would ultimately be incapable of justification merely owing to the passage of time." (3)

2430. Bona fide consent.—Again the consent to be given must be *bona fide* consent, that is to say, consent given with the object of validating a transfer as supported by legal necessity. The fact that the reversioner receives a consideration for so doing does not invalidate his consent though it may affect his *bona fides* and weaken the presumption otherwise arising as to the legality of the transfer. (4) And so far as the consenting reversioner is concerned he will be estopped. (5) But a consent given or obtained by collusion or fraud in order to validate a transaction otherwise invalid or unsupported by legal necessity is of no

(1) *Harikishen v. Kashi Pershad*, 42 C. 876 (885) P. C.

(2) *Banga Chandra v. Jagat Kishore*, 44 C. 186 (196) P. C.

(3) *Banga Chandra v. Jagat Kishore*, 44 C.

186 (196) P. C.

(4) *Bajrangi v. Manokornika*, 30 A. 1 P. C.; *Gangappa v. Subbu*, 6 M. L. T. 260. •

(5) *Muthuveera v. Vythilinga*, 32 M 206

effect and would not support the transaction even though consented to by the next reversioner. ⁽¹⁾ Since it is not the law that consent takes the place of legal necessity but is only evidence of its existence and if it appears or is shown that it did not exist, the presumption arising as to its existence can no longer alter the fact.

2431. From the fact that consent of the next reversioner raises a presumption of legal necessity it follows that such consent must be to an alienation made to some one other than the consenting reversioner himself. If the transfer is made in his favour he must either prove legal necessity or surrender and in the latter case, the alienation will be subject to the special rule governing it. (S. 259.)

2432. The power of the next reversioner to consent to a transfer is personal to him and cannot be delegated by him to his executor. ⁽²⁾

2433. Gift excluded.—Since consent is merely presumptive evidence of legal necessity it follows that consent cannot validate a transfer which is not supported plainly by legal necessity or is in favour of the next reversioner and does not amount to the accretion of inheritance. ⁽³⁾ Consequently a gift by the widow though consented to by the next reversioner cannot convey an absolute estate, ⁽⁴⁾ unless the gift itself is supported by legal necessity. Such for example is the gift by the mother on the occasion of the daughter's marriage which, as already stated, is supported by law as conducive to the spiritual benefit of the father and would then be good if consented to by the joint body of reversioners. ⁽⁵⁾

2434. Consent cannot legalize the creation of an estate unknown to the law. So where the widow and mother of the owner provided for the descent of their estate on their death to the natural brothers of the adopted son and the deed was consented to by the next reversioner it was held that his consent could not legalize the devolution of the estate in a line different from that prescribed by the law. ⁽⁶⁾

2435 Consent of female reversioner immaterial.—In order to let in the operation of this rule the consent must be of the next male reversioner, since females ordinarily take only a limited estate, and they cannot by their consent confer an absolute title which by reason of their sex they are themselves precluded from taking. ⁽⁷⁾ This exception applies equally to Bombay irrespective of

(1) *Kolandaya v. Vedamutu*, 19. M337.

(2) *Hayes v. Harendra*, 31 C. 698 (702).

(3) *Rangasami v. Nachinpa*, 36 M. L.J. 493 P. C. ; 50 I. C. 498 ; *Bhawani v. Chait Ram*, 39 A. 1 P. C. ; *Ramphal v. Tula Kuari*, 6 A. 116 ; *Bakhtavar v. Bhagvana*, 32 A. 176 ; *Abdulla v. Ram Lal* 84 A. 129 ; *Raja Dei v. Umed Singh*, 34 A. 207 ; *Humsraj v. Moghibai*, 7 Bom. L. R. 622 ; *Ananda v. Indra*, 12 C.W.N. 49.

(4) *Rangasami v. Nachiappa*, 36 M. L. J. 493 P. C. ; 50 I. C. 498 ; *Ismail v. Jagannath*, 19 I. C. (A) 258 ; *Abdulla v. Ram Lal*, 84 A.

129 ; *Abdulla v. Ram Lal*, 8 A. L. J. 13 (18)

Beni Madho v. Jagot Singh, 10 A. L. J. 33 ;

Pilu v. Bobaji, 84 B. 165.

(5) *Abhe sang v. Raisang*, 14 Bom. L. R. 602

(6) *Rup Narain v. Gopal*, 86 C. 780 (797) P. C.

(7) *Goolab Singh v. Puran Singh*, 14 M. I. A. 176 (186) ; *Madan Mohan v. Puran Mal* ; 6 A. 288 ; *Nobo Kishore v. Hari Nath*, 10 C. 1102 ; *Abinash v. Hari Nath*, 82 C. 62 ; *Bepin Behari v. Durga Charan*, 25 C. 1086 (1090) ; *Waliul Hasan v. Gopal*, 6 C.W.N. 905 (908).

the rule that certain females take there an absolute estate. (1) But though the next female reversioner may not consent to a surrender to a remote reversioner there is nothing to prevent her from joining the heiress in conveying the estate to her own son (2)

2436. When next reversioner a minor.—It would seem that when the next reversioner is a minor his consent may be obtained through his guardian (3) though in this case the minor on attaining majority may repudiate his guardian's consent.

2437. Alienation otherwise valid.—The rule here stated is only a rule of evidence dispensing with the proof of legal necessity where it may be presumed from the consent of the next reversioner. But where such consent fails the transaction may nevertheless be good and upheld by proof of legal necessity *aliundi*. And where it is good apart from legal necessity, it will be upheld even though the parties misunderstood their rights. So where the widow and mother of the last owner effected a partition providing for the devolution of their estate by inheritance on the natural brothers of the son whom the widow had adopted and this deed was signed by the next reversioner it was held that the deed was divisible, into two parts that which effected the division of the estate *inter parte* required no consent of the next reversioner and was therefore valid without their consent—but that which provided for the descent of the estate in a line different from that prescribed by law was a thing which the widow could not do either with or without the reversioner's consent which therefore did not estop him and who could therefore recover on his title as if he had never consented. (4)

An alienation by a female heir though not supportable as a surrender may yet be held binding as a compromise of a claim (5) or as a family settlement.

2438. Estoppel by consent—From the fact that consent is evidence of necessity and even creates a presumption, it is clear it is strong evidence against the consenting reversioners (6) and it may amount to an estoppel against them and their legal representatives. But since one reversioner does not claim through another, there is no privity of estate between the two even though they be related as father and son. (7) The widow entered into an arrangement with her three daughters and their sons dividing her entire estate among them and three daughters acted up to this arrangement for 38 years after which one of them sued the purchaser of the property from another on the the widow's death by her right of survivorship. Her claim was decreed by the Subordinate Judge but it was dismissed on appeal both the High Court and the Privy Council holding the plaintiff bound by the family arrangement to which she was a party and which she had not repudiated for so long (8) A reversioner is not estopped by taking the mortgage of the property from the heiress's donee since such mortgage is not consistent with his reversionary right. As the Privy

(1) *Varjiban v. Ghelji*, 5 B. 563; *Vinaya v. Govind*, 25 B. 129.

(2) *Chinnaiwami v. Appaswami* 43 M. 25.

(3) *Waliul Hasan v. Gopal*, 6 C. W. N. 905; *Chandi v. Jangi*, 8 O. C. 21; *Bhogaraju v. Adapalli*, 10 M. L. T. 179.

(4) *Rup Narain v. Gopal*, 36 C. 780 (797) P. O.

(5) *Suresur v. Mohesh*, 20 C. W. N. 142.

(6) *Krishna v. Sambasiva*, 11 I. C. 24.

(7) *Ramphal v. Ram Prasad*, 27 A. 37 (45) P. C.; *Rup Narain v. Gopal*, 36 C. 780 (797, 798) P. C.; *Govind v. Thayammal*, 28 M. 57; *Rangappa v. Kamti*, 31 M. 366 F. B.; *Muthuveera v. Vithilinga*, 32 M. 206; *Ananda Rao v. Bansi Nath*, 3 N. L. R. 85 (89); *Majhura v. Jagat*, 18 I. C. (O) 289; *Ram Krishna v. Tripurabai*, 13 Bom. L. R. 940.

(8) *Harolei v. Bhagwan Singh*, 50 I. C. (A) 812 P. C.

Council said: " Now at the time of the mortgage the plaintiff did not know whether he would ever be such a reversioner in fact as would give him a practical interest to quarrel with the deed of gift. Why should he not take all that the mortgagors could give or propose to give ? To hold that by so doing he barred himself from asserting his own title to part of what was mortgaged seems to their Lordships a quite unwarranted proposition." (1)

(1) *Rangasami v. Nachiappa*, 42 M. 528; 36 M. L. J. 432 P. C; 50 I. C. 468 (506).

CHAPTER XXV.

REVERSIONERS AND THEIR RIGHTS.

2439. Topical Introduction.—Under the English law of real property “a reversion is where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of the estate”. (1) It is so called because the land returns to the grantor on the determination of the particular estate. So if an estate in fee simple be granted to *A* for life and the remainder to *B*, the estate of *A* is the estate in possession and is called the “particular estate” (2) and *B*’s estate is called a “remainder.” (3) But if the grant be to *A* for life with no subsequent estate to another, the latter continues in the grantor and is called a reversion. (4) The ultimate estate is always an estate in fee simple and is called a remainder or reversion as it is granted out or continues in the grantor. (5)

2440. The term “reversioner” is born of Anglo-Indian law. It is not to be found in the Sanskrit texts. The term owes its origin to the close similarity between the rights of a Hindu reversioner and those of the English reversioner or remainderman. Even the Hindu widow was at one time spoken of as a life tenant; but it was soon perceived that she was not a tenant, but the owner and her estate not a tenancy, because there was no one else in whom the ownership could vest on her estate coming into being. The only person in whom the estate could possibly vest is the reversioner, but his estate was not a vested interest at all but a mere contingency, and that therefore full ownership must remain in the widow whose estate was one of complete ownership qualified by use. These qualifications were partly necessitated by reason of her sex and her presumed incapacity to exercise all the rights of ownership and partly by a feeling that the natural course of devolution of property was in the male line and that females though allowed to come in did so by sufferance on whose death the succession should revert to the natural line from which it had become diverted into the female line. This is the doctrine of reverter referred to by the Privy Council (6) and it explains both the term reversioners as also their rights.

2441. The female heiress being the owner of her inheritance and the reversioner having nothing but a *spes successionis*, this chapter deals with the extent of that interest and of the protective equity to which it is held entitled. The right of the reversioner to protect his reversion is now beyond dispute, but it is a right necessarily limited and should not be extended beyond the necessities of the case. The cases have defined with some particularity, its nature and scope.

2442. The woman’s estate acquired by inheritance or partition being thus limited, those interested in the reversion become naturally interested in the estate and it is clear that they are entitled to some protective equity during the continuance of the life estate as they are entitled to the definition of their rights upon its determination.

(1) Co. Litt. 22 (b).

(2) *Ib.* 143 (a).

(3) *Ib.* 49 (a).

(4) *Ib.* 22 (b).

(5) Fearn’s Contingent Remainders (9th Ed.) p. 8, note (4): 24, Hals S. 409.

(6) *Sheo Paritab v. Allahabad Bank*, 25 A. 476 (489) P. C.

Reversioner's Inte-
rest.

261. (1) So long as the estate is vested in the heiress the interest of her reversioners to succeed to it is a mere *spes successionis* and is incapable of being the subject of any contract, surrender or disposal.

(2) One reversioner does not derive his title from another but all derive their title equally from the last full owner.

Synopsis.

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| (1) <i>Nature of reversioner's right</i> (2443). | <i>successionis</i> (2446-2450). |
| (2) <i>Spes successionis</i> (2444). | (5) <i>Title of reversioner</i> (2451). |
| (3) <i>Not capable of transfer</i> (2445). | (6) <i>Limits of his rights</i> (2454). |
| (4) <i>Compromise relating to spes</i> | (7) <i>Estoppel of reversioner</i> (2455). |

2443. Analogous Law.—Both the clauses of this section are now settled by the decisions of the Privy Council. (1) As to the reversioner's right in relation to the heiress they said, "A Hindu reversioner has no right or interest *in praesenti* in the property which the female owner holds for her life. Until it "vests in him on her death, should he survive her, he has nothing to assign, or to relinquish or even to transmit to his heirs. His right becomes concrete only on her demise. Until then it is a mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto." (2)

2444. From the fact that the heiress takes a full estate though her interest is qualified it follows that the estate vests in her for the time being (3) and that the heirs expectant on her demise have no vested interest but merely a hope of succession. (4) This interest is a mere chance dependent upon their being alive at her death. As such it is not property and possesses none of its attributes. It cannot be transferred (5) or be the subject of any contract or devise.

2445. As the Privy Council observed "A Hindu reversioner has no right or interest *in praesenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign, or to relinquish or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is a mere *spes successionis*. His guardian, if he happened to be a minor cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto." (6)

(1) Cl. (i)—*Amrit Narayan v. Gaya Singh* 45 C. 590 (608) P.C. Cl. (ii)—See cases cited post.

(2) *Amrit Narayan v. Gaya Singh* 45 C. 590 (608) P.C.; *Gur Narayan v. Sheo Lal* 86 M.L.J. 68 P. C.

(3) *Janaki v. Narayanasami*, 39 M. 684, (687) P. C.; *Sham Sundar v. Achhanikuar*, 21 A. 71 P. C.

(4) *Nund Kishore v. Ram Tewary*, 29 C. 355 P. C.; *Janaki v. Narayanasami*, 39 M. 684 (687) P. C.; *Manickam v. Ramalinga*, 29 M. 120; *Chiruvolu v. Chiruvolu*, 29 M. 390 (399); *Muthuvara v. Vythilinga*, 32 M. 206; *Bhogaraju v. Adeipalli*, 35 M. 580; *Jagannath*

v. Dibho, 31 A. 58; *Hargawan v. Baijnath*, 32 A. 88; *Gumanan v. Jehangira*, 40 A. 518; *Parvati v. Govind*, 13 N. L. R. 187; 42 I. C. 387.

(5) S. 6 (a) Transfer of Property Act; *Nund Kishore v. Kanes Ram*, 29 C. 355; *Amrit Narain v. Gayasingh* 45 C. 590 P. C. *Manickam v. Ramalinga*, 29 M. 120; *Pindiprolu v. Pindiprolu*, 30 M. 486 (489) *Ramaswami v. Ramaswami* 30 M. 255 (262) *Miduapore Zemindari Co. v. Appaya sami* 41 M. 749 (776 777) contra *Ryehurn v. Peary Monee Maugh*, 622 is no longer sound.

(6) *Amrit Narayan v. Gaya Singh*, 45 C. 590 (608) P. C.

2446. But here the reversioner was a minor and reference to arbitration on his behalf a subterfuge to divide⁽¹⁾ the estate. But if the reversioner is adult and contracts with reference to his future rights, his contract would be indistinguishable from any other contract relating to future property, and though there cannot be a disposal of a non-existent property, there is nothing to prevent its being made the subject of a valid contract; though being a contract relating to a contingency, it has to be closely watched.

2447. So where the widow entered into an arrangement with the nearest reversioner for the time being by which she conveyed part of her widow's estate to the reversioner and he in turn purported to give her an absolute estate in the remainder, it was held to be an arrangement which did not bind the actual reversioner. (1) The reversioner has nothing to renounce⁽²⁾ and nothing that could be seized in execution of a decree against him. (3) In case of insolvency it is not his property which could be made available to his creditors (4) and an agreement amongst presumptive reversioners to divide it when it fell in, would at least be an agreement to divide future property which will convey no title, *in praesenti* (5) though being an agreement, it might be specifically enforced upon the estate becoming vested in the reversioner. So where the owner died leaving his estate to his widow *B* who devised to her daughter *C* who in her turn devised it to her husband *D*. On *B*'s death her reversioner *E* claimed the estate, but subsequently compromised their claim with *D* by which *D* gave certain lands to *E* in consideration of *E*'s withdrawing his claim to the rest of the property. On a suit by *B*'s mortgagee against *D* the question arose whether *D* was assignee or assignee of the reversion. In the former case he would take subject to the mortgage. In the latter he would not take any rights. It was held that *D*'s compromise with *E* may amount to *E*'s waiver of his reversionary right, but it could not amount to an assignment clothing *D* with the status of a reversioner and that therefore *D* could not dispute the validity of *B*'s mortgage on the ground of legal necessity. (6)

2448. So in another case on the death of a widow disputes having arisen between the husband's agnate and the daughter as to the latter's right to succeed to her mother, the question was referred to arbitrators, before whom the daughter's husband purporting to act as well for her as for her infant son *A* came to an agreement with the agnates, by which some moveable property and two small fractional shares of certain lands which stood in her and mother's name were given to her, and all right to the immoveable property of her father was abandoned in favour of the agnates. Her infant son was absolutely ignored in the compromise. The arbitrators passed an award on the basis of this compromise and latter on a decree was passed upon the basis of the award, in spite of the daughter's opposition. In a suit by *A*, *inter alia* for a declaration that the compromise did not bind him, it was held that the bargaining of the reversionary interest of *A* in the guise of an arbitration was ineffective and null and void; that even if

(1) *Meenatchi v. Rajam*, 11 M. L. J. 335.

(2) *Dhoorjeti v. Dhoorjeti*, 30 M. 201.

(3) *Amrit Narayan v. Gaya Singh* 45 C. 590 (603) P. C.

(4) S. 90 (m) C. P. C. In *Chidambaramma v. Hussainamma*, 39 M. 565 it was held that a sale for her husband's debts made against the widow binds the reversionary interest; but it does not justify its seizure and sale as such.

(4) S. 2 (e) Provincial Insolvency Act (III of 1907); S. 52 Presidency Insolvency Act (III of 1909); *Babu v. Krishnarav*, 21 B. 819.

(5) *Amrit Narayan v. Gaya Singh* 45 C. 590 P. C.

(6) *Ramaswami v. Ramaswami*, 30 M. 255 (262, 263); *Pindiprolu v. Pindiprolu* 30 M. 486 (492); *Madnapore Zemindare Co., v. Appayasami*, 41 M. 743 (776, 777).

A had an existing right in the property his mother had no power to enter into an arrangement which wiped out all the interest of the minor without consideration ; and that as the conditions which make a decree against a Hindu widow binding on the estate were wanting in this case, the decree against A's mother did not bind him. (1)

2449. But here the reversioner was a minor and reference to arbitration on his behalf a subterfuge to divide the estate. But if the reversioner is adult and contracts with reference to his future rights, his contract would be indistinguishable from any other contract relating to future property and though there cannot be a disposal of a non-existent property there is nothing to prevent its being made the subject of a valid contract ; though being a contract relating to a contingency it has to be closely watched.

2450. But in another case the compromise related to an impartible estate. The owner had bequeathed it absolutely to his widow whom his reversioner sued for possession on the ground that the will was invalid, but compromised his suit with the widow acknowledging her as the "gaddinashin" for her life and on her death the estate should fall on the reversioner or any of his representatives then alive. The reversioner predeceased the widow and his own widow sued for possession of the estate on the strength of the compromise which the court decreed though no attempt was made to distinguish its earlier cases. (2) But the decision was apparently based on the rule that a compromise of a disputed claim bound the parties and their representatives. In other words, while a reversionary right cannot be transferred surrendered or renounced, it is an interest which may support a compromise. This was the *ratio decidendi* of another case in which the court upheld a similar compromise on the ground that it amounts to an arrangement which is not the transfer of an expectancy prohibited by S. 6 (a) of the Transfer of Property Act but the settlement by parties litigating on doubtful rights in which the parties define their respective interests, and which the courts upheld for the sake of preserving the peace of families. (3)

2451. Reversioner's title.—It is settled law that one reversioner does

not derive title from another but from the last full owner, (4)
Gl. (2) so that, strictly speaking, he is not bound by any representation made by or any adjudication had between the last limited owner, and one reversioner and another (5), though on the last point the Courts have extended the principle of *res judicata* as equally extending to the reversioner, but as pointed out before, it is so on the ground of public convenience. But

(1) *Ram Shankar v. Ganesh* 23 A. 451 (455-456) following *Mewa Kunwar v. Hulas Kunwar* L. R. 1—A 157 (166) ; *Gobind v. Abdul Qayy* an 25 A 546 (575) *Bahe v. Dharam Das* 28 A 352.

(2) *Harpal Singh v. Lekhraj*, 80 A. 406.

(3) *Olali v. Varadarajulu*, 81 M. 474 ; *Hardei v. Bhagwan Singh*, 50 I. C. (A) 812 P. C.

(4) *Chhidu v. Durga*, 9 M. I. A. 548 ; *Jumorna v. Bamasunderi*, 1 C 289 P. C. ; *Istri Datt v. Hansbutti*, 10 C. 824 P. C. ; *Bhagwanta v. Sukhi*, 22 A. 83 F. B. ; *Chhidu v. Durga*, *it.* 882 ; *Shib Shankar v. Soni Ram*, 32 A. 88 (41) affirmed O. A. *Soni Ram v. Kanhaya Lal*, 35 A. 227 P. C. ; *Chhidu Singh*

v. Durga Dei, 32 A 382 ; *Risal Singh v. Balwant Singh*, 40 A. 593 P. C. *Sakyabani v. Bhavani*, 27 M. 588 ; *Govinda v. Thayammal*, 28 M. 57 ; *Chiruvolu v. Chiruvolu*, 29 M. 890 (408 F. B. ; *Chinnaveerayya v. Lakshmi*, 22 M. L. J. 375 *Abinash v. Hari Nath*, 32 C. 62 (71) ; *Abinash v. Harinath*, 32 C. 62 (71) ; *Manokarni v. Haripada*, 18 C.W.N. 718 P.C. *Govinda v. Thayammal*, 28 M. 57 ; *Veerayya v. Gangamma*, 36 M. 570 contra *Chhagan Ram v. Motigavri*, 14 B. 572 overruled by the contrary held by the Privy Council.

(5) S. 48 Specific Relief Act. *Venkata-narayana v. Subbammal*, 38 M. 406 (411, 412) P. C.

the same rule cannot apply to admissions as to which the Privy Council observed: "According to Indian law the claimants of 1847 were but expectant heirs with a *spes successionis*. The appellants claim in their own right as heirs of Mohar when the succession opened and it would be a novel proposition to hold that a person so claiming is bound by contracts made by every person through whom he traces his descent." (1) Reversioners do not even derive their title through their parents and any statement made by the latter is not therefore admissible against them. (2) "There is no privity of estate between one reversioner and another as such and therefore an act or omission by one reversioner cannot bind another reversioner who does not claim through him." (3) Consequently the fact that one has consented to an alienation by the heiress does not estop another from contesting it.

2452. But in Madras it has been held that the daughter's sons inherit jointly under the ordinary law of inheritance with right of survivorship so that there is right of representation *inter se*. (4)

2453. A reversioner, (though not presumptive) has been held entitled to redeem property sold in execution of a decree against the female heir as provided in O. 21 R. 89 of the Code of Civil Procedure (5).

2454. Limits of his Rights.—The act which entitles the reversioner to sue must be an act which endangers the reversion directly and immediately and not indirectly and remotely.

As already stated an act in the nature of a preparation does not give the reversioner the right to sue. So it has been held that a reversioner cannot sue for a declaration that an authority to adopt given by the husband is forged (6) or that a will made by the heiress bequeathing her estate to certain persons purporting to be in pursuance of an oral direction given by her husband, is invalid (7) since such a will might be cancelled by her at any time. But though this was conceded (8) the Privy Council did not reverse the decisions of the two courts below concurrently made in the deliberate exercise of a discretion entrusted to them by law. But such cases illustrate the practice of the Privy Council. They do not affect the rule.

2455 Estoppel of Reversioner.—But though the reversioner cannot contract or compromise his right and no right accrues by reason of such contract or compromise, it may create an estoppel which may preclude the reversioner from making a claim by reason of his contract or compromise. Here the right arises not by reason of the contract, but by reason of the estoppel the principle of which is one of universal application. So where a person (A) governed by the Mitakshara died leaving a widow and a daughter surviving her. The widow's right to succeed was disputed by the widows, of his predeceased brothers and by the plaintiff Kanhailal, his sister's son who

(1) *Bahadur Singh v. Mohar Singh*, 22 A. 95 (107, 108).

(2) *Manokarni v. Haripada*, 18 C. W. N. 718 P. C.; 24 I. C. 311; *Govinda v. Thayammal*, 28 M. 57; *Veerayya v. Gangamma*, 86 M. 570.

(3) *Govinda v. Thayammal*, 28 M. 57 (60, 61).

(4) *Krishniah v. Lakshmiammal*, 18 M. L. J. 275 following *Venkayyanma v. Venkata*, 25

M. 678 P. C. explained in *Veerayya v. Sunpara*, 36 M. 570 (573, 574).

(5) *Pankhabati v. Nonihal Singh*, 18 C. W. N. 778; 21 I. C. 207; *Brij Kishore v. Pratap Narain*, 4 Pat. L. J. 369; 51 I. C. 859.

(6) *Sreepada v. Sreepada*, 35 M. 592.

(7) *Umrao v. Badri*, 37 A. 422; *Ram Bhajan v. Gurucharan*, 1 A. L. J. 468.

(8) *Jaipal v. Indar Bahadur*, 26 A. 238 (243) P. C.

claimed to have been adopted by one of these widows to her deceased husband. In 1892 a compromise to which all the four ladies and the plaintiff were parties, was made under which all the ladies took each a fourth of the estate. The plaintiff took nothing immediately, but his adoption and his right to succeed to his mother were recognized, whose share he later on acquired by relinquishment. Then A's daughter died leaving a daughter of her own. Later still A's daughter died leaving a daughter of her own, and later still A's widow died. The plaintiff and his brother Ramsarup claimed as next reversioners the whole of A's property allotted to the three ladies other than his own mother by the compromise. His suit was dismissed by the courts in India but he pressed his claim on the ground that his reversionary right could not be the subject of a valid compromise. But their Lordships threw out his appeal holding the plaintiff estopped by his own act in 1892 in inducing the ladies to a compromise in which his mother and by her relinquishment, he himself obtained a fourth of the estate, and secured from them the recognition of his adoption (1)

No declaration by reversioner of his rights.

262 A reversioner cannot bring a suit. merely to obtain a declaration of his reversionary rights.

Synopsis.

- (1) *Declaratory suits by reversioners* (2456). (2) *Declaration of reversionary rights not allowed* (2456).

2456. Analogous law.—Since a reversionary right is a mere contingency it follows that a reversioner cannot sue for a declaration of his contingency that is to say, sue that he would be entitled to succeed the heiress in case he should survive her, a contingency which may never happen and about which the courts will therefore entertain no suit. In one case the presumptive reversioner sued to restrain waste failing which he applied for the declaration of his right as such reversioner, but the Privy Council threw out his suit holding "that it was impossible to predicate at this moment who is the next reversionary heir of the deceased proprietor. If a court of law proceeded to make any declaration of right upon that subject such a declaration would be subject to being rendered valueless by the development of events. It would not after events had developed, be even of authority in regulating or declaring the rights of the present respondents as against any other claimant to the character of reversionary heir. Accordingly, a declaration of right granted at the present stage would appear to be stamped with something in the nature of futility." (2) But though a reversioner is not entitled to establish his own *status* as a reversioner there is nothing to prevent his establishing his relationship to the last owner if it is challenged. And as will be presently seen he is entitled to restrain waste.

(1) *Kishori Lal v. Brij Lal*, 40 A. 487 P. C. distinguishing *Samsuddin v. Abdul Hussein*, 81 B. 165

(2) *Janaki v. Narayanasami*, 89 M. 684 (687 688), P. Q. To the same effect *Shen Parson v. Ramnadhani*, 48 C. 694 (705) P. C.; *Kathama Nachiar v. Dorasinga*, 6 M. H. C. R. 310 affirmed

O. A. 28 W. R. 314 (322) P. C. followed *Parvati v. Govind*, 13 N. L. R. 187; 42 I. C. 387; *Mankuar v. Lachman*, (1886) A. W. N. 244 contr. *Manmatha v. Rohilla* 27 A. 408; *Udu v. Durgadin* 5 O. C. 360 must be treated as overruled by the Privy Council,

Prevention of waste, improper act and alienation.

263. (1) Subject to the provisions of the next section, the reversioner is entitled to restrain the heir or her alienee from committing waste or any other act endangering the reversion.

(2) And he may restrain her by an injunction from making an improper alienation and obtain a declaration that any alienation made by her would be voidable by him on her death.

(3) He may obtain a declaration that an alleged adoption prejudicing his reversion is invalid or never in fact took place.

(4) He may oppose the grant of probate to the limited owner if prejudicial to the reversion.

Synopsis.

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|--|---|
| (1) <i>Suit by reversioner to restrain waste</i> (2457-2458). | (5) <i>Representative character of reversionary suits</i> (2458). |
| (2) <i>What is waste</i> (2459-2460). | (6) <i>Reversioner may oppose probate</i> (2463). |
| (3) <i>Suit for injunction restraining improper alienation</i> (2461). | (7) <i>Administration suit</i> (2464). |
| (4) <i>Suit for declaration of invalidity of adoption</i> (2462). | |

2457. Analogous Law.—The right of the reversioner to restrain waste is not a personal right nor is his suit a personal suit which he is entitled to maintain as the presumptive reversioner. As observed by the Privy Council, "A reversionary heir, although having only those contingent interests which are differentiated little, if at all, from a *spes successionis*, is recognized by courts of law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life. But the reversionary heir thus appealing to the court truly for the conservation and just administration of the property does so in a representative capacity, so that the *corpus* of the estate may pass unimpaired to those entitled to the reversion... This representation is in law founded upon a different set of considerations from those which would seek to stamp the character of reversionary heir upon one individual. The latter operation attempted during the enjoyment of the life estates would necessarily be premature, and might, as stated, be futile. The former is justified by the considerations of keeping the estate intact for the persons to whom as reversioners it shall ultimately and at the proper time be determined that the estate shall go." (1)

2458. It is thus settled that that the reversioners' suit is a representative suit, and even as such it is permitted because the waste committed might otherwise be past remedy, and as regards an improper alienation all evidence might disappear if a suit were only permitted when the succession opened. As the Privy Council observed in another case: "Suits of that kind form a very special class, and have been entertained by the courts *ex necessitate rei*. It seems however, to their Lordships that if such a suit as that is brought it must be brought by the reversioner with that object, and for that purpose alone, and that the question to be discussed is solely between him and the widow; that he cannot

by bringing such a suit, get, as between him and a third party an adjudication of title which he could not get without it. (1)

2459. Waste.—It is not every waste that the reversioner may sue to restrain. As previously remarked, the heiress does not hold the estate in trust for him. She holds it in her own right, subject only to rights of the reversioner. What those rights are have by now become well settled, and the general principle was thus stated by the Privy Council: "It is not sufficient to say that there is one person entitled in possession, and another entitled in remainder, in order to induce the court to interfere to take the property out of the hands of the individual who is in possession of it; but it is necessary to show that there is danger to the property from the mode in which the party in possession is dealing with it, in which case and in such case only, the court will interfere." (2) In an old case Peel, C. J. said: "The Hindu female is rather in the position of an heir taking by descent until a contingency happens Therefore a bill filed by the presumptive heir in succession against the immediate owner who has succeeded by inheritance, must show some case approaching to spoliation, must enable the court to see that there is probable ground for apprehending that unless an injunction be granted to restrain some threatened or a pending act, ultimate loss to the heirs who may come into possession by a succession will ensue. It is not enough to make out that some gift has been made, or some disposition taken place or that such is about to be made or to take place which the law would not support. The estate of the female owner, her own personal estate, might be large and adequate to repay ten times over the alleged spoliation, and there might not be the remotest prospect of loss, and the thing alienated might have no specific peculiar value." (3) So in an old case the Privy Council formulated the following rules as applicable to limited owners:—"That when the husband dies intestate and without issue, the widow is entitled to the absolute possession of the property descended from him, to enjoy it during her life-time, and to dispose of it under certain restriction, that the extent and limit of her power of disposing of the property are not definable in the abstract, but must be left to depend upon the circumstances of the disposition when made, and must be consistent with the law regulating such disposition. That there is no distinction in this respect between the moveable and immoveable property descended." (4)

2460. The term waste as used in this connexion must then be understood to mean spoliation, or such damage as endangers the inheritance. The reversioner has no right to rush into court upon a mere possibility. So where the widow had received Rs.55,466 in the company's 5 percent rupee paper which they redeemed at par, paying to the widow the amount in cash which she retained for about three months awaiting an advantageous investment whereupon the reversioner rushed into court with an allegation that the widow intended to misappropriate the amount upon which the widow denied that the reversioner had any cause of action. The latter however argued that it was an ordinary *quia timet* suit and the Privy Council held that the mere retention of money did not make the heiress guilty of *devastavit* or showed the slightest intention of committing waste and

(1) *Kathama Nachir v. Dorasidga* L.R. 2 I. A. 169 (191) cited in *Shao Parsan v. Ramnath* 43 C. 694 (705) P. C.

(2) *Hurrydoss v. Upoornath*, 6 M. I. A. 433

(3) *Hurrydoss v. Dossee*, 2 Tay. and B. 279 (287); 2 I. D. (OS) 744 (749).

(4) Per Lord Gifford in *Cossinault v. Hurrooondery Mortou*, 85; 1 I. D. (OS) 945.

that therefore the reversioners suit was rightly thrown out. ⁽¹⁾ But the case was held to be different where upon acquisition of land the widow withdrew the compensation awarded in respect thereof under the pretence of absolute ownership which she would not have been allowed, if she had disclosed her limited title. The court thereupon ordered her to invest the money as required by S. 32 of the Land Acquisition Act. ⁽²⁾ The two classes of cases are distinguishable. She had the right to the money in the one case which she had not in the other. Where she has the right "the general apprehension of danger that, if personal property be entrusted to a Hindu widow there is every probability of its being parted with and if so, it may not be recovered, is an element which cannot be allowed to exist or considered consistently with the views of the Privy Council case last cited. ⁽³⁾ The danger must be established not as a matter of probable speculation, but as one of reasonable certainty to the satisfaction of the court. ⁽⁴⁾ It must be remembered that the reversioner is merely entitled to his reversion in whatever state he finds it. The heiress is not the guarantor of its state or condition. As owner she is entitled to make full beneficial use of it, by opening mines and working them ⁽⁵⁾ and tapping other new sources of income. She is not to be deterred from any compassionate regard to the rights of her successor from making full use of her property. Nor can the successor complain of its deterioration as waste or its exhaustion as a danger to his reversion, since both these contingencies are fully consistent with the prudent exercise of rights of ownership.

2461. Improper alienation.—The reversioner is entitled to restrain the heiress from alienating her property for unauthorised purposes. The reversioner may either restrain her as well as her intended alienee from proceeding with the alienation

or if the alienation is made he may obtain a declaration that it was made without legal necessity and was therefore void beyond the heiress life-time. ⁽⁶⁾

2462 Disputing Adoption.—The reversioner is entitled to dispute the factum and validity of an adoption made by the heiress because it has the effect of defeating his rights ⁽⁷⁾ but a reversioner cannot sue for a declaration that an authority to adopt given by the husband is fabricated, for it is only a preparation and does not of itself affect the reversionary right. ⁽⁸⁾

(1) *Hurry Doss v. Upoornath*, 6 M. I. A. 433 (447).

(2) *Mrinalini v. Abnash* 11 C.L.J. 538. 6 I. C. 608; *Gambirmal v. Hamirmal*, 21 B. 747 *Contra Bindoo v. Bolie* 1 W. R. 115.

(3) *Cossinath v. Hurroscandery Morton* 85. 1 I. D. (OS) 945.

(4) *Biswanath v. Khantomini* 6 B.L.R. 747 (751).

(5) *Subba v. Changalumma* 22 M. 126.

(6) S 42 ill (e) *Specific Relief Act. Raj Lakh-hee v. Gokool Chunder*, 13 M. I. A. 209. *Goolab Singh v. Kurun Singh*, 14 M. I. A. 176; *Mahomed Shamsool Hooda v. Shewuk Ram*, 22 W. R. 609 P. C.; *Jumoona v. Bamasooderai*, 1 C. 269 P. C. *Radha v. Kour*, (1864) W. R. 148; *Gobindamani v. Shamlal*, W. R. (F. B.) 165; *Oodoy Chand v. Dhummones*, 3 W. R.

183; *Chuttar v. Wooma*, 8 W. R. 273; *Grose v. Anrutamayi*, 12 W. R. 13; *Bisobehari v. Baijnath*, 16 W. R. 49. *Chotloo v. Jemab* 6 C. 198; *Hem chunder v. Surnamoyi*, 22 C. 354, *Balbhadra v. Eshawani*, 34 C. 853.

(7) *Anand Kumar v. Court of Words*, 6 C. 764 P. C. approving *Bhikis v. Jaginath*, 10 B. H. C.R. 351; *Kattama v. Dorasinga*, 23 W. R. 314 P.C.; *Venkatanarayana v. Subbammal*, 38 M. 406 P. C. *Ramabai v. Rangrav*, (1894) B.P. J. 287. *Ramabai v. Rangrav*, 19 B. 614; *Anyaba v. Daji*, 20 B. 202; *Gyanendro v. Lobongomunjari*, 11 C. L. R. 198; *contra Juggendronath v. Rajendronath*, 7 W. R. 357 (overruled by the Privy Council in *Anand Kumar v. Court of Words*, 6 C. 764 P. C.)

(8) *Sreepada v. Sreepada*, 35 M. 592.

2463. May oppose Probate.—On a similar principle a reversioner has been held entitled to oppose the grant of a probate and he may intervene when he finds the heiress guilty of collusion between herself and her adopted son. So where one S alleging himself to be adopted son of M applied for the probate of the will of his father and the latter's widow had first opposed the application but subsequently withdrew her opposition to probate being granted to S whereupon her daughter K applied for leave to oppose the grant of probate on the ground that her mother had colluded with the applicant which the court granted holding that the daughter was reversioner and her rights would be prejudiced by the grant of a probate without hearing her, as the widow who had at first contested the application had withdrawn her opposition, and there was reason to suspect that she was in collusion with the son. (1)

2464. Administration Suit.—A reversioner is entitled to sue for administration if a dedication of property to which a reversioner is entitled is not valid and the executors proposed to carry out the dedication. Such an act would entitle the reversioner to seek the assistance of the court and have the property properly administered. (2) When a person entitled to an estate in reversion brings a suit against the executors of the estate for administration and subsequent thereto an administration suit is brought by one executor against his co-executors and a consent decree obtained without the reversioner being made a party, such a reversioner will be entitled to bring his suit to a hearing, and upon a second decree being made, the accounts and enquiries already had under the first decree will be adopted in the second decree so far as it can be applied and the reversioner who brought the first suit will be entitled to the conduct of the proceedings. (3)

264. (1) Such suit must be brought in the first instance by the presumptive reversioner, but if owing to Reversioner's suit his minority, collusion, or consent, ratification, waiver of his right as reversioner, estoppel or limitation, he is unable or unwilling without sufficient cause to sue, then it may be brought by the reversioner next to him in succession but in that case the court may join the presumptive reversioner as a party to the suit.

(2) A suit instituted by the presumptive reversioner may on his death, or otherwise on proof of laches or collusion with the heiress whose acts are impugned, be continued by the next presumable reversioner.

(3) Where the immediate reversioner is a female the nearest male reversioner may maintain such suit without having to show any of the causes mentioned in clause (1).

(4) Any adjudication made in such suit is resjudicata as against the heir when the reversion opens.

(1) *Khettramoni v. Shyama Churn*, 21 C. 539.

(2) *Hem Chunder v. Sarnamoyi*, 22 C. 354, *Roomoyes v. Troyluckho*, 29 C. 260 (272).

(3) *Rajomoyes v. Troylukho* 29 C. 260 (272, 273) following *Zambaco v. Cossavetti* L.R. 11, Eq. 489; *Mellors v. Surre*, 21 Ch. D. 647.

Synopsis.

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| (1) <i>What reversioner may sue</i> (2465). | <i>sioner no bar</i> (2467-2468). |
| (2) <i>Preferential right of presumptive reversioner</i> (2466). | (6) <i>Minority, collusion, consent of nearer reversioner</i> (2469-2473). |
| (3) <i>Right of remote reversioner to continue the suit</i> (2465). | (7) <i>Reliefs claimable in such suits</i> (2474-2475). |
| (4) <i>Suits to be instituted in a representative capacity</i> (2465). | (8) <i>Effect of decision as res-judicata</i> (2476). |
| (5) <i>Existence of nearer female rever-</i> | |

2465. Analogous Law.—A suit to enforce what may be called the rever-

Cls (1), (2).

sioners' equity set out in the last section belongs in the first instance to the presumptive reversioner. He and he alone is entitled to sue. As the Privy Council observed : " Although a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule it must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed if the widow were to die at that moment. They are also of opinion that such suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow or have precluded themselves from interfering. They consider that the rule laid down in *Bhikaji Appaji v. Jaganath Vital* ⁽¹⁾ is correct. It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue. ⁽²⁾ In such a case upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue the court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue and would probably require the nearest reversioner to be made a party to the suit. ⁽¹⁾ "Such a suit brought by the presumptive reversioner is in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment just as the relief sought is for their common benefit. On the death therefore of the presumptive reversioner, the next presumable reversioner would clearly be entitled to continue the action instituted by the deceased plaintiff unless there is anything in the processual law of India to preclude him from so doing." ⁽²⁾ Again, "there is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner or even obtaining the conduct of the suit on proof of lapses on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned. It is the common injury to the reversionary rights which entitles the reversioner to sue. Apart therefore from the question whether the next presumable heir is the legal representative of the deceased presumptive reversioner, there remains the outstanding fact of iden-

(1) 10 B. H. C. R. (AC) 351.

(2) *Goolab Singh v. Kurum Singh*, 14 M. I. A. 176.

(1) *Anand Kunwar v. Court of Wards* 6 C. 764 (772, 773) P. C.

(2) *Venkatanarayana v. Subammal*, 38 M

406 (411) P. C. *Janaki v. Narayanasami* 39 M. 684 P. C. *Challagundiav Madalli* 35 M. L. J. 57 (71) F. B. *contra Sakshahari v Bhavani* 27 M. 588 *Chinna v. Lakshminarasamma* 37 M. 406 *Arunachallan v. Vellaya* 28 M. L. J. 719,

tity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights." (1)

2466. The right of suit belongs to all reversioners in their order of succession without regard to sex. (2) So the daughter may sue during the life-time of her mother if her reversionary rights are seriously threatened. (3) So where the widow abandoned possession of her husband's estate alleging that her husband was not separate but a member of the joint family, the daughter was entitled to sue and was put in physical possession of the estate as manager during the widow's life-time. (4) So where the daughter was found to have colluded with the widow, the next presumable reversioner was held entitled to sue both. (5) So where the widow and the plaintiff's father jointly made an alienation the son was held entitled to maintain the suit for its cancellation even though his father and not he was the immediate reversioner. (6)

2467. The existence of an immediate female reversioner such as the daughter is no obstacle to the next presumptive male reversioner avoiding an improper alienation, since the one takes only a life estate while the other takes an absolute interest. Moreover as observed in a case "that in the case in which upon the death of a full owner, the estate successively passes through the hands of a series of female heirs who take only a qualified estate before the property vests in another full owner they may rightly be regarded in the aggregate as the holder of a limited interest which intervenes between the full ownership of the original owner and the ultimate taker". (7)

2468. It may be also suggested that since such suit is a representative suit the female owner cannot represent the interest of the male reversioners who have therefore a cause of action of their own which is unaffected by her intervention.

The contrary was laid down in some earlier cases of the Allahabad Court where it was held that apart from collusion or connivance the existence of an intermediate female reversioner was an obstacle to the maintainability of the suit by the next presumptive male reversioner.

But since the suit is a representative suit a reversioner entitled after the death of a tenant for life to a share in the inheritance cannot lay claim to any definite share nor can he sue to set aside a transaction affecting the inheritance so far only as it would affect his probable share. For instance, suppose he is one of 6 reversioners complaining of an adoption. He cannot sue only for his one sixth share and pay court fee thereon alleging that he sues only to the extent of his interest. (8) The reversioner cannot oust the heiress because she denies his title but if she disclaims all interest in the estate, the court may place the reversioner in possession as manager for her life-time. (9)

(1) *Venkatanarayana v. Subbammal*, 38 M 406 (412, 413).

(2) S. 39, S. 54 ill (M) Specific Relief Act (1 of 1877).

(3) *Golab v. Shib Sahi* 2 Agra 54.

(4) *Gunesh v. Lal Muttee* 17 W. R. 11.

(5) *Jwala Nath v. Kulloo* 3 Agra 55 F.B. *Gauri Dai v. Gur Sahai* 2 A 41.

(6) *Retoo v. Laljee* 24 W. R. 399.

(7) *Abinash v. Harinath* 82 C. 62 (66); *Narayan v. Chengalasuma* 10 M. 1; *Kandasami v. Akkamthal* 18 M. 195; *Raghupati v. Tirumalai* 15 M. 422; *Chunder Koomar v. Dwarkanath*

(1859) B. S. D. A. 1628; *Balagobind v. Hirumanee* 2 W. R. 255; *contra Booma Sundree v. Bama Soonduree* 10 W. R. 801; *Balagobind v. Ram Kumar* 6 A. 431; *Raja Dei v. Umed Singh* 34 A. 207; *Lakshpati v. Rambodh Singh* 37 A. 850; *Jaint Singh v. Gosain* 16 A. L. J. 498 46 I. C. 85 *contra Radha v. Bakhtawar* Agra 1. *Madari v. Malki* 6 A. 428; *Ishwar v. Janki* 15 A. 192.

(8) *Keshava v. Lashminarayana* 6 M. 192.

(9) *Naulakhi v. Jai Mangal Singh* (1886) A. W. N. 279.

The nearest or any other reversioner must, of course, prove his relationship to the last full owner if it is denied, and unless he proves his own title as reversioner entitled to sue, the defendant cannot be called upon to justify her alienation. (1)

Minority.

2469. The minority of the nearest reversioner justifies a reversioner more remote to maintain such suit. (2)

Collusion and consent.

2470. The question of consent has already been examined before. Connected with it is the question of collusion. Collusion implies that the presumptive reversioner had improperly joined with the heiress in destroying the reversion which enables the remote reversioners to vindicate their rights. (3) So where the immediate reversioner consented to a gift be a widow it did not prevent a remote reversioner from impeaching it. (4)

Ratification.

2471. Ratification is consent given to an act *post facto*.

The circumstances in which a remoter reversioner may maintain a suit have been stated in the section. But a question arises how is he to satisfy the court that the presumptive reversioner was unable or unwilling to sue.

Where such reversioner has joined in the alienation it is not difficult to prove his complicity. But in other cases it is apprehended that this fact need not be proved with the accuracy of a plea. It will suffice if there is a verified declaration against the presumptive reversioner who is impleaded as a party defendant. It will then be obvious whether he is interested in upholding the suit or opposing it if a remote reversioner sues without joining the nearest reversioner (5) or proving why the nearest reversioner is precluded from maintaining the suit (6) his suit is liable to be dismissed. (7)

2472. So would be the suit instituted by the plaintiff as next reversioner when he was merely a remote reversioner and there was no allegation of any collusion and the like against them. (8) In such cases the court may allow an amendment of the plaint if it is not too late and would not alter the nature of the suit. (9)

2473. Not only the actual reversioner who consents to a transfer but his legal representative also is precluded from maintaining a suit for its cancellation, (10) and where several persons join in a conveyance and convey "the whole and entire property absolutely" it must be taken that they have exercised every power which they possess and that they have parted with their whole interest whether in possession or in expectation. Where therefore the widow and the immediate next reversioner made such alienation in favour of a third person, the reversioner would be prevented from afterwards avoiding the transfer. (11)

(1) *Ganesh v. Lal Muttu* 17 W. R. 11

(2) *Bhabuti v. Khetal Singh* 21 I. C. 274 ;
Dalgon v. Parsidh 11 I. C. 202; *Bhola v. Chandi* 5 I. C. 666.

(3) *Lachmi Narain v. Mathro*, (1909) P.W. R. 109; 4 I. C. 957.

(4) *Naikram v. Soorujbuns*, (1859) S D A. B. 891.

(5) *Bakhtawar v. Bhagwan*, 92 A. 176

(6) *Rughoobar v. Bhekaree* 22 W. R. 472.

(7) *Jhandu v. Tarif*, 87 A. 45 P. C.

(8) *Meghu Rai v. Ram Khelawan*, 35 A. 326.

(9) *Avula v. Avula* (1913) M. W. N. 888 ;
18 I. C. 213.

(10) *Rangappa v. Kamti*, 31 M 366 F B.

(11) *Trilochun v. Umash*, 7 C. L. R. 571.

So a reversioner may ratify a transfer. So where a tenure granted by the widow was recognized after her death by the reversioner who received rent from the holder of the tenure, such receipt was held to amount to ratification of the tenure precluding a suit for setting it aside on the ground of the widow's incompetency. (1)

2474. Relief.—The relief admissible in such suit must necessarily depend upon the nature of the claim. If it relates to an adoption it may challenge its factum or validity or both. If to an alienation, it may deny its validity on the ground that it was wholly unsupported by necessity. Where it is so it is open to the court to cancel the alienation altogether. (2) If it is partially supported by necessity it is open to the court to declare it valid to that extent and charge the sum upon the property of which it may order payment. (3) The uncertainty regarding the person who would be entitled to succeed the widow is no ground for refusing a declaration regarding the character of the alienation and the declaration may be that the alienation is invalid as a whole, but that on equitable ground the alienee should have a charge declared in his favour for the binding portion of the consideration. (4) In some cases it has been held that the plaintiff cannot obtain a declaration of the invalidity of an alienation partially supported by legal necessity unless there is an offer in the plaint to reimburse the alienee to the extent the alienation was for necessity. (5) But it is submitted that the right of reimbursement is merely an equity which the court awards as a portion of its relief and that it is always open to the court to grant such relief as the plaintiff may be found entitled to. (6)

2475. In a reversioner's suit in the life-time of the limited owner the latter **When owner ousted.** cannot be ejected since whatever may be the effect of her improper alienation, it does not entail forfeiture of her own estate. (7) And all that the reversioner is entitled to and can claim is to have his possible interest protected. As such he is not entitled to a remedy more extensive than is requisite to protect his rights. His reversionary interest is not accelerated by an alienation which the heiress may make in fraud of his presumptive right. All that the reversioner is ordinarily entitled to is a declaration that the female owner's act is null and void as far as it may affect the interest of the person entitled as reversioner and if there were danger lest from the nature of the property the *corpus* should be wasted, the utmost he can claim is a decree for its protection by the appointment of a receiver or by such other means as the court might deem suitable. (8) But though this is the rule, cases may arise where her own conduct may lead to her own dispossession. So where the daughter who was entitled to her father's estate acquiesced in the possession of her father's relatives holding them out as the rightful heirs the court awarded her possession but added a clause that if she declined to accept possession the

(1) *Mahesh v. Ugrakanth*, 24 W. R. 127. As to what is ratification see *Bejoy v. Girendra*, 13 C. W. N. 201; 4 I. C. 518

(2) S. 89, Specific Relief Act.

(3) *Paparayudu v. Rattamma*, 37 M. 275; *Gobind V. Baldeo*, 25 A 880; *Partapa v. Altar Singh*, (1918) P.R. 84; 20 I. C. 289

(4) *Paparayudu V. Rattamma* 37M 275.

(5) *Pholchund v. Raghoobun* 9 W. R. 108; *Sugeeram v. Juddoobun* 9 W. R. 284; *Muteeram Gopal* 20 W. R. 187; *Gobind V. Baldeo* 25 A 880; *Subramania V. Ponnusami* 8 M, 92;

Singam V. Draupadi, 31M. 158; *Gouri v. Tirumaya*, 18 M.L.J. 17; *Dina Nath v. Hrisikesh* 20 C.L.J. 285 (290)

(6) *Garikipati v. Garikipati* 37 M. 275, *Vithu v. Mendli*, 5 N.L.R. 172.

(7) *Lall Soonder v. Hurry Krishen Marah* 118; *Jwala Nath v. Kulloo*, 3 Agra 55; *Kishnes v. Kheales Ram* 2 N. W. P. H. C. R. 424; *Haradhin v. Issur Chunder* 6. W. R. 222; *Shid Koeree v. Jorgun* 8 W. R. 155.

(8) *Jwala Nath v. Kulloo*, 3 Agra 55 (59) F.B.

reversioner was to be put into possession as manager of the property on her behalf and that he would then act under the orders and directions of the trial Court filing accounts in and paying the income to her through such court. (1) In another case the order of the court appointing a receiver was upheld by the Privy Council. In that case the property in question a large and valuable zamindari was seized by Government but afterwards restored to the widows of the last holder. Within four years of this restoration the two junior widows sued the senior widow complaining of various acts done to the detriment of their rights and more especially that she had without their consent adopted a son to whom she has transferred the entire estate. The senior widow upheld the adoption and alleged that all the other widows had no right beyond a claim for maintenance. The court found the senior widow's management reckless and her expenditure lavish and that the adopted son could not supersede the widows. But though it held the widows entitled to the estate it refused to remove the manager as they were old and incompetent. The widows appealed but the Privy Council held that it was a matter of discretion with the court as to the removal of the receiver and looking to the case the court had exercised a very sound discretion in not removing him. (2) The courts have in other cases upheld the appointment of a manager in a case of proved waste endangering the reversion. (3) It will not interfere in an attempt at false adoption and the mutation of names in favour of the so called adopted son. (4) As the court remarked, "certain specified acts of misconduct by her operate according to Hindu Law to destroy her estate and to vest the property in the reversionary heirs and according to several decisions the courts also have jurisdiction to interfere to prevent the waste or destruction or the fraudulent alienation of property by her if a sufficient case is made to justify this interference. In such cases the widow has been deprived not of her interest but of all control over the property which has been placed for its preservation in the hands of others (sometimes in the hands of the reversioners themselves) as managers on her behalf." (5)

2476. Decision Res judicata.—Since the reversioner's suit is a representative suit in which he represents fully the whole reversion it follows that a decision given in his suit operates as *res judicata* against reversioners. (6) This is the logical outcome of "the identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their right." (7) In this view "it is impossible to resist the conclusion that if the right litigated is a common right, and if that litigation has been honestly conducted the other reversioners are affected by the law of *res judicata*. This is a logical result of the decision of the Judicial Committee." (8)

(1) *Adi Deo v. Dukharan*, 5 A. 582 (542) *Radha Mohun v. Rama Dass* 24 W. R. 86 note. The view of the case on the subject of limitation has been overruled by the legislature)

(2) *Jijamda (In re)* 18 M. 830 (394) P. C.

(3) *Moharam v. Naddu Lall* 10 W. R. 78.

(4) *Komul Mone v. Alhadmone*, 1 W. R. 256

(5) *Ib* P. 257.

(6) *Brojo Kishore v. Sreenath* 9 W. R. 463 (465) 57 *Chiruvolu v. Chiruvolu* 29 M. 390; (401) F. B.; *Challagundla v. Madala* 41 M. 659 F. B. overruling *contra Sahyayani v.*

Bhavani 27 M. 588; *Govinda v. Thayammal* 28 M. 57; *Venkatanarayana v. Subhammal* 28 M. 406 (412); *Veerayya v. Gangamma* 36 M. 570; *Narayana v. Rama* 38 M. 396; *Garikipati v. Rattamma* (1912) M. W. N. 1176 (1179).

(7) *Venkatanarayana v. Subhammal* 38 M. 406 (413) P. C.

(8) *Challagundla v. Madala* 41 M. 659 F. B. explaining and following *Venkatanarayana v. Subhammal* 38 M. 406 (413) P. C.; *Janaki v. Narayanasami* 39 M. 634 P. C.

Where an alienation made by the heiress is found to be only partially supported by legal necessity or benefit binding on the reversion, it may, except as otherwise provided, be set aside or upheld in accordance with the following rules :—

Alienation for partial necessity. (1) Where it is mainly supported by legal necessity but only an inconsiderable part is not so supported, the alienation will not be set aside but the alienee, will be bound to make good the amount not supported by legal necessity.

(2) Where the alienation is not mainly supported by legal necessity, the alienation will be set aside on the reversioner refunding to the alienee the consideration he had paid for legal necessity.

(3) Provided that no person not a bona fide alienee for valuable consideration and without notice, can claim such equity to compensation.

Synopsis.

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| (1) <i>Alienation by heiress for partial necessity</i> (2477). | (4) <i>Alienation when confirmed</i> (2479). |
| (2) <i>Equities on setting aside</i> (2478). | (5) <i>Alienation when set aside.</i> (2480). |
| (3) <i>Reversioner liable to pay binding portion of the considera-</i> | |

2477. Analogous Law.—This section is necessarily subject to other provisions. For instance the reversioner who had consented to the alienation cannot afterwards claim to set it aside. And similarly where the alienee was a privy to the transfer being made without legal necessity he cannot claim the equitable relief by way of restitution. If, however, the alienee is a *bona fide* transferee without notice and the reversioner has not by his consent or acquiescence encouraged or ratified his transfer, then the rules set out in this section apply. It has no application when the transfer is wholly supported (1) or unsupported by consideration. (2)

2478. But it applies to an excessive sale for necessity and the question whether the sale should be affirmed or its consideration refunded depends upon the excess. As Dwarkanath Mitter, J. said in an old case. "If there were any necessity such as the Hindu Law warranted for a sale of part of the property and the widow sold a larger portion of the estate than was necessary to raise the amount which the law authorized her to raise, it appears to me that the sale would not be absolutely void as against the reversioners and that they could only set it aside upon paying that amount which the widow was entitled to raise with interest." (3) This principle underlies Ss. 65 and 70 of the Contract Act. It is an equitable relief which the court may grant though the reversioner does not offer to make any refund in his pleading. (4)

(1) *Raghubar v. Akhtar*, 5 A. L. J. 366.
 (2) *Vijbhukhan v. Dayaram*, 82 B. 82.
Janki v. Mahadu, 9 Bom. L. R. 710; *Hari v. Bajrang*, 13 C. W. N. 544; 1 I. C. 434.
 (3) *Phool Chand v. Raghoobun*, 9 W. R. 108; *Mutes Ram v. Gopal*, 20 W. R. 187.

(4) *Phool Chand v. Raghoobun*, 9 W. R. 108; *Mutteeram v. Gopal* 20 W. R. 187; *Singam v. Draupadi* 81 M. 153; *Garikipati v. Garikipati*, (1912) M. W. N. 1176; 17 I. C. 508; *Vithu v. Mendri*, 5 N. L. R. 172 (174).

2479. The principle of this section was considered by the Privy Council in a case in which the widow had sold her heritage for Rs 7,080 due under a decree and interest thereon and a fresh advance of Rs 7280. The first item was proved as supported by no necessity but there was no proof of the second as either paid and if paid, for necessity. The Privy Council held that the sale should be set aside on refund by the reversioner of the sum of Rs 7,080 which alone was supported by necessity. (1)

2480. The principle of this case has guided the courts in the determination of several cases. So where the sale was for Rs. 2,995 out of which Rs. 2,550 was supported by necessity the court decreed possession of the property sold on payment by the vendee of that sum within three months fixed by the court. (2) In another case out of the total consideration of Rs 3291-8-0 Rs 2923-8-0 were found supported by necessity and yet the court decreed conditional cancellation. The same relief was held justified where out of the price of Rs 160- Rs 125 was justified, it being held that "the character of a sale by a limited owner will not be improved by the fact that all but a small proportion of the consideration was intended for a necessary purpose." (3) But there is another possible view. Isn't the limited owner entitled to any discretion at all? And purchasers do not always study the rule of proportions. And as observed: "It would manifestly be impossible and possibly prejudicial to the interest of the estate if the widow were to be held to be bound in every instance to sell property for exactly the sum due to the creditor." (4) So the widow permanently leased a tank for a premium of Rs 174- reserving the annual rent of 8 annas only to pay off the debt of Rs 100- and the court upheld the lease holding it as supported by necessity. (5) Again, proof that the bulk of the alienation was supported by legal necessity may be evidence that the remainder was also presumably so supported. Mere failure to prove any part of the consideration as supported by necessity is not necessarily tantamount to proof that it was unsupported by it.

266. (1) In a suit between the reversioner and the heiress's alienee for possession of property comprised in her estate, it lies on the latter to prove that the former is bound by the transfer to him as supported by legal necessity.

(2) In a suit between a pardanashin heiress and her transferee, it lies on the transferee to prove not only that the deed was executed by, but was explained to and really understood by the former who had executed it by the free and independent exercise of her will.

Synopsis.

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| (1) <i>Onus of proving validity of sale on alienee</i> (2481-2482). | (2) <i>Strict proof in the case of transfer by purdanashin women</i> (2483). |
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(1) *Deputy Commissioner v. Kanjan Singh*, 29 A. 331 (388) P. C. Consideration in about the same proportion was found supported by legal necessity in *Govinda v. Vasudeva*, 16 I. C. (M) 885.

(2) *Ram Dei v. Abu*, 27 A. 494.

(3) *Gobind v. Baldeo*, 25 A. 330 (335).

(4) *Vithu v. Mendri*, 5 N. L. R. 172 (176) following *Ram Dei v. Abu*, 27 A. 494.

(5) *Pelaram v. Bagalanand*, 14 C. W. N. 895; 6 I. C. 207.

2481. Analogous Law.—It is a general rule that a transferee from a limited owner must establish that his transfer was competent. As such in a suit between the reversioner and the female heiress's transferee, the former is entitled to succeed by reason of his natural title unless it is displaced by proof of a better one in the transferee. As between the grantor and the grantee the rule is, however, different, since the grantor cannot derogate from his grant.

But the case of pardanashin women is exceptional because a pardanashin naturally labours under a special disability and is therefore entitled to the same special protection which law confers on the weak, the ignorant and the in firm.⁽¹⁾ As the Privy Council observed: "The lady was a pardanashin lady, and the law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest not with those who attack but those who found upon the deed and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood, by the grantor. In such cases it must also of course, be established that the deed was not signed under duress but arose from the free and independent will of the grantor. The law as just stated is too well settled to be doubted or upset."⁽²⁾

2482. Reversioner and limited owner's transferee.—The first clause deals with the burden of proof in a suit between the reversioner and the alienees of the last limited owner. As the reversioner does not claim through or under the limited owner, he is not bound by her recitals and acknowledgement of transfer which have to be proved by the transferees. This he may do in any of the following ways:—

(1) By proof of consent of the then presumptive reversioner raising a presumption of necessity.

(a)—Such consent may be proved by the attestation of the deed by him if it is shown that it was made after it had been read to him.

(b)—It may be proved by subsequent conduct such as ratification or acquiescence.

(2) By independent evidence of payment of consideration and proof of necessity.

(3) By proof that after reasonable enquiries he was satisfied of the necessity.

2483. Pardanashin transferor.—Where, moreover, the transferor is a pardanashin, her transferee has to prove in a suit whether by the grantor or her reversioner, that the transfer was made by her on an intelligent appreciation of its nature and effect and that no advantage was taken of her disability.⁽³⁾

It is sometimes insisted on that a pardanashin lady must have independent advice but as pointed out by the Privy Council,⁽⁴⁾ this is not an

(1) *Kamini v. Krishna*, 89 C. 988 (946).
 (2) *Kali Baksh v. Ram Gopal*, 86 A. 81
 (89) P. C. *Sajjad Hussain v. Wasir Ali*, 84
 A. 455 P. C.
 (3) *Keshublal v. Radharaman* 17 C. W. N

991 (995).
 (4) *Mahomed Buksh v. Hosseini*, 15 C. 684
P. C. Kali Buksh v. Ram Gopal, 86 A. 81 (91)
 P. C.

absolute rule of law. Advice is merely a means to secure that which is essential, an intelligent appreciation of the transaction. It is not the formal execution which so much matters since if they are proved to have understood the deed the fact that they assented to it from behind a screen would not vitiate it for want of due execution as required by S. 59 of the Transfer of Property Act. (1)

267. A suit to avoid an alienation may be brought by the presumptive reversioner within 12 years and by a presumable reversioner within six years from the date thereof.

2484. Analogous Law.—Art. 125 prescribes the period of limitation applicable to the suit of the nearest reversioner, which allows 12 years calculated from the date of alienation. But a remote reversioner must bring this suit within six years under the general article 120 calculated from the same date.⁽²⁾ Of course neither the presumptive nor presumable reversioner is bound to sue the heiress or the alienee during the former's life-time. Their right of suit is a concession made with a view to have the question tried before evidence is lost by lapse of time.

2485. But since the reversioner's suit is a representative suit the cause of a action arises on the date of the alienation, jointly and simultaneously for the entire body of reversioners. If therefore, an alienation by an heiress, is not impeached in a declaratory suit, instituted within the period of 12 years prescribed by Article 125, by the reversioners then in existence, a presumptive reversioner though born after the lapse of 12 years from the date of the alienation will be debarred from bringing a suit for a declaration in respect of it.⁽³⁾ A collusive suit may for the purpose of limitation be treated as a private alienation provided it is the necessary result of some collusive arrangement made by her to use the Court as medium of transfer, or in other words, if she intended to transfer the property and used the Court sale as a means to effect her purpose⁽⁴⁾ Otherwise, the alienation cannot be held to be made by the heiress within the meaning of Article 125, and the only other article applicable would be Article 120 and not Article 125.

268. An alienation by the heiress in excess of her powers is not void but is voidable at the election of the reversioner.

Synopsis.

- (1) *Improper alienation voidable at the option of reversioners* (2486). (2) *Mode of avoidance* (2487). (3) *Institution of suit* (2488).

2486. Analogous law. It is now settled⁽⁵⁾ that an alienation by the heiress without legal necessity is not void but merely voidable at the instance of

(1) *Padarath v. Ram Narain*, 37 A. 474 (481) P. C.

(2) *Guntupalli v. Guntupalli*, 24 M. L. J. 188; 18 I. C 710

(3) *Challagundla v. Madala*, 41 M. 659 F. B.

(4) *Ranga Rao v. Ranganayaki*, 85 M. L. J. 864; *Shro Singh*, 19 A. 524; *Ramsarup v.*

Ramdey, 29 A. 289

(5) *Bejoy Gopal v. Krishna*, 84 C. 329 P. C. reversing *O. A. Bejoy Gopal v. Nil Ratan*, 80 C. 990; *Kishori Lal v. Bhusai*, 140 W. N. 106; *Deonandan v. Udat Narain*, 18 C. W. N. 940; *Chavhan v. Ram Sarup*, 20 O. C. 282; 42 I. C. 27.

reversioner who may ratify it or treat it as a nullity. But except as against the reversioner it is valid and cannot be avoided by a third party. ⁽¹⁾

2487. Mode of avoidance: Even as regards the reversioner such transfer will only be avoided if it is unsupported by legal necessity and he has not consented to or ratified it. A reversioner is not bound to sue for its cancellation immediately after it is sold. He may wait till the reversion falls it. He is then put upon his election whether to ratify or avoid it. If he elects to treat it as a nullity he may sue the alienee for possession and it is then on the latter to make good his alienation by proving both its factum and validity.⁽²⁾ Even where the reversioner challenges it in a suit of his own, the burden of proof is still on the alienee. He has still to prove that his alienor was justified in making the alienation or that he had after reasonable inquiries ascertained the existence of legal necessity and *bona fide* believed in its existence. If he proved this his title cannot be shaken even though in fact there was no necessity for as the Privy Council observed: "The lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of the charges and they do not think that under such circumstances he is bound to see to the application of the money. It is obvious that the money to be secured on any estate is likely to be obtained on easier terms by a mortgage than by a loan which rests on mere personal security, and that, therefore the mere creation of a charge securing a proper debt cannot be viewed as imprudent management. The purposes for which a loan is wanted are often future and as regards the actual application a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that the *bona fide* creditor should suffer when he has acted honestly and with caution but is himself deceived"⁽³⁾ These words refer to the powers of the manager of an infant's estate. The heiress is not merely the manager of the estate. She is its owner though her power of alienation may be limited. "Her alienation is not therefore absolutely void but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it or he may at his pleasure treat it as a nullity without the intervention of any court and show his election to do the latter by commencing an action to recover possession of the property. There is nothing in fact for the court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir."⁽⁴⁾

2488. Who may avoid it.--None but the reversioner is entitled to impeach an alienation made by the heiress, though on her death if there is no reversioner the crown takes the inheritance as the *ultima haeres*, it has the same right of impeaching an unauthorised alienation.⁽⁵⁾ The same right belongs to an execution purchaser who has acquired the entire estate and not merely

(1) *Deonandan v. Udit Narain*, 18 C. W. N. 940.

(2) *Bijoy Gopal v. Krishna*, 34 C. 329 (393, 384) P. C.

(3) *Hannoomon Persad v. Mt. Babooes*, 6 M. I. A. (393) (424).

(4) *Bijoy Gopal v. Krishna*, 34 C. 329 (383) P. C.

(5) *Collector v. Cavalry*, 8 M. I. A. 529; *Deonandan v. Udit Narayan*, 18 C. W. N. 940 (941); *Bijoy Gopal v. Krishna*, 25 C. 1; *Madhu Sudan v. Rooke*, 11 C. W. N. 424.

the limited estate of the female owner. (1) As against all but the reversioner her transfer stands good. So where the heiress mortgaged her property which was sold in execution to another who sold it to the plaintiff who sued her transferees for possession whereupon the latter challenged the mortgage as unsupported by necessity the court held that as the defendant was not the reversioner but a mere assignee of the mortgagor's right he could not be permitted to challenge the plaintiff's title. (2)

**Succession of
reversioners**

269. (1) On the death of the heiress her limited estate devolves on her next reversioner then alive.

(2) Reversioners take *per capita*.

(3) Where the next reversioner disclaims the estate it devolves on the reversioner next to him in succession.

Explanation.—The term “death” in clause (1) includes civil death as by remarriage or abandonment of worldly affairs which determines the estate.

2489. Analogous Law.—On death or remarriage of the female heir the estate reverts to the natural line of heirs. Hence the term “reversioners” who are heirs of the last full owner if he had lived up to and died simultaneously with the female owner. (3) If the next reversioner disclaims the inheritance it falls on one who stands next to him in the line of succession. (4) Reversioners take *per capita* and not *per stirpes*.

It has already been seen that the succession may be accelerated by the remarriage of the female owner, or her renunciation of worldly affairs (5) or of the estate. (6)

**Reversioners' rights
on succession.**

270. On the estate vesting in the reversioner he acquires the following rights :—

(1) He is entitled to possession of the estate together with all its accumulations, accretions, and incidents as on the death of the heiress.

(2) He is entitled to dispute all unauthorised acts of the female heir.

(3) He is entitled to represent the estate and as such, may continue the suit instituted by or against the heiress.

(4) He may execute all decrees obtained by her as representing the estate as he is liable to satisfy all such decrees obtained against her.

(1) *Raj Kishen v. Jaheroorul Hug*, (1864) W. R. 851; *Braro Kishore v. Sreenath* 9 W. R. 468.

(2) *Deonandan v. Udit Narayan*, 18 C. W. N. 940.

(3) *Abinash v. Probodh*, 15 C. W. N. 1018; 10.

I. C. 856.

(4) *Ladoolah v. Sanvaley* 8 Agra 191; *Goos-haen v. Pursotum*, *ib.* 285.

(5) *Hafsoorissa v. Padhrobinode*, (1856) 12 S. D. A. B. 559; 15 I. D. (O.S.) 78 (84).

(6) S. 261 (Surrender of woman's estate.)

Synopsis.

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|---|--|
| (1) <i>Rights of reversioner on succession</i> (2490). | (2491). |
| (2) <i>Rights to accretions and accumulations</i> (2491). | (4) <i>Right to dispute unauthorised acts.</i> (2493). |
| (3) <i>Liability to pay Compensation</i> | (5) <i>Right continue legal proceedings</i> (2494-2495.) |

2490. Analogous Law.—On the death of the limited owner her reversioner, whether a male or a female, becomes entitled to all the estate of the full owner including all its accumulations, accretions and incidents. As such succession is by descent and not by survivorship, the heir is bound to take out a succession certificate, if any, of the property inherited by him and is subject to Succession Certificate Act. (1)

2491. He is entitled to the estate with all its increments and incidents. So where a widow had mortgaged a shop which she had inherited from her husband without any necessity and the property being destroyed by floods the mortgagee rebuilt it with his own money which he continued to treat as the property mortgaged to him. On the widow's death her reversioner sued for possession while the mortgagee claimed his cost of re-building by way of compensation, but the court decreed possession without compensation holding that the rebuilding of the shop by the mortgagee did not confer on him any higher equity than if it had been rebuilt by the widow. "Had she rebuilt by borrowing the amount it would have been binding on the reversionary estate only if there had been legal necessity for the purpose and the widow had mortgaged the estate therefor." (2) Such a case is indistinguishable from one in which one builds a house upon the land of another. He cannot make him pay for it. For as the Privy Council observed: "It is not in every case in which a man has benefited by the money of another that an obligation to repay the money arises. To raise an equity of that kind there must be an obligation, express or implied, to repay." (3) Such an obligation would be implied if the mortgage had been wholly or even partially for legal necessity. So if the heiress had borrowed money for the purpose of increasing her estate, the reversioner cannot take the acquisition and repudiate the debt. (4) The equity against the reversioner would of course be stronger if he had encouraged the building (5) or the builder had *bona fide* believed that he was absolutely entitled to the property and improved it by adding to its market value. (6) The building of a costly temple is not such improvement which the reversioner has to pay for. (7)

2492. But in such case the builder will be permitted to remove his embellishments (4) unless he had treated as their owner the heiress in which case he has no equity even to remove them. (1)

As to accretions, see **S. 254.**

(1) *Abinash v. Probodh*, 15 C. W. N. 1018; 10 I.C. 857.

(2) *Vrijbhukandas v. Dayaram*, 32 B. 32.

(3) *Ram Tubal Singh v. Biaswar*, 23 W. R.

305 P. C.; *Godeppa v. Apayi* 8 B. 287.

(4) *Oodoy Singh v. Phool Chund*, 5 N. W. P. H.C.R. 197; *Shewak Ram v. Bhowani* 6 C. L. R. 140.

(5) *Dattaji v. Kalbha*, 21 B. 719.

(6) S. 51 Transfer of Property Act; *Abhoy Churn v. Altarmoni*, 13 C.W.N. 981.

(7) *Kidar Nath v. Mathu Mal*, 40 C. 555 (564) P. C.

(8) *Narayan v. Bholagir*, 6 B.H.C.R. (AC) 10; *Vinayak Rao v. Vidyashankar* 9 Bom. L.R. 404; *Premji v. Cassum* 20 B. 298.

(9) *Vrijbhukandas v. Dayaram* 32 B. 32 (36).

2493. He may dispute unauthorised acts.—The reversioner may challenge all unauthorised acts of the widow. For instance he may treat her improper alienation as null and void and enter upon the property ignoring her conveyance. As stated before it will be then on the alienee to make good his title or claim compensation or any other equity to which he may feel entitled.

2494. Her legal representative.—He is entitled to continue as a legal representative all proceedings pending at her death and relating to his estate. (1)

2495. As such he may execute decrees obtained by her as representing the estate (2) as others are entitled to execute against him their decrees obtained against her as such representative. He is not of course bound by any proceedings erroneously continued against the heiress's personal representatives. (3)

His liabilities. **271.** (1) On succession, the reversioner becomes subject to the following liabilities :—

(1) He is bound by all alienations made by the heiress supported by legal necessity or benefit of the estate.

(2) He is liable to pay for the reasonable expenses of her Shradh in proportion to the estate which he has inherited.

(3) He liable to pay all her debts and for her wrongs to the extent provided in the next two following sections.

2496. Analogous Law.—An alienation by an heiress for necessity being authorized by law necessarily binds the reversioner. The reasonable expenses of her Shradh are chargeable on the inheritance in the hands of the reversioner who is liable to contribute a reasonable amount in proportion to the estate inherited by him. (4)

2497. His liability to pay her debts depends upon their nature and necessity. The question was put to the shastris in a case and they replied "Supposing the proprietor's widow, who succeeded him, to have contracted the debts for the payment of rent due to Government or other necessary disbursements to save the estate, or for the purpose of promoting her husband's spiritual welfare, or for the support of the family or for the due execution of any conditions made by her husband, and to have died prior to the liquidation of such debt, the proprietor's heirs, that is, his brother and brother's sons, are bound to discharge the debt. And if the amount was borrowed for the purpose of being appropriated to any other purposes than those specified, such debt must be satisfied by him who becomes possessed of her jewels and other moveable property" (5). Other cases have been decided conformably to this opinion, it being held "that if wives, who, with the consent of their husband assume the management of his family affairs,

(1) *Bijhai Rai v. Sheo Pujan Singh* 33 A. 15; *Jadubansi v. Mahpal* 38 A. 111; *Chintamony v. Mohesh Chundra* 23 C. 454; *Prem moyi v. Premnath*, ib 686.

(2) *Mahadeo v. Sheokaran* 35 A. 481

(3) *Kailash v. Girija* 39 C. 929.

(4) *Ramdhari v. Permanand*, 19 C.W.N. 1188 (1187).

(5) Mac. H. L. Case 7 pp. 248, 249.

contract a debt, the liquidation of such debt rests with the husband ; otherwise he is not answerable for it." (1)

**Debts of the
heir.**

272. Reversioners are not bound to pay the debts of the heiress other than her trade debts incurred in respect of a family business or those not supported by legal necessity or benefit.

Synopsis

- (1) *Liability of reversioner for debts of heiress* (2498). (3) *Personal claim against widow.* (2499).
(2) *What debts binding on reversion.* (2499). (4) *Arrears of revenue.* (2500).

2498. Analogous Law.—S. 271 (3) defines the extent of the reversioner's liability to pay the debts of the previous female holder. This section defines the limit of his liability. It is settled that the reversioner is bound by an alienation made by the heiress for legal necessity or benefit. But it is not as well settled whether he is equally bound to pay her debts similarly supported though this would appear to be the case. (2) In Bombay it has been held that they are liable for the unsecured trade debts of the widow incurred for the purpose of a family business (3) but in so holding Sir Lawrence Jenkins, C. J., who delivered the judgment of the Full Bench addressed himself to the general question and was inclined to hold that the reversioner was liable to pay the legal debts of his predecessor. (4) And this is in accord with the view of the Madras Court (5) but the Allahabad Court (6) and some cases of the Calcutta Court (7) have laid down the contrary.

2499. Personal Claim.—Some claims are from their very nature personal to the heiress and any sale made to satisfy them cannot convey any interest beyond that of the limited owner. Such is a claim for rent accrued due after the death of the last full owner (8) or one made in respect of a debt advanced on the personal security of the widow. (9) And though ordinarily a money decree against the heiress does not bind the reversion (10) still where it is a decree in respect of a debt due from the last owner it is a decree passed against the heiress as representing the estate and as such will bind the reversioners. (11) But where the suit is for maintenance, which is a personal obligation binding on the heiress as such, the decree will only affect her own interest. (12) So the mere fact that the debts were incurred by the widow and the reversioner does not necessarily make the decree realizable out of the entire estate since they may have both contracted the debt without representing the estate. (13)

(1) *Mao. H. L. case 4*; pp. 246, 247.

(2) *Ramcomar v. Ichamoyi* 6 C. 86 (89); *Hurry Mohun v. Gonesh* 10 C. 828 F.B.

(3) *Sakhabhai v. Magon Lal* 26 B. 206 (215) F.B.

(4) *Sakhabhai v. Maganlal* 26 B. 206 (215, 216) F. B.

(5) *Regella, v. Nimushakari* 33 M. 492; *Veerabhadra v. Marudoga*, 34 M 189; *Maharaja, of Bobbili v. Zamindar of Chundi* 35 M. 108.

(6) *Shiamanand v. Har Lal* 18 A. 471; *Dhiraj Singh v. Mangal Ram*, 19 A. 300; *Kallu v. Faiyaz Ali*, 30 A. 394.

(7) *Pradunno v. Unedur*, 18 C. W. N. 353; *Giribala v. Srinath* 12 C. W. N. 769.

(8) *Kristo v. Hem Chunder* 16 C. 511; *Bradjalal v. Jiban*, 26 C. 285; *Sadat Ali v. Hara Sundari* 16 C.W.N. 1070; *Bireswar v. Kamal Kumar* 17 C.W.N. 887; *Rameswar v. Provabai* 19 C. W. N. 818.

(9) *Kallu v. Faiyazali* 30 A. 394; *Kristo Moyee v. Prosunno* 8 W.R. 304;

(10) *Ram Shewak v. Sheo Gobind* 8 W. R. 519; *Narana v. Vastava* 17 M. 208

(11) *Mohenia v. Ram Kishore*, 28 W. R. 174; *Bradjalal v. Jiban*, 26 C. 285 (300).

(12) *Baijun v. Brij Bhokun*, 1. C 188 P.C. *Baijun v. Brij Bhokun*, 24 W. R. 806.

(13) *Mohenia v. Gouri Nath*, 2 C. W. N. 162 (165).

2500. Sale for arrears of Revenue.—The question what interest the purchaser takes on a sale held for arrears of revenue must for its answer depend upon the terms of the revenue law under which the sale is held. So on a sale held under Act XI of 1859 the question arose what interest the purchaser took by his sale. It was contended that the effect of S. 52 was to convey the estate subject to all encumbrances but the court held that reading that section along with S. 13 the sale conveyed the entire estate. ⁽¹⁾

273. The reversioner is bound to pay for the tortious acts of the heiress committed for the benefit of the estate.

Wrongs of the heiress

2501. Analogous Law.—Even the wrongs of the heiress committed for the benefit of the estate bind the reversioners. In one case the plaintiff as reversioner sued the widow for possession and mesne profits of certain property wrongly taken possession of by the widow's husband. He obtained a decree and in execution obtained possession of the property but the decree for mesne profits remained unsatisfied which he sought to enforce against her reversioners. It was held that the property of the husband in the hands of the reversioner was liable. ⁽²⁾ In another case the widow had taken possession in good faith of certain property from which she was ejected by a suit in which mesne profits were also decreed. The decree-holder sued out execution against the reversioners impleading them as her legal representatives and they were held liable for mesne profits because the widow had acted for the benefit of the estate. ⁽³⁾

274. The reversioners are bound by a decree passed against the heiress personally as representing the estate, unless it is shown that it was a decree obtained by collusion or fraud, or that there had not been a fair trial of the rights in the suit.

Decree against the heiress.

Explanation.—1. The decree in this section includes all proceedings consequent upon such decree including a sale in execution thereof.

Explanation.—2. A decree passed against the heiress on a matter personal to her is not a decree passed against her as representing the estate.

Explanation.—3. A decree otherwise valid is not rendered invalid merely by reason of the fact that it had been obtained by consent or compromise.

Illustrations.

(a) A, a widow sues B for a declaration of the invalidity of his adoption. Her suit is dismissed on the ground that B's adoption was valid. On A's death her daughter sues B for possession of the estate on the ground that B's adoption is invalid. The question is *res judicata*

(1) *Debi Das v. Bigro Charan*, 22 C. 641 (642.)

(2) *Lachmin v. Sham Sundar*, 1 I. C. (A) 116,

(3) *Lalji v. Kurki*, 14 C. L.J. 90 following *Ramkishore v. Kalli Kanto*, 6 C. 479; *Prem-moyi v. Preonath*, 23 C. 686.

(b) A a widow sues B for a declaration of the invalidity of B's adoption. Afterwards A compromises her claim with B and suffers a decree declaring B's adoption valid. On A's death her daughter C sues B for possession of the estate alleging the invalidity of B's adoption. The question whether the matter as to B's adoption is *res judicata* depends upon whether the decree in the previous suit had been obtained after a fair contest.

(c) A the mother of the last owner obtains a decree for maintenance against his widow B. In execution she attaches and brings to sale the right, title and interest of B. The seller takes only the widow's estate as the decree was a personal decree against B.

(d) A the creditor of the last owner sues and obtains a decree against the latter's widow B in execution of which he sells the right, title and interest of B. The sale passes the entire estate and not merely B's life estate.

Synopsis.

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| (1) Decree against widow when binding on reversion (2502). | (7) reversioners (2508). Unfair trial, effect of (2511-2513). |
| (2) Widow represents the estate (2503). | (8) Compromise decree against widow effect of (2513-2515). |
| (3) Cause of action when personal to the widow (2504). | (9) Personal decree against widow (2516). |
| (4) Bona fide litigation essential (2505). | (10) Execution against estate in the hands of the widow (2518-2520). |
| (5) Fair trial of the case (2506-2508). | (11) What passes at execution sale (2520). |
| (6) Consent decree when binding on | |

2502. Analogous Law.—The heiress takes a limited estate and on her death her reversioners do not succeed by any right derived through her, since are the heirs of the last full owner. Now the rule of *res judicata* enacted in S.11 of the Code of Civil Procedure makes an adjudication final only as between the same parties to the suit "or between parties under whom they or any of them claim." (1) As the reversioners do not claim under the heiress, the rule of *res judicata* is strictly speaking inapplicable to them. (2) But both convenience and policy have sanctioned a qualified rule deduced from the underlying principle of *res judicata* under which they are held bound if (i) the heiress in the previous suit represented the estate; (ii) there was a *bona fide* litigation; and (iii) the decree was obtained on a fair trial of the matter in suit. These three conditions being fulfilled there is no reason why the reversioners should be suffered to re-agitate the same matter which has already been decided against their predecessor in estate.

2503. Moreover, it is the general rule now enacted as a part of the statute law that any person against whom a judgment is used as barring the retrial of the same question may show that it had been obtained by fraud or collusion. (3) This is a general safeguard of which the reversioner can equally avail himself of. The rule was so stated by Turner, L. J., in a leading case on the subject (4) in which he said, "Their lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit, or in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the Zillah court by any person claiming in succession to Anga Muttu Natchiar (the widow). For assuming her to be entitled to the

(1) S. 11 C. P. C.

(2) *Kisal Singh v. Balwan Singh*, 40 A. 98 P. C.

(3) S. 44. Ev. A.

(4) *Katamanachiar, v. Raja of Shivganga*, 9 M. I. A. 589 (604).

zemindari at all, the whole estate would for the time be vested in her, absolutely for some purposes, though in some respects, for a qualified interest and until her death, it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow." (1) This rule was adhered to in a later case by Lord Romilly who however added that it was the duty of the widow as heiress not only to represent but also to protect the estate, as well in respect of her own as of the reversionary interest. (2) In other words, before the reversioners are held bound it must appear that the character in which the previous holder was sued was such that he represented the entire estate and not only her own limited interest and such she was charged with the double duty of protecting the dual interests—her own and that of her reversioners. In other words, the suit was a representative suit, and not a suit only on matters personal to herself.

The working of these rules in practice may now be examined.

2504. Representative suit.—In the first place then, the suit must be one in which the heiress was arrayed as representing the entire estate. It is not necessary that she should be so described. But what is necessary is that from the subject matter and character of the suit it must appear that she had been so sued. Such is necessarily the suit in which she sues for recovery of the inheritance, (3) or attacks the factum or validity of an adoption which if good, would divest her estate. (4) But on the other hand where the decree for rent of a temporary tenure was obtained against the widow of a tenure-holder as administratrix of her husband's estate, it was held that the description of the widow as administratrix in the decree was not conclusive evidence against the reversionary heir, that the estate in his hands was not bound by the decree and that the decree being in respect of a temporary tenure was personal to the widow and could not therefore be executed against the reversioners. (5) So a decree for rent of the estate in hands of the daughter for the year of her possession is a personal decree. So is the decree for maintenance of a relation not charged on any estate. (6)

2505. Bona fide Litigation.—Secondly the decree must have been obtained on a *bona fide* litigation between herself and her adversary. There is no *bona fide* litigation where one person sues to eject the widow and the latter absents herself or admits his claim. In neither case is there anything on record to show that the litigation was *bona fide* or that any question raised therein was fairly tried. (7) But this should not be treated as a general rule. For it is conceivable that the case may be too righteous to admit of any contest and consequently the mere fact that the heiress did not contest the suit does not suffice

(1) *Katama Nachiar v. Raja of Shivganga*, 9 M. I. A. 589 (604).

(2) *Nugender v. Raminee*, 11 M. I. A. 241 (267).

(3) *Brojo Nath v. Jugeswar*, 9 C. L. J. 346 1 I. C. 62.

(4) *Risal Singh v. Bulwant Singh*, 87 A. 496 O. A. 40 A. 593 P. C.

(5) *Baijun v. Brij Bhokun*, 1 C. 188 P. C; *Kristo v. Hem Chunder*, 16 C. 511; *Brajlat v.*

Jiban, 26 C. 285 affirmed O. A. *Jiban v. Brajlat* 30 C. 550 P. C. *Bereswar v. Kamal Kumar* 17 C. W. N. 387; 16 I. C. 437.

(6) *Baijun v. Brij Bhokun*, 1 C. 188 P. C;.

(7) *Sant Kumar v. Deo Saran*, 8 A. 865; *Sachit v. Budhua*, 8 A. 420. *Gobid v. Khunni Lal*, 29 A. 497 (194); *Mahadei v. Baldeo* 30 A. 75; *Ghelabhai v. Javer* 37 B. 172; *Jewan v. Vetha*, 5 Bom. L. R. 885.

to take the suit out of *res judicata*. It depends upon its own facts. The court has to examine the record, if necessary, to see whether the litigation was *bona fide* notwithstanding that the heiress did not appear or did not consider it worth her while to contest the suit ⁽¹⁾

2506. Fair Trial.—Thirdly the decree must have been obtained on a fair trial of the matters in suit. What is then a fair trial? It is apprehended that all that it means is that the heiress should have prosecuted her case with a reasonable diligence furnishing all available evidence, withholding and suppressing none, and that the record should evidence no collusion or secret compact or compromise presenting to the court an appearance which masks the reality of the case. A fair trial is perfectly consistent with any natural disadvantage from which the heiress may suffer. It is even consistent with a special disadvantage which may impair the force of her pleading. So where the adoptive mother sued her adopted son for a declaration of the invalidity of his adoption on the ground of want of authority from her husband and the court upheld the adoption⁽²⁾ and where in a subsequent suit by her reversioner for ejectment of the son, the latter pleaded *res judicata* by reason of the previous decision, which the reversioner resisted on the ground that the previous suit was decided on a personal estoppel against the widow and the latter in suing the defendant did not represent the estate but only herself; but both these contentions were overruled by the Privy Council who held that the previous suit had been expressly decided without recourse to the doctrine of estoppel and that as to the second their Lordships held, that “notwithstanding the personal estoppel under which she laboured the widow did represent the estate on the question of fact as to whether the defendant had or had not been validly adopted.” ⁽³⁾

2507. In other words without representing the estate the question of the validity of the defendant's adoption to her husband would be meaningless. It was however conceded that as a litigant she laboured under a personal disadvantage in the previous suit by reason of her own adoption but this did not suffice to remove the bar of *res judicata* as it could not be said in the language of the leading case that there had not been a “fair trial of the right in that suit.” ⁽⁴⁾ “In the absence of all authority their Lordships cannot decide, that a Hindu lady, otherwise qualified to represent an estate in litigation ceases to be so qualified merely owing to personal disability or disadvantage as a litigant, although the merits are tried and the trial is fair and honest. The principle is that reversioners must risk that, so that there may be an end to litigation.” ⁽⁵⁾

2508. Another question in this connection arises whether the reversioners are bound by consent decrees passed against the widow. It is said that a Hindu widow who is a limited or qualified owner cannot confess judgment and be party to a consent decree so as to bind the reversioners ⁽⁶⁾ but the decisions of

(1) *Gur Nanak v. Jai Narain*, 34 A. 885; *Subbammal v. Avudaiyammal* 80 M. 3.

(2) *Dharam Kuar v. Bahwant Singh*, 30 A. 549 O. A. 31 A. 898 P. C.

(3) *Bisal Singh v. Bahwant Singh*, 40 A 598 P. C.

(4) *Kajama Nachiar v. Raja of Sivaganga*, 9 M. I. A. 589.

(5) *Bisal Singh, v. Bahwant Singh*, 40 A

598 P. C.

(6) *Raja Lakshmi v. Kalyayani*, 88 C. 689 (673) following *Roy Radha v. Nan Ratan*, 6 C. L. J. 525; *Sheo Narain v. Khurgo*, 10 C. L. R. 837; *Sant Kumar v. Deo Saran*, 8 A. 365; *Gobind v. Khunnilal*, 29 A. 487; *Mahadei v. Baldeo*, 30 A. 75; *Jeram v. Veerbai*, 5 Bom. L. R. 885; *Rama v. Daji*, 20 Bom. L. R. 947; 48 I. C. 125.

the Privy Council ⁽¹⁾ have rendered this view no longer tenable ; and the sole test by which the decrees and compromises of limited owners are to be judged is whether they were fair and suffered or made with due regard to the interests of the reversioners. So the mere fact that the heiress did not contest the suit or having contested it, filed an appeal which she afterwards withdrew ⁽²⁾ does not render the decree ineffectual against the reversioners.

2509. Heiress represents the estate.—Since the estate vests in the female heir in her own right it follows that she is entitled to represent it in all transactions concerning it. ⁽³⁾ Where for instance a suit is pending or a decree passed with reference to the estate she is on the death of the last owner entitled to continue or to defend the proceeding as his legal representative.⁽⁴⁾ If a decree is executed against the estate of the deceased without joining her as his legal representative, subsequent proceedings do not affect the estate which she has inherited and nothing passes by any sale of the estate made in the proceeding to which she was no party.⁽⁵⁾

2510. Since the heiress represents the estate any decree fairly and properly obtained against her in regard to the estate is, in the absence of collusion or fraud binding on the reversionary heir and where merits are tried and the trial is fair and honest, a Hindu lady otherwise qualified to represent the estate in litigation does not cease to be so qualified merely owing to a personal disability or disadvantage as a litigant. ⁽⁶⁾

2511. A converse case was decided by the same Board in a case in which the reversioners having disputed the daughter's right to succeed, the matter was referred to the arbitrators between the daughter and her son Amrit, then a minor, represented by his father on the one side and the reversioners on the other but before they could decide the parties effected a compromise by which the reversioners were to receive the estate the arbitrators were requested to give and they in fact gave their award in accordance with the compromise which was filed in court and embodied into a decree. On the death of the daughter her son sued the reversioners for possession but the reversioners pleaded the award in bar of his claim which Amrit pleaded was a nullity as secured by fraud during his minority and when he was not properly represented. The High Court overruled his contention, but on appeal the Privy Council reversed the High Court holding that Amrit had merely a *spes successionis*, during the life time of his mother and it could not be the subject of any contract or compromise. The action of Amrit's father therefore in referring to the arbitration any matter connected with his son's reversionary interest was null and void. Moreover the compromise was not beneficial to the minor and therefore not binding on him. The decree

(1) *Khumtilal v. Gobind*, 33 A. 356 P. C.
Hiran v. Sohan 18 C. W. N. 928 P. C.

(2) *Gholhabai v. Javer*, 37 B 172.

(3) *Bhau v. Govind* (1879) B. P. J. 60;

(4) *Natha v. Jamni* 8 B.H.C.R. (AC) 37 ;
Haré v. Manakshi 5 M. 5

(5) *Ramasami v. Sabu Kai* 8 M.H.C.R. 186;
Siva v. Palanai 4 M. 401 (403); *Subhanna v. Venkatakrishnan* 11 M. 408; *Jatha v. Venkappa* 5 B. 14; *Akoba v. Sakharam* 9 B. 429;
Alukmonsee v. Banne Madhub 4 C. 677.

(6) *Katama Nachiar v. Raja of Shivganga* 9

M.I.A. 539; *Jogul Kishore v. Jotendro* 10 C. 985, 5 C. *Pratap Narain v. Triloknath* 11 C. 186 P. C.; *Hurrimath v. Mothoor M. Jhun* 21 C. 8 P. C.; *Risal Singh v. Balwant Singh* 40 A. 598 P. C.; *Jharulu v. Jalandhar* 39 C. 8 87; *Mohendra v. Shamsunnessa* 19 C.W.N. 1280; *Nand Kumar v. Radha* 1 A. 282; *Sachit v. Budhna* 8 A. 429; *Hanuman v. Bhaganti* 19 A. 357 (371); *Madar Mohan v. Akharyar* 20 A. 241; *Shelabai v. Javer* 37 B. 172; *Bhogaratu v. Addepalli* 35 M. 530.

following the award did not determine or affect his reversionary rights. The minor was not even a party to the proceedings which culminated in the compromise being reduced to a decree. There had not then been a fair trial of the minor's rights in the previous suit and it did not operate as *res judicata* to his claim. (1)

2512. This was then a case in which there could have been no *bona fide* litigation and no settlement or compromise. Such was also the case of the widow who sued to recover her husband's estate. After partially examining some of her witnesses she declined to proceed further with their examination and summoned the defendant and on his failure to attend, her suit was dismissed. The widow did not appeal against that order. On her death her daughter's sons sued the same defendant to recover the same property and he pleaded the previous suit as *res judicata*.

The High Court held that in view of the circumstances disclosed by the facts of the previous disposal, it was obvious that the facts of the previous case should be closely examined to see whether there had been a fair trial. Apparently there was not, because the widow, did not fairly prosecute her case and did not appeal against its closure. She was bound to protect not only her own interest but also the interests of the person who was to take after her death. (2)

2513. Compromise Decree.—Since the decree is to be made on a fair trial of the matter in suit, a question arises and has been considered in several cases whether a compromise decree binds the reversion. It was at one time held that it did not (3) since a compromise was a contract and a decree on a compromise was indistinguishable from an alienation *inter vivos* which did not bind the reversion. How could it then become (it was said) more binding by the mere fact that it was embodied in a decree. But a compromise decree may still be a fair decree more favourable to the reversion than what a decree might have been if passed on contest. It cannot therefore be asserted as a general rule that no compromise binds the revision. The more correct rule would appear to be that though the reversioner as such cannot *ipso facto* reject a decree passed on compromise, the question whether he is or is not bound by such a decree depends upon whether it answers the general test. Moreover a compromise may amount to a family settlement and the reversioner will then be bound by it. It is immaterial whether it is called a compromise, for even a compromise is valid if it is a fair settlement of rival claims. It has been so held by the Privy Council (4) in which the reversioner had contended on the strength of the earlier cases that a compromise was indistinguishable from an alienation, but the Privy Council overruled this contention holding the compromise had been made under the advice of the District officer and that as a settlement of the family dispute it bound the reversioners.

(1) *Amrit Narayanan v. Gaya Singh*, 45 C. 120 P. C.

(2) *Bramomoye v. Kristo*, 2 C. 222 (224 225).

(3) *Suni Kumar v. Deo Saran*, 8 A 865; *Gobind v. Khunnilal*, 29 A 48; *Mohandli v. Baldeo*, 30 A 75; *Indro Kuar v. Abdool*, 14 W. R., 146; *Imrit v. Roop Narain*, 6 C. L. R., 6; (81); *Sheo Narain v. Kanurao*, 10 C. L. R. 887;

Radha Krishna v. Nanratan, C. L. J. 490 (525); *Rajakshmi v. Kuttyani*, 38 C. 638 (678); *Jeram v. Veeraven*, 5 Bom. L. R. 885; *Rama v. Daji*, 40 Bom L. R. 947; 48 I. C. 125.

(4) *Khunni v. Gobind*, 38 A. 356 (367) P. C; *Hiram Bibi v. Sohan Bibi*, 18 C. W. N. 929; 24 I. C. 309, *Hardie v. Bhagwan Singh* 50 I. C. (A) 812, P. C.

2514. These cases have overruled the contrary held by the Indian Courts and settled the rule that a decree passed on a fair compromise will equally bind the reversioners if it is a fair settlement. (1) It is not an alienation or subject to its restrictions. (2)

2515. A compromise out of court stands on the same footing and its validity is subject to the same test, *viz.*, it is valid and would bind the reversioners if it is a compromise made for the benefit of the estate and not for the personal advantage of the heiress. Moreover the reversioner who has taken part in such compromise and benefited himself thereby would be estopped from dispensing its validity. So where the last owner's sister's son A disputed the right of the widow B to inherit her husband's estate but compromised his claim by which the property was immediately divided amongst the widow and other members. A took share under the compromise but he was thereby recognized as the adopted son of another deceased uncle whose widow had taken a share and which she some 6 years later surrendered to him. On the death of B four years later A and his brother claimed the entire property as reversioners, but the Privy Council threw out A's claim holding that A having entered into and taken the benefit of the compromise was precluded from claiming as reversioner. (3)

2516. Decree against her personally.—Again since the heiress alone represents the estate it has been held that in order to operate as *res judicata* the decree should have been passed personally against her as representing the estate and not against any of the representatives. So where the widow executed a mortgage on foot of which the mortgagee sued and obtained a decree against her. She preferred an appeal but while her appeal was pending she died and the appeal was continued not by the reversioners but by the widow's personal representatives. It was dismissed and the mortgagee obtained possession. The reversioner sued him for possession challenging his mortgage as fraudulent and without legal necessity. His suit having failed, he sued him again for redemption on the ground that he was not bound by any proceedings continued since the death of the widow and this contention was upheld by the High Court who held that since the decree of the Trial Judge merged in that of the court of appeal and since that court had passed a decree against the widow's personal representatives who could not represent the estate, there was no decree which bound the reversioner, and since there was a valid mortgage as held in the previous suit against the reversioner, the latter was entitled to redeem it. (4)

2517. But though the limited owner's right to compromise a claim is now beyond controversy, it must be a compromise, and not merely an alienation in the guise of a compromise. Every compromise pre-supposes a *bona fide* claim and if there was no claim there could be no compromise. (5) This is no exception to the rule that a

(1) *Beharilal v. Daud Husin*, 85 A. 240; *Kambinayani v. Kambinayani*, 88 M. 478.

(2) *Gur Nanaka v. Jai Narain*, 34 A. 885; *Hiran v. Sohan*, 18 C. W. N. 929 P. C.; following *Khunnilal v. Gobind*, 83, A. 856 P. C. overruling contra *Sohan v. Hiran*, 1, I. C. (A) 180 overruled O. A. *Hiran v. Sohan*, 18 C. W. N. 929 P. C.; *Kambinayani v. Kambinayani*, 88 M. 478; *Beharilal v. Daud Husin*, 85 A. 240; *Kunnilal v. Gobind*, 88 A. 856 P. C.; *Hiran v. Sohan*, 18 C. W. N. 929.

P. C. *Mohendra v. Shamsunnesa*, 20 C. L. 157 (163); *Upendra v. Bindeseri*, 20 C. W. N. 210; *Ram Sunran v. Shyam Kumari*, 47 I. C. (Pat.) 697.

(3) *Konh Lal v. Brij Lal*, 40 A. 487. P. C.

(4) *Khatilash v. Girija*, 89 C. 925 (980) *Jaihu Naik v. Venkatapa*, 5 B. 14; explained in *Devji v. Sambhu*, 24 B. 185 (144, 142.)

(5) *Anupnarain v. Mchabir*, 3 Pat. L. J. 88; 42 I. C. 95.

compromise is binding if it is fair and made with due regard to the interests of the reversioners.

2518. When execution sale binds the reversion.—If the decree binds the

Exp. (1) estate so does the sale held in execution of such a decree. But decrees are often passed without specifying the interest affected in which case the question whether on the sale of the right, title and interest, of the widow in execution of a decree, the whole interest or inheritance in the family estate does, or does not pass depends on the nature of the suit in which the execution of the decree takes place. If the suit is on a personal claim against the widow, then merely the widow's limited estate is sold. If on the other hand the suit is against the widow in respect of the family estate, or upon a cause not merely personal against her, then the whole of the inheritance passes by the execution sale. In order to ascertain the quantum of interest affected by the decree it is permissible to examine the judgment upon which the decree is passed (1). So where the plaintiff sued for and obtained a decree for her maintenance against the widow in execution of which she attached whatever right and interest the judgment debtor had in the estates, the Court held it to be a personal decree and as such one which in execution sale conveyed only the life-interest of the widow. "The real question is what was liable to be sold under the decree, and what in fact was sold. The purchaser may have made a mistake. He may have thought that the Court was selling something which they did not sell, but he was informed distinctly by the notification that the Court was selling the interest of the defendant in the estate, and that besides that interest no other interest was being sold... It appears therefore to their Lordships that what was intended to be sold was the widow's interest only and not the absolute estate." (2) But the mere fact that the proclamation advertised for sale the right, title and interest of the heiress is not conclusive since it is still a question for enquiry, what that interest is and in many cases although the right, title and interest of the widow had been sold the whole interest in the estate was held to have passed and the reversionary heir to be bound by it. (3)

2519. The question in such cases depends as already stated upon the nature of the suit. As Sir Lawrence C. J said, "Now the cases make it clear that the courts in determining the effect of an execution sale look to the substance of the whole matter and have declined to hold themselves fettered by any incorrect description, or by any informality in procedure which can have no practical influence on the result. And so it has constantly happened that where justice and equity require such a determination it has been held that a greater or other interest in the property has passed than would be warranted by a strict adherence to the words of the sale notification or certificate in execution proceedings. Similarly, the whole estate of a deceased debtor has been held to be bound by proceedings in execution of a money decree though the actual heirs were not in so many words bound by the decree; but were substantially represented in the suit. And one can well understand how the courts, and more particularly the Privy Council, have declined to apply the more rigid test of English practice to proceedings in this country." (4)

(1) *Jugul Kishore v. Jotendro*, 10 C. 985.

P. C.

(2) *Ba'um v. Brij Bhookun*, 1 C. 133 (139)

(3) *Jugul Kishore v. Jotendro*, 10 C. 985

(140) P. C. explained in *Jugul Kishore v. Jotendro*, 10 C. 985 (992) P. C.

(992) P. C.

(4) *Deoji v. Shambhu*, 24 B. 135 (189).

So where the decree was passed against the widow, in respect of rent of the estate due for a period when her husband was alive, the court held the sale to convey the absolute estate and not merely the interest of the widow against whom the decree was passed.

2520. In some cases the widow was held even to have sufficiently represented her minor sons living, who were held bound by the decree passed against her, unless they could show that the decree was not binding on the estate in their hands by reason of the debt not being one for which the estate was liable. (1)

The matters for consideration in such cases are :—

(1) What property could have been brought to sale in a properly constituted suit ;

(2) What property was it actually intended to sell and buy ; and

(3) Has there been such an error in the constitution of the suit or the conduct of the proceedings that effect cannot properly be given to the intention or, to state conversely, has there been a substantial representation of those interested in the property intended to be sold and bought ? (2)

2521. Personal decree.—The explanation 2 merely states the rule of construction, viz that the nature of the decree must be determined by the nature of the cause of action. If it was personal to the widow, so is the decree. If it affected the entire estate, so does the decree. If the cause of action was personal the fact that the decree was passed both against the heiress and her reversioners would not make the entire estate liable. (3)

275. The reversioner is entitled to sue for possession of immoveable property to which he becomes entitled on the death of a female owner at any time within 12 years from her death as provided in Art. 141 of the Limitation Act ; or in case of its forfeiture, within the same period calculated from when the forfeiture is incurred as provided in Art 143 of the Limitation Act.

(2) Where, however, the property to be recovered is moveable he must sue within six years from the same event under Art. 120 of the Limitation Act.

(3) Provided that where the heiress had at any time set up an adverse title against the reversioner his claim will be barred by her adverse possession for 12 years.

Synopsis.

- (1) *Limitation for suit for possession by reversioner* (2523). (2) *Limitation for suit for recovery of moveables* (2524)

(1) *Achut v. Manju nath*, 21 B. 539.

(2) *Devji v. Sambhu*, 24 B. 135 (146)

(3) *Nobin Chandra v. Hemchandra*, 19 C. W. N. 265.

2522. Analogous Law.—The starting point of limitation for recovery of the estate is, since the Limitation Act of 1871, the death of the heiress prior to which possession adverse to the heiress was held to constitute possession equally adverse to the reversioner. And if adverse possession commenced against the former it was held to continue to run as such against the latter. ⁽¹⁾ In other words under the Limitation Act XIV of 1858 the starting point of adverse possession was its commencement against the heiress and its starting point under the later Acts has been her death. ⁽²⁾

It is settled by the Privy Council that as regards moveables the reversioner's suit for possession is subject to Art. 120. ⁽³⁾

This is the normal case where the widow does not set up any adverse title on her own account. Where, however, she does so, limitation commences to run as from the date of her assertion of such title and the reversioner would then be barred unless he sues for possession within 12 years from that date as provided in Art. 144 of the Limitation Act. ⁽⁴⁾

2523. Reversioner's suit for possession.—The reversioner's suit for possession is subject to Art. 141 of the Limitation Act whether the reversioner be a male or female ⁽⁵⁾ and whatever may be the number of intervening female estates. ⁽⁶⁾

The starting point for limitation being unalterably fixed from the date of the heiress' death her alienations whether purporting to be for life or absolute are immaterial. ⁽⁷⁾ So it is said, is the fact of her adoption and the possession of the adopted son. ⁽⁸⁾ Where however the heiress has forfeited her estate by reason of her remarriage the period of limitation is the same though it commences to run as from the date of her remarriage when the forfeiture is incurred as provided in Art. 143. ⁽⁹⁾

2524. Suit for moveables.—The only article applicable for recovery of moveables is Art. 120 which allows 6 years from the death of the heiress. Such a suit is not a suit for a distributive share of property to which Art. 123 could apply nor a suit for specific moveable property wrongfully taken which is subject to Art. 49. ⁽¹⁰⁾

(1) *Amirtolal v. Rajooneekant* 23 W. R. 214 P. C.

(2) *Runchordas v. Perantibhai* 21 B. 646 affirmed O. A. 23 B. 725 P. C. *Bijoy Gopal v. Krishna* 34 C. 329 P. C. *Persut v. Palut Roy* 8 C. 442; *Srinata v. Prosunno Kumar* 9 C. 984; *Harihar v. Dasarathi* 38 C. 257; *Meeraw v. Girjanandan*, 12 C. W. N. 857; *Mulka v. Dad* 18 B. 216; *Rakhmabai v. Keshav*, 81 B. 1; *Ram Kali v. Kedarnath*, 14 A. 156, *Hanuman v. Bhagauli* 19 A. 857 *Amrit v. Bindesri* 23 A. 448 (dissenting from *Tikaram v. Shama Charan* 20 A. 12); *Sreeramula v. Krishnamma* 26 M. 148.

(3) *Mahomed Rissat Ali v. Hasin Banu*, 21 C. 157 P. C.; *Runchordas v. Parvatibai*, 23 B. 725 P. C. affirming O. A. 2, B. 646

(4) *Sham Koer v. Dab Koer*, 29 C. 664 P. C.; *Lachhan Kumar v. Anant Singh*, 22 C. 445 P. C.; *Mahabir v. Adhikari*, 28 C. 942; *Amrit v. Bindesri*, 28 A. 448; *Jhamman v.*

Tiloki, 25 A. 435, *Gajadhar v. Parbati*, 38 A. 812.

(5) *Ram Dei v. Abu*, 27 A. 494.

(6) *Jhamman v. Tiloki*, 25 A. 435; *Sambasita v. Ragava*, 13 M. 512.

(7) *Ram Shewak v. Sheo Gobind*, 8 W. R. 519; *Hanuman v. Bhaganti*, 19 A. 857.

(8) *Bhagwat v. Murarilal*, 15 C. W. N. 524; 7 I. C. 427; *contra Ramkrishna v. Tripurabai*, 33 B. 88 in *Sreeramulu v. Kristamma*, 26 M. 143 both arts. 141 and 144 held applicable.

(9) *Nathu v. Nat Babu*, 11 N. L. R. 86; 29 I. C. 612; *Doraiswamy In re*, 12 M. L. T. 158; 15 I. C. 602. Case different where remarriage entails no forfeiture. *Abdul Aziz v. Nirma*, 35 A. 466.

(10) *Mahomed Rissat Ali v. Hasin Banu*, 21 C. 157 (188) P. C.; *Ranchor Das v. Parvatibai*, 23 B. 725 P. C.

CHAPTER XXVI.

STRIDHAN.

2525. Topical Introduction.—The rights of women in Europe have developed as time progressed, but the rights of women here have become similarly curtailed. This tendency is noticed by Sir Henry Maine who wrote: "The settled property of a married woman, incapable of alienation by her husband, is well known to the Hindus under the name of *Stridhan*. It is certainly a remarkable fact that the institution seems to have been developed among the Hindus at a period relatively much earlier than among the Romans but instead of being matured and improved as it was in the Western Society, there is reason to think that in the East, under various influences which may partly be traced, it has gradually been reduced to dimensions and importance far inferior to those which at one time belonged to it.....Among the Aryan communities as a whole, we find the earliest traces of the separate property of a woman in the widely diffused ancient institution known as the bride-price. Part of this price which was paid by the bridegroom either at the wedding or the day after it, went to the bride's father as compensation for the patriarchal or family authority which was transferred to the husband but another part went to the bride herself, and was very generally enjoyed by her separately and kept apart from her husband's property. It further appears that under a certain number of Aryan customs the proprietary rights of other kinds which women slowly acquired were assimilated to their rights in their portion probably as being the only existing type of woman's property." (1)

2526. But with the impact of Western civilization there is again a tendency towards the education and emancipation of women. In the Vedic age when marriage was generally a love union between adults women possessed individual rights. The Vedic text quoted by Baudhyayan which later writers reiterated as establishing women's dependence was probably an interpolation and it is so considered by West, J., in a considered judgment in the course of which he said: "In the dim twilight of the early Vedic period, it is possible to discern some indications of a theory of perfect equality once subsisting between the parties to a marriage. The indications are by no means uniform, but the prevailing notion appears to have been that of a free choice of her husband by the damsel, who was even dowered by the father. The married couple were conjoined to pass their lives in union and content. Yet by the time of the actual composition of the Vedas a text could be introduced which according to the interpretation of Baudhyayan⁽²⁾ and Apastamb⁽³⁾ declared that "women are not entitled to use the sacred texts or to inherit." Thus the traces of generous respect were partly lost in the overgrowth of another stage in the national existence, and by the time when the Code of Manu was drawn up, the sex had fallen to a distinctly lower position. A woman is never to seek independence, no religious rite is allowed to her apart from her husband; she must revere him as a god.⁽⁴⁾ To the

(1) Maine, *Early Institutions*, 321-324.

(2) Baudhyayan II-II 27; 14 S.B.E., 291.

(3) Apastamb II-VI-14.

(4) Manu V-148, 154, 155.

same set of doctrines must be assigned such texts ⁽¹⁾ which taken without the gloss of Kalluk Bhat "exclude wives and daughters from the line of inheritance." ⁽²⁾ It is thus possible to trace throughout the principal sources of Hindu Law two entirely different, if not inconsistent lines of thought on the subject of the position and legal capacities of women.

2527. In the more modern developments of that law, these opposite views have given rise to directly contrary theories on subject of woman's property. The widow's right to take her husband's estate or the share having been established, the questions became, under what circumstances did this occur? and what was the nature of her right? The text of Manu ⁽³⁾ which defines or enumerates the six-fold property of a woman is immediately followed by one ⁽⁴⁾ which apparently recognizes two kinds of such property not included in the preceding enumeration. The lawyers of the Bengal school, though not without a great many variances of opinion, have resolved that the enumeration of the six kinds is intended by Manu to be exhaustive... Thus the doctrine of a general incapacity, qualified by a special capacity for property of particular kinds, and generally of no great value forms the ground-work of the whole of the Bengal Law of woman's property. It is necessary on this theory to exclude property acquired by inheritance from the class of *Stridhan*, though women are allowed to enjoy such property for their lives. ⁽⁵⁾

2528. This is also the theory of the Mitakshara which, however, includes all property inherited by a woman in her *stridhan*. In the same chapter ⁽⁶⁾ it had been previously arrived, through an elaborate course of argument, at the conclusion that a widow takes the whole estate of her deceased husband separated in interest from his brethren. It makes no distinction between inheritance of a woman from her husband and her inheritance from any other person. The right which it thus confers on her is balanced by a corresponding right which it allows to the husband and his *sapindas*. Thus inheritance from a member of her own family, which on a woman's death, would according to the Bengal school, revert to the next heirs of him from whom she inherited and which according to the Mayukh would go to her heirs as though she had been a male, is assigned by Vijyaneshwar to her daughters, her sons, and after them to her husband and his *sapindas*. The two rules spring from the same source, a higher conception of a woman's capacity for property, and of her complete identification by marriage with her husband's family, than the Bengal lawyers would entertain; while the limiting of the widow's rights as an heir to the case of her husband's having been separated in interest from his brethren harmonises more with the Hindu theory of the united family than the opposite doctrine of her taking his share equally, whether the family have divided or not.

2529. But whatever may have been the genesis of Baudhayan's text and the curtailment of women's rights the fact remains that women had no rights in the mediæval epoch, being classed with slaves and cattle and it is only in a comparatively later age that their rights became once more recognized and the Smritikars began to concede to them limited rights. There appears to have been some conflict of thought between their rights and their duties. For while

(1) Manu, IX-185, 187.

(2) *Vijarāgam* v. *Lakshuman*, 8 B.H.C. R. (O.C.) 244 (259).

(8) Manu, IX-194.

(4) Manu, IX-195

(5) *Vijarāgam* v. *Lakshuman*, 8 B.H. C.R. (O.C.) 244 (259)

(6) II 1-39.

on the one hand the woman was assigned an exalted rank by the side of her husband as her better half she was still treated as incompetent to hold and wield property of her own. Apart from their domestic duties their only occupation appears to have been spinning and weaving; and Manu knew of no occasion to speak of women's separate property except in the six-fold gifts which he treated as her sole *Stridhan*.

2530. This was the stereotyped expression of her rights which later Smritikars reveal with no refreshing comments of their own. Even Yajnavalkya who did much to develop the law of inheritance left women in that strait. His expositor Vijyaneshwar took a bold stand and taking advantage of one loop-hole in his author's description of women's property classed all her estate as *Stridhan*. But it was an isolated passage and later writers demurred to so astounding an innovation. Jinut Vahan who drove a chariot through his conception of a joint family and modernized the law of property so far as regards man, struggled against the Mitakshara conception of *Stridhan* of which he laid bare the hollowness.

2531. The law of *stridhan* is the most difficult as it is the least settled branch of Hindu Law. In its forefront stands its etymological definition by Vijyaneshwar and its repudiation by the Privy Council. The term *stridhan* literally means "woman's property" and Vijyaneshwar defined it as such. But as has been seen, woman's property is a generic term and embraces property which a woman may acquire by inheritance or partition or it may come to her by gift from her parents, husband or his or her other relations. Yajnavalkya employed the term *stridhan* to denote the quality of the right in property which she obtained mostly by gift over which she had absolute power of disposal. In describing such property he mentioned that which was obtained by gift from her husband *et cetera (adi)*. Vijyaneshwar seized hold of this word and explained *et cetera* to include all her other estate howsoever acquired with the result that if his explanation were accepted all that woman acquires by inheritance and partition would fall into the same category as her bridal gifts with the result that they will all be at her absolute disposal and on her death pass to her own heirs. Now as Vijyaneshwar's scheme of woman's rights was limited and followed the earlier conception of her dependance and cautious concession of enjoyment, the Privy Council would not allow the enlargement of her rights as the result of a single text and one wholly out of keeping with the general tenor and purpose of his general scheme. In the very first case which they had to try they repelled the logical deduction pressed upon them. (1)

2532. In later cases (2) they reiterated and strengthened their earlier standpoint with the result that Vijyaneshwar's definition of *stridhan* stands repudiated and the term *stridhan* must now be limited to comprise only such property as the woman acquires otherwise than by inheritance and partition and over which she possesses plenary powers of disposal. Leaving out of account then all other property *stridhan* has but a limited significance. It is a legal concept—a term of art and bears only the meaning assigned to it in S. 278 where all the sources of her acquisition of such property are set out.

2533. This *stridhan* the owner may dispose of by a gift *inter vivos* or by will. But it does not mean that the donee or the devisee as the case may be,

(1) *Thakar Deybee v. Bulukram* 11 M. I. A. 189 (175)

(2) *Bhugwandeon v. Myna Bee* 11 M.I.A. 487; *Choday Lall v. Chunno Lall* 4 C. 744 P. C.; *Sheo Shukar v. Debi Sahai* 25 A. 468 P. C.

Sheo Periab v. Allahabad Badli 1b 476 P.C. *Debi Mangal v. Mahadeo* 34 A. 234 P.C. overruling O. A. *Debi Mangal v. Mahadeo* 89 A. 253 also *Chhiddu v. Naubat* 24 A. 67 (74). 76).

will acquire all the rights which she had herself possessed in the property since the incapacity of the sex remains and if the donee or the devisee be a woman she will acquire no more than a limited estate, whatever may have been the intention of the grantor. Here again Hindu Law modifies the first rule of conveyancing which holds the transferee to take all that his grantor can give. The same rule obtains in case of inheritance. Take an example. A Hindu widow acquires one village (A) by inheritance and another (B) by adverse possession. If she sells or mortgages both, the vendee whether a male or a female, a relation or a stranger, acquires an absolute estate both in A and B because the transaction is subject to chapters IV and V of the Transfer of Property Act which overrules any rule of Hindu Law to the contrary.

2534. But if instead of mortgaging or selling the two villages suppose she makes a gift of them, then, since the Hindu Law of gifts remains unaffected by the Transfer of Property Act, the interest which her donee takes in the two villages depends upon her personal law. Now since this law only recognizes a limited estate as possible to a woman the sex of the donee will determine the quantum of interest which her deed of gift will convey to the donee. If the latter is a male, he will take an absolute estate. If she is a Hindu female she will take but a limited estate for that is all that Hindu Law permits a woman. If a donee were a non-Hindu woman her estate would not be trammelled by the limitations of Hindu Law, since Hindu Law does not prohibit absolute ownership in a woman but what it does prohibit is that an absolute owner if a female cannot directly convey her absolute estate to another Hindu female by gift or devise. But in such a case she may evade the law by transferring her absolute ownership to a male and then the latter may transfer it as absolutely to the female who was to have been primarily the object of the owner's bounty. In other words she may do indirectly what she cannot do directly.

2535. This is again an anomaly but when law creates artificial barriers, anomalies do creep in and they abound in the law relating to succession, which follows no uniform general rule but depends upon at least five disturbing factors : (1) The kind of stridhan; (2) the fact whether the owner was a maiden or married and if married, (3) whether she had children, (4) or was childless ; (5) even the mode of her marriage ; and (6) lastly, the school to which she is subject. Even in the case of the heirs when they are daughters preference is given to unmarried and indigent daughters over daughters who are married and well off ; while the Bengal law discriminates between daughters who have a son or are likely to beget a son and those who are widowed and sonless.

2536. It might be supposed that in the face of these numerous distinctions it would not be possible to generalize upon the law of succession to stridhan. And the text writers do not attempt it. But if the subject is analysed it will be seen that there is a possibility of reducing these rules to a system.

In the first place though stridhan is acquired in a variety of ways, an examination of the subject will show that all its sources are reducible to two main heads. Stridhan which the older Smritikars describe in detail and which is all they provide for has come to be understood as the technical or proper stridhan. It forms an inconsiderable part of woman's absolute estate. It, however, follows the special rules of devolution upon which there is the greatest conflict. Other stridhan described in clauses 1-6 of S. 278 is subject to a more general rule because it has of only latterly become recognized and its law of succession is not trammelled by any textual directions. It is then possible to formulate the general rules subject to which this description of stridhan passes. Both as regards its enjoyment and

the law of its succession it is not a wide departure from the general law. It is, however, natural that the mother's estate should first go to her female issue. As remarked in a case: "The law of succession therefore generally follows the female line."

Stridhan defined

276. (1) Stridhan means woman's property over which she possesses the power of full disposal and which on her death devolves upon her own heirs.

(2) It includes property into which it is converted by sale exchange or otherwise.

Illustrations

(a) A possesses two properties B and C as her stridhan. She makes a gift of B to D and devises C to E. Both the gift and the devise are valid as the properties being A's stridhan, she possessed the absolute power of disposal over them.

(b) A inherits the property B from her husband. She accumulates its income which she bequeathes to C by will. The bequest is void as though A possessed the absolute power of disposal over B's income it was not her stridhan. She could not therefore bequeath it.

Synopsis.

- (1) *Texts on stridhanam* (2537). (2538).
- (2) *What is stridhanam* (2538). (4) *Modern definition of stridhanam*
- (3) *Difference between commentators* (2539).

2537. Analogous Law.—The following texts bear on the subject of this section.—

Manu:—What was given before the nuptial fire, what was given on the bridal procession, what was given in token of love and was received from a brother, a mother, or a father, are considered as the six fold separate property of a married woman. (1)

Narad:—What was given before the nuptial fire, what was presented in the bridal procession, her husband's donation and what has been given by her brother, mother or father is termed the six-fold property of a woman (2)

Vishnu:—What has been given to a woman by her father, mother, sons, or brothers, what she has received before the sacrificial fire, (at the marriage ceremony) what she received on supercession, what has been given to her by her relatives, her fee (Sulk) (3) and a gift subsequent, are called a stridhan (woman's property). (4)

Katyayan:—Whatever is given at the time of their marriage before the nuptial fire which is the witness of nuptials is denominated by the sages *Adhyagnik stridhan*. (5)

Apastamb:—Ornaments are the exclusive property of the wife and so is wealth given to her by kinsmen or friends, according to some legislators. (6)

Yyas:—That which is given to bring the bride to the family of her husband is her perquisite which is given as a bribe or the like, that she may cheerfully go to the mansion of her lord (7)

Devala:—Food and vesture, ornaments, perquisites, and wealth received by a woman, from a kinsman, are her own property; she may enjoy it herself, and her husband has no right to it except in extreme distress. If he gives it away on a false consideration, or consume it, he must repay the value to the woman with interest, but he may use the property of his wife to relieve a distressed son. (8)

Yajnavalkya:—What was given (to a woman) by the father, the mother, the husband, or a brother, or received by her before the nuptial fire or presented to her on her husband's marriage to another wife and the rest (*Adya*) is denominated *Stridhan* so that it is given by a kindred as well as her marriage-fee (Sulk) and anything bestowed at a marriage. (9)

(1) Manu IX-1 4

(2) Narad XIII-8; 88 S. B. E. 190

(3) Sulk was originally the bride-price paid to the wife's father. Later on it became payable to the wife as her wedding present. See Gautam XV-11-25; 2 S.B.E. 808

(4) Vishnu XXVII-18; 7 S.B.E. 69.

(5) 3 Dig. 557, 558

(6) 3 Dig. 570.

(7) 3 Dig. 588.

(8) 3 Dig. 577, 578.

(9) Yaj. II-144.

Mitakshara :—(*Citing the last*) That which was given by the father, by the mother, by the husband, or by a brother and that which was presented (to the bride) by the maternal uncles and the rest (as paternal uncles, maternal aunts etc.) at the time of the wedding before the nuptial fire and a gift on a second marriage or gratuity on account of supercession as will be subsequently explained (1) and also property which she may have acquired by inheritance purchase, partition, seizure or finding are denominated by Manu and the rest *stridhan*. (2)

Dayabhag :—That alone is her peculiar property which she has power to give, sell, or use, independently of her husband's control. (3)

Mayukh :—*Cites and comments on previous texts.* (4)

2538. What is Stridhan.—With the exception of the Mitakshara all texts use the term "Stridhan" to denote the property of a woman over which she has absolute power of disposal. Yajnavalkya uses it in that sense, and illustrates his meaning by enumerating certain well known kinds of that property, adding the word "Adya" *i. e.* and the like, or *et cetera* as meaning that his enumeration is merely illustrative and not exhaustive. The author of Mitakshara takes advantage of this incomplete enumeration and explains the word "Adya" to mean all other property acquired by a woman whether by inheritance or partition. It might at first be supposed that Vijyaneshwar an ascetic and expositor of the conservative thought, was striving to enlarge the rights of woman by conferring upon women absolute power of disposal over property even acquired by them by inheritance or partition. But this does not appear to have been his object, though by enlarging the meaning of the term and giving it a wider significance he clearly intended that all such property to descend to the woman's special heirs. This was in itself a serious innovation and was not submitted to by the other commentators and the courts who held that it did not descend in the special line prescribed for Stridhan strictly so called (5) and that in this respect there was no distinction between a woman's property inherited from a male and that which she inherited from a female, (6) and that on this point there is no distinction between the Mitakshara and the Mayukh (7) or the Bengal laws. (8) In other words property acquired by inheritance and partition (9) by a woman is not her *Stridhan* and Vijyaneshwar is not to be followed when he defines Stridhan as including such property. (10)

2539. Ignoring then the wider definition of the term "Stridhan" contained in the Mitakshara as incorrect, there remains its original connotation and in that sense, the term has now come to be recognized and will be used throughout in this chapter. *Stridhan* is sometimes spoken of and defined as property of a

(1) Mit. II-34.

(2) Mit. II-XI-2

(3) Dayabhag IV-1-18 quoted in *Brij Indr v. Janki*, 1 C.L.R. 818 (825) P.C.

(4) Ch. IV—X—1—82

(5) *Thakoor Deyhee v. Baluk Ram*, 11 M. I.A. 189; *Bhugwandeon v. Myna Bae* 11 M. I.A. 487; *Chokay Lall v. Chumnoo Lall* 4 C. 744 P.C.; *Muttu v. Dorasinga*, 8 M. 290 P.C. *Chelikani v. Chelikani*, 25 M. 678 P.C.; *Sheo Shankar Lal v. Debi Sahai*, 25 A. 468 (478) P.C. reversing O.A. *Debi Sahai v. Sheo Shankar Lal* 22 A. 858

(6) *Vijjarangam v. Lakshuman*, 8 B.H.C.R. (O.C.) 244 (272); *Manilal v. Rewa*, 17 B. 758 (761); *Vira Sengappa v. Rudrappa*, 19 M. 110 (118); *Sheo Sankar Lal v. Debi Sahai* 25 A.

468 (478) P.C.; *Sheo Partab v. Allahabad Bank*, 25 A. 476 P.C.

(7) *Vijjarangam v. Lakshuman*, 8 B.H.C.R. (O.C.) 244 (260); *Narmada v. Bhagwantrao*, 12 B. 505; *Manilal v. Rewa*, 17 B. 758; explained in *Sheo Shankar Lal v. Debi Sahai*, 25 A. 468 (474) P.C. reversing O.A. *Debi Sahai v. Sheo Shankar Lal*, 22 A. 358.

(8) *Huri Dayal v. Grish Chunder*, 17 C. 911 (916).

(9) *Debi Mangal v. Mahadeo*, 84 A. 284 P.C. overruling O.A. 32 A 253 and *contra* in *Chhiddu v. Nambal* 24 A. 67; *Sri Pal v. Surajbali* 15 82.

(10) *Janakisetty v. Miriyala*, 32 M. 521 (524); *Sengamalathammal Valayudy*, 8 M.H.C.R. 312.

woman over which she possesses the unfettered power of disposal. But all property over which she possesses such power is not necessarily her Stridhan. For example she possesses an absolute power of disposal over the income of her inherited estate; but it is not her *Stridhan* because on her death it devolves upon the heir of the last owner and not on her own Stridhan heir. Only such property over which she exercises uncontrolled dominion when alive and which on her death devolves on her own heirs is her stridhan.⁽¹⁾ On the other hand a sister in Bombay inheriting to her brother takes his property as her Stridhan, because she has an absolute power of disposal over it during her life time and on her death it devolves upon her own heirs namely her own daughters.⁽²⁾

What property is stridhan. **277.** The following property constitutes a woman's stridhan :—

(1) Property inherited by female heirs born in the family and subject to Mayukh.

(2) Property acquired by grant, gift, or devise from a relation or a stranger which confers an absolute power of disposal.

(3) Property given for the purpose, or in lieu of maintenance, not being property allotted on partition to a wife or widow.

(4) Accretions to and purchases made out of such property.

(5) Property acquired by adverse possession.

(6) Property acquired by self exertion.

(7) Wedding gift and more particularly the following:—

(i) *Yatuk* including—

(a) *Adhyagnik Stridhan*—gifts made before the nuptial fire, i.e. at the, actual marriage ceremony, and

(b) *Adhyarahnik Stridhan*—gifts received at the time of the marriage procession.

(ii) *Sulk*—or gratuity.

(8) *Adhivednik*—or the compensation given by the husband to his wife on his marrying another wife.

(9) *Anwadeyik*—or gifts made after marriage by her relations or by her husband's relations.

Synopsis.

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|---|---|
| (1) <i>What property is stridhanam</i> (2540-2541). | (2549-2550). |
| (2) <i>Bombay law</i> (2542). | (7) <i>Acquisition by self-exertion</i> (2551). |
| (3) <i>Grants and gifts</i> (2543-2546). | (8) <i>Yautak</i> (2552-2554). |
| (4) <i>Property given for maintenance</i> (2547). | (9) <i>Ayautaka</i> (2553). |
| (5) <i>Accretions and purchases</i> (2548). | (10) <i>Sulka</i> (2555). |
| (6) <i>Acquisition by adverse possession</i> | (11) <i>Adhyavednik</i> (2556-2557). |
| | (12) <i>Anwadheik</i> (2558). |

(1) *Phulnar Singh v. Ramjit Singh*, 1A. 661.

(2) *Bhaskar v. Mahadeb* 6 B. H. C. R. (O C) 1.

2540. Analogous Law.—All the clauses of this section are drawn from the decided cases. ⁽¹⁾ Of the 9 clauses. Clauses 7-9 alone are referred to in the texts

cited under the last section as constituting *Stridhan*, but as the Court remarked "we are not prepared to hold that the rules of Hindu Law are so inelastic as to be capable of application only to each description of interests in the property as formed the subject-matter of transactions at the time when the rules were first formulated. Indeed, if the rules of Hindu Law were so narrowly construed and applied it would be impossible to administer them because in any case, the courts would be called upon to hold a preliminary enquiry as to when a particular rule was first laid down and also as to what kinds of interest in property were recognized at that time" ⁽²⁾ Moreover, the six-fold description of property was never intended to be exhaustive.

2541. The rest are generally described or necessarily implied. The woman's *stridhan* was formerly the battle ground for interminable logomachies and being a topic on which according to Kamlakar "the lawyers fight tooth and nail" ⁽²⁾ and Jimut Vahan himself was glad to close the subject with these words: "Thus has been explained the most difficult subject of succession to a childless woman's *stridhan*." ⁽⁴⁾

2542. Bombay females:—It is now settled that females outside Bombay, to whatever school subject, do not acquire an absolute estate in property inherited by them whether from a male or a female, or obtained on partition. (§2324) But as has been seen before, in Bombay female relations born in the family take an absolute estate and the property so inherited devolves upon their own heirs. It is, therefore, their *Stridhan*. (§2340)

2543. Grant and gift.—It is now settled that a grant or gift to the wife made by the husband or any of his or her relations conferring upon her an absolute power of disposal is her *stridhan*. This is in accordance with the recognised texts:—

- (1) Cl. (1) *May*. IV- X- 26; *Vijjarangam v Lakshuman* 8 B. H. C R. (OC) 244 (261); *Bhagirathi Bai v. Kanhujiarav*, 11 B. 285 (803, 810), *Gandhi v. Jadbai* 24 B. 194; *Gulappa v. Tayawa* 81 B. 453;
- Cl. (2) *Manu* IX. 200; *Doorga v Tejoo* 5 W.R. (M.A) 58; *Court of Wards v. Mohessur* 16 W. R. 76; *Judoonath v. Bassunt* 19 W. R. 264; *Salemma v. Lachman* 21 M. 100; *Subramaniam v. Arunachalam*, 28 M. I.
- Cl. (3) *Doorga v. Tejoo*, 5 W. R. (M.A. 58); *Nelloi Kumaru v. Marakathammal* 1 M. 166; *Subramania v. Arunachalam* 28 M. 1.
- Cl. (4) *Appa Rao v. Gopala* 81 M. 321
- Cl. (5) *Kanhai Ram v. Amri*, 82 A. 189; *Mohini Chunder v. Kashi Kant*, 2 C.W.N. 161 *Maghli v. Ladli* 18 I. C. 644; *Prattipati* (In re) 11 M.L.T. 261; 15 I.C. 408.
- Cl. (6) *Katvayan* cited in *Dayabag* IV- 1-10 explained in *Salemma v. Lutchmana*, 21 M. 100 (102).
- Cl. (7) (i) *Dayabag* 1-II-13, 14; *Mayukh* VI-X-17, Sm Ch IX-III 18 1b. Cl. (a) *Manu* IX-194; *Narad* (Jolly) 95; Mit II-XI-2; *Churamun v. Gopi* 18 C.W. N. 994 (996) 1b; Cl. (1) (b) *Manu* IX-194; *Bistoo Pershad v. Radha*, 16 W.R. 115 (ii) Mit. 11-XI. 6
- Cl. (8) Mit II XI 2.
- Cl. (9) *Manu* IX 194; Mit II XI 57 *Basanto v. Kamikshya* 33 C. 25 P.C. *Ram Gopal v. Narain*, 88 C 315; *Gopal v Ram Chandra* 28 C.311; *Sitabai v. Wasant Rao* 8 Bom. L. R. 201.
- (2) *Ram Gopal v. Narain* 88 C. 315 (319).
- (3) *Bannerji's Marriage and Stridhan* (4th Ed) 250.
- (4) *Ib. Dayabag* IV-II-42 (Colebrookes's translation omits the words quoted in the text).

Narad :—What has been given by an affectionate husband to his wife, she may consume as she pleases when he is dead, or may give away excepting immoveable property.

Yyas :—What has been given to a woman by her husband she may consume as she pleases. (1)

Her power over moveables being thus admitted, the question arises whether the texts control her power of disposal over immoveables. It has been held that her power in this respect is subject only to the general law that whatever is absolutely given to the wife by the husband, whether moveable or immoveable, is equally at her disposal by gift or devise at her discretion (2) and that the same rule applies to property acquired by her by grants and gifts from any other relation, such as her father (3) mother (4) son (5) brother (6) husband's father's sister's son (7) or a complete stranger. (8) such as the Government (9).

2544. Property granted or gifted to a woman by her husband or his or her own relations is called *Stridayik* (10) over which she possesses unfettered power of disposal by gift or devise even during coverture as will be presently seen. (11).

2545. It has been seen before, that any property acquired by deed or devise, that is to say otherwise than by inheritance or partition, (12) may be stridhan if it is taken absolutely. (13) Such was held to be the case of an Oudh Taluqdar whose estate had been confiscated in 1858 by the British Government by virtue of Lord Canning's proclamation. The estate belonged to one Rai Charan Singh and at the time of its confiscation it was in the possession of his junior widow Kublas Kuar upon whom the Government finally conferred it by a Sanad which declared that in the event of her dying intestate, the estate should descend to the nearest male heir, according to the rule of primogeniture and that all her successors should have full power to alienate the estate. On the question arising whether the estate became Kublas' stridhan descendible to her own heirs, the Privy Council held that the *Sanad* was a fresh grant and had made Kublas an absolute owner of the estate. They added: "If the interest which Kublas, as the widow of her deceased husband originally took in the property had remained

(1) Cited in Sm. Ch. IX 11 and in *Venkata v Venkata* 1 M. 221 (187); *Bhujanga v. Ramayamma* 7 M. 387.

(2) *Luchmun v. Kallichurn*, 19 W. R. 292 P. C. followed in *Venkata v. Venkata*, 2 M. 333 (335) P. C. affirming O. A. 1 M. 281; *Thakoo v. Gangoo Prasad*, 10 A. 197 P. C. *Kesserbai v. Hunsraj*, 33 B. 431 P. C. overruling O. A. *Hunsraj v. Kisserbai*, 6 Bom. L. R. 17; *Jairam v. Keswadee*, 4 Bom. L. R. 555; *Kurdaram v. Humibhai*, (1879) B. P. J. 8; *Jeewun v. Sona*, 1 N. W. P. H. C. R. 66; *Radha v. Bisheshwar*, 6 N. W. P. H. C. R. 279; *Bhujanga v. Ramayamma*, 7 M. 387; *Kashee Chunder v. Gour Kishore*, 10 W. R. 189.

(3) *Muthappudayan v. Ammani*, 21 M. 59; *Guru Prasad v. Nafar Das* 11 W. R. 497; *Judonath v. Bussunt* 13 W. R. 264; *Ameer Singh v. Kanh Singh*, (1870) P. R. 56;

(4) *Churamon v. Gopi*, 87 C. 1.

(5) *Doorga v. Teeto*, 5 W. R. (Mis) 58.

(6) *Gosaien v. Kishanmunnee*, 6 B. S. R. 90; *Basanta v. Kanikshya* 88 C. 28 P. C. *Munia v. Puran*, 5 A. 810

(7) *Hurry Mohun v. Shmuntun*, 1 C. 275.

(8) *Suleman v. Latchman*, 21 M. 100.

(9) *Salemma v. Latchman* 21 M. 100; *Subharaya v. Mudali* 23 M. 47; *Gosaien v. Kishanmunnee*, 6 B. S. R. 90; *Doorga v. Teeto*, 5 W. R. (M. R) 53 contra *Narad* 1 28; *Dayabhag* IV 1 20; *Virmirodai V-1 4* (Settur) 442; Sm. Ch. IX 1-16; *Ramdulal v. Joymaney*, 2 Mor Dig. 65 which declare the wife's immoveable property as subject to the control of the husband as no longer tenable.

(10) *Lil Sau* Love day given Love offering through love.

(11) *Bharu v. Raghunath*, 80 B. 229 (240).

(12) *Thakoor Deyhce v. Batuk Ram*, 11 M. 1 A. 159; *Bhargwadeen v. Myna Bai*, Ib. 487; *Chotay Lal v. Chunoo Lal*, 4 C. 744 P. C.; *Sheo Shankar v. Debi Sahai*, 25 A. 468 P. C.; *Sat Sheo Pertab v. Bahadur*, Ib. 476 P. C.; *Debi v. Mahadeo*, 31 A. 284 P. C.

(13) *Kunj Behari v. Premchand*, 5 C. 684; *Ram Narain v. Peary Bhagat*, 9 C. 880; *Bhotarini v. Peary Lal*, 24 C. 646; *Annaji v. Chandrabai*, 17 B. 503; *Moti Lal v. Rai Lal*, 21 B. 170

unaltered, she would have had no power of alienation either in her lifetime or by will. The estate would have descended to the heirs of her husband, and not to her heirs; but her interest as widow and that of the reversionary heirs were absolutely destroyed and put an end to by the confiscation under Lord Canning's proclamation, by which it was declared that 'the whole proprietary right in the soil is confiscated to the British Government, which will dispose of that right in such manner as to it may seem fitting.' In disposing of that right by the Sanad, the Government granted to Kublas and her heirs male, according to the law of primogeniture the full proprietary right and title to the estate." (1) It was contended that upon acquisition Kublas become a trustee for those who would have been entitled to it if it had not been confiscated, to which their Lordships replied: "To hold that such a trust arose would reduce to a nullity the confiscation and disposal by the Government of the property confiscated. The power of alienation by sale, mortgage or gift, or bequest was wholly inconsistent with an intention on the part of Government to create a trust for the benefit of the reversionary heirs of her husband." (2) In another case the land in dispute formed part of the emoluments attached to the office of *Mantem* in a Government village. The husband was the *mantem* but was dismissed for embezzlement and his wife appointed in his place. On her death the question arose whether her daughter or her husband was the preferential heir. In other words, was the property her *stridhan* or not. It was held that inasmuch as the land had been granted to her by Government it become her own earnings or was a gift from a stranger and as such became her *stridhan* descendible to her own daughter in preference to the husband. (3)

2546. Where the husband during his lifetime always represented that certain immoveable property belonged to his wife it was held that purchasers from her could not be equitably turned out of the property in favour of his heirs, since his heirs would be as much bound by the representations of the owner as the owner himself. (4)

2547. Property given for maintenance.—Property given for the purpose or in lieu of maintenance (5) not being property allotted on partition to a wife or widow (6) is *stridhan*. So Devalla

Cl. (3) cited in the *Dayabhag* says, "Her sustenance, her ornaments, her perquisite, and her gains, are the separate property of a woman." (7) In this view arrears of maintenance due to a widow at her death do not revert to the estate from which they were to be derived, on the ground that they were not separated from the corpus of that estate during her life. (8) So property purchased by a widow out of her maintenance is her absolute property. (9)

So where a sum of money was given to a widow without restriction in lieu of maintenance by her deceased husband's family it was held that it became her *stridhan* which she was competent to dispose of *inter vivos* or by will. (10) Maintenance is a personal right and all arrears due to a woman on account of maintenance constitute her *stridhan*. (11)

(1) *Brij Indar v. Janki*, 1 C.L.R. 318 (322) P. O.

(2) *Ib.* p. 328

(3) *Salemma v. Latchmana*, 21 M. 100 (105)

(4) *Luchmun v. Kallichurn*, 19 W. R. 292 (296) P. O.

(5) *Doorga v. Tejoo*, 5 W.R. (M.A.) 53; *Nallaikumar v. Markathammal*, 1 M. 166; *Subramiam v. Arunachalam*, 28 M. 1.

(6) *Court of Wards v. Mohessur*, 16 W.R.

76; *Debi v. Mahadeo*, 84 A. 284 P.C.

(7) *Dayabhag* IV.1.15

(8) *Court of Wards v. Mohessur*, 16 W.R. 76

(9) *Pellisari v. Sendamarai*, 8 M.L.T. 284; 8 I. O. 385

(10) *Chandranath v. Ramjai* 6 B.L.R. 308; *Doorga v. Tejoo*, 5 W.R. 53; *Neslai Kumaru v. Marathihammal*, 1 M. 166.

(11) *Court of Wards v. Mohessur*, 16 W.R. 76.

Property which comes from a father to a daughter before her marriage under a testamentary devise is her stridhan according to the text of Katyayan. "That which has been given to her by her kindred goes on failure of kindred to her husband." (1)

2548. Accretions made to Stridhan themselves become Stridhan. (2) One Cl. (4) **Accretions and Purchases.** Autar Singh had purchased a Darpatni mahal in the name of his wife, whom he declared to be its owner. In several suits relating to the estate he made similar averments. The wife sold the estate to another whom Autar's adopted son sued to eject. Autar's widow pleaded a gift of the estate to her by her husband which was not proved. It was falsely recited in her sale-deed that the consideration of Rs. 3,200 was her stridhan but it was found that she was poor and had no money of her own. The purchaser had no notice of it whereupon the Privy Council held the plaintiff bound by his father's disclaimer and misrepresentation. They said: "It appears to their Lordships that there was a misrepresentation on the part of the father in allowing the property to be taken by the wife under a deed of sale representing that the purchase money was her stridhan and in all his acts both public and private during his life-time representing that the property was his wife's. After the representation on the part of the father his heirs were no more entitled to recover than the father who had been in his life-time . . . And it appears to their Lordships that the minor claiming by descent from the father is equally bound by those representations and that he cannot, as heir to his father, set up that that property belonged to the father when the father could not in his own life-time under similar circumstances have set up that the property belonged to him." (3) In another case the wife had received money presents from her husband from time to time and on his death partly out of such property and partly from other funds raised by the pledge of jewels admitted to be her stridhan, the wife purchased an estate which she devised to the defendants whom her reversioner sued to eject. The defence was that the defendant's alienor had acquired the estate by her own exertions and was therefore her stridhan. All the courts upheld the defence and the contrary contended for was disposed of by the Privy Council in the following words. "It is suggested that where the funds are shown to have come wholly or in part from the husband and to have been afterwards invested in land by his widow, the same law which governs the devolution of immoveable estate derived from the husband is to govern that acquisition, but their Lordships cannot find any trace of authority to support such a distinction. It is clearly the law that from the time the funds were given to the widow by the husband they became her stridhan and that she had full power of disposition over them. Years after the death of the husband she chooses to invest them in land. Can it be contended with any plausibility that that was land which was derived from the husband. Their Lordships can see no ground for establishing this subtle distinction, or for thus arbitrarily interfering with the power of investment and application and disposition which the general law gives to a Hindu female over her stridhan." (4) These last words are significant. They were used with reference to the plea of perpetual dependance of women and the restraint upon her power of alienation analogous to that

(1) *Judoo Nath v. Bussant*, 19 W.R. 264 (265); *Muthu v. Sellathammal*, 10 M.L.T. 587; 26 I. O 785; *Janakisetty v. Miriyala*, 82 M. 521.

(2) *Luchmun v. Kallichurn*, 19 W.R. 292.

(3) *Luchmun v. Kallichurn*, 19 W. R. 292 (297) P. O.

(4) *Venkata v. Venkata*, 2 M. 389 (385) P.C. affirming O.A. 1 M. 296; following *Luchmun v. Kallichurn*, 19 W. R. 292 P. C.

imposed upon a Hindu father by his sons (1), for which in the opinion of their Lordships there was no justification as a Hindu woman was as regards her own property, subject only to the general law.

The subject has already been examined in the preceding discussion.

2549. Adverse possession.—The acquisition of title by adverse possession is the creature of law which is independent of Hindu law.

Cl. (5) The title so acquired is absolute without reference to the sex of the acquirer.⁽²⁾ A female may acquire a complete title against all comers including her own reversioners. But in such case the ordinary presumption would be against her though it is open to her legal representatives to show that her *animus possidendi* was adverse.⁽³⁾ The fact that she obtains possession to the exclusion of the rightful heirs would make her possession *prima facie* adverse unless it is otherwise explained away or accounted for. So where of two joint brothers A and B, A died leaving a widow C and a fortnight latter B died leaving his mother D as his sole heir, C however took possession of the estate as against the mother and continued in possession for 12 years, it was held that C's possession was adverse to D and that on the expiry of the statutory period the estate became her stridhan descendible to her own heirs.⁽⁴⁾ So where on the death of the father-in-law his daughter-in-law being the wife of his predeceased son assumed possession to the exclusion of his grandson and his wife, her possession was held to be adverse to reversioners who on her death could not lay claim to her estate.⁽⁵⁾

2550. It was contended in this case that a property acquired by a female by adverse possession is not her stridhan but the court had no difficulty in overruling this contention by reference to precedents apart from which reference to S. 28 combined with Art. 144 of the Limitation Act is a sufficient answer.

2551. Acquisition by self-exertion.—The prototype of this clause is Katyayan's text cited in the Dayabhag.⁽⁶⁾

Katyayan :—The wealth which is earned by the mechanical arts or which is received through affection from any other (but the kindred is always subject to her husband's dominion) The rest is pronounced to be the woman's property.

Dayabhag explains the mechanical arts to mean "spinning and weaving" which was the only occupation of women when the texts were composed. The woman being regarded as the chattel of her lord all her exertions went to his benefit. But the text does not say so. It merely exempts from stridhan the product of mechanical labour pronouncing the "rest to be the women's property." All product of her individual skill and industry will, therefore, constitute her stridhan. So where the wife had acquired her husband's office and its emoluments since enfranchised, it was held that the land become her stridhan which she may dispose of at her discretion, and which on her death devolves on her heirs.⁽⁷⁾ So whatever is acquired with profits earned by both husband and wife in a joint trade is their joint property, and on the death of the wife, her heirs are entitled to inherit her share.⁽⁸⁾

(1) *Venkata v. Venkata*, 1 M. 285 (286).

(2) S. 28 and Art. 144 Limitation Act.

(3) *Pratipati (In re)* 11 M.L.T. 261; 15 I. C. 408.

(4) *Maghi v. Ladli*, 18 I. C. (A) 644.

(5) *Kanhi Ram v. Amri*, 82 A. 189 (193)

following *Brij Indar v. Janki*, 1 C. 818 P. C. *Mohini v. Koshi*, 2 C. W. N. 161.

(6) Dayabhag IV-1-19

(7) *Salemma v. Lutchmanq*, 21 M. 100(102)

(8) *Ramakrishna v. Narumuthu*, 26 M. L. J. 582; 26 I. C. 363.

2552. Yautak.—Clauses 6 to 8 deal with stridhan specifically mentioned in the old texts and which is, therefore, sometimes called technical or proper stridhan all else being non-technical or improper stridhan. This stridhan is, generally speaking: wedding gifts, though the classical writers discriminate and describe it with particular minuteness. Of these Yautak ⁽¹⁾ and its anaologue Ayautak are thus described :

Manu :—Property given to the mother on marriage (Yautak) is the share of her unmarried daughter. (2)

Dayabhag :—(citing the last) Here *Yautak* signified property given at a marriage, the word *Yut* derived from the verb *Yu* to 'mingle' imports "mingling" and "mingling" is the union of men and women as one person and that is accomplished by marriage. For a passage of the scripture expresses—"She becomes identified with his bones, flesh with flesh, skin with skin." (3) Therefore what has been received at the time of the marriage is denominated Yautak. (4)

Smṛiti Chandrika :—Yautak is wealth given by any one to the bride and bridegroom while seated together at a marriage or the like. It is said in the Nighantu [dictionary] that the word Yautak is derived from being then joined together [*Yut*]. The meaning is, that wealth given to the bride and bridegroom is denominated Yautak, the term Yautak deriving its origin from *Yut* (mingling). (5)

Ayautak :—**Dayakram Sangrah** :—The order of succession requisite to be observed in regard to women's peculiar property generally whether Yautak or 'Ayautak' on a failure of heirs including all yet enumerated will be hereafter declared. But at first we treat of the order of succession in regard to wealth not received by women at the time of nuptial termed "Ayautak." (6)

2553. The gift is *Ayautak* if made after the marriage though in fulfilment of a promise made at the marriage since Ayautak refers to the time when the gift is made and not to the time when it is promised. (7) The burden of proving that property purchased by a woman long after her marriage was *yautak* property because the purchase was made from a special fund obtained during, her nuptial ceremony is on the person who asserts it. (8)

2554. Gifts are further subdivided into (a) *Adhyagnik* or gifts made before the nuptial fire, i.e., at the actual-marriage ceremony. (9) and (b) into *Adhyavahnik* or gifts at the time of the marriage procession, or at a time during the continuance of the marriage rites before or after the crucial ceremony of marriage. "Given before the nuptial fire" is, however, only a term to signify all gifts made during the continuance of the marriage ceremony. (10) So the pandits opined in a case. (11) "A gift of ornaments or other effects to a woman of any one of the four classes at the time of her marriage by a member of the family, either of a husband or her parents or by a stranger is by law termed *Adhyagni* stridhan, or in other words, the woman's peculiar pro-

(1) Lit ' Congugal-from Jut (Lat. Jugum) a yoke

(2) Manu IX—181.

(3) Veda

(4) Written both as "Yautak" and "Yautuk."

(5) Sm. Chand IX-III 18; (Setlur) 266.

(6) Dayakram Sangrah II-IV-1 (Setlur), 129.

(7) *Mahendra v Giris Chandra*, 19 C. W. N 1287; 31 I C 561.

(8) *Dalahuney v. Prabhati*, 22 C. W. N. 990; 45 I. C. 879.

(9) Manu IX-194; Mit II-XI-2; *Churamun v. Gopi*, 87 C I.

(10) *Bisnoo v. Radha* 16 W. R. 115.

(11) Case 2 in Macn. H. L. 108, 109; 3 Dig. 559, 560.

perty bestowed before the nuptial fire. It becomes her exclusive property and the husband's mother or other persons have no right to share it with her. (1)

2556. Sulk (Gratuity).—The term "Sulk" is explained in the Mitakshara as gratuity for the receipt of which a girl is given in marriage. (2) Sulk was originally the bride price received by the father on the marriage of his daughter but as the property over children ceased *Kanyadan* or the gift of a daughter was exalted to a virtue. The price was still received but treated as the wife's dowry. Virmitrodai cites Vyas who describes it as "what is given to bring to her husband's house is called the fee or sulk." (3) Evidently the *sulk* differed according to the needs of the wife and the means of the husband. So we have the following description of it by Katyayan, "whatever has been received as a price of work on houses, furniture and carriages milking vessels and ornaments is denominated Sulk or a fee." (4) Citing this the Dayabhag explains it as "the price of labour, since its purpose is to engage a labourer" (5) or "what is given by way of bribe or the like to induce her to go to the house of her husband" (6) or rather to induce the father to part with her to go to her husband. Virmitrodai speaking of the Sulk says "both these descriptions of property belonged to the woman for to her alone, they are given". (7)

2556. "Adhyavednik"—Solatium on re-marriage or Adhivedanik is another species of stridhan being compensation given by the husband on his marrying another wife. The Mitakshara explains it as a "gratuity on account of supercession" (8) paid as provided by Yajnavalkya:—

To a woman whose husband marries a second wife let him give an equal sum [as compensation] for the supercession provided no separate property has been bestowed on her but if any had been assigned, let him allot half." (9)

Mitakshara (Citing the last)—She is said to be superseded over whom a marriage is contracted. To a wife so superseded as much should be given on account of the supercession as is expended 'in jewels and ornaments, or the like' for the second marriage provided separate property had not been previously given to her husband or by her father-in-law. But if such property had been already bestowed on her, half the sum expended on the second marriage should be given. So much, therefore should be paid as will make the wealth already conferred on her equal to the prescribed amount of compensation. Such is the meaning. (10)

2557. That Adhivedaik gifts by the husband to the wife on the occasion of his remarriage are not unusual was admitted by the Privy Council who said, "It is not unusual for a husband upon his being about to marry a second wife to make a present to his first wife and if he does so the property so presented becomes her stridhan according to the doctrine above laid down." (11) In that case the question arose with reference to a village measuring 679 bighas 2 biswas which the wife in her evidence stated, had been gifted to her in 1847, by her husband on the eve of his second marriage. There was no actual proof of that fact but the Privy Council thought it not improbable "that the husband when about to marry a second wife, should have stated

(1) See this term explained in Viramitrodaya Ch. V 1 3. (Setlur) 410; So in Dayakram Sangrah II II-8 (Setlur) 121: Gifts "at the time of the marriage" (Yautak) are explained as made between "the time occupied by the ceremony commencing with the performance of funeral obsequies for the departed ancestors, and concluding with the prostration of the husband at the feet of his wife"

(2) Mit. II-XI.6.

(8) Virmitrodaya V-1-8 (Setlur) 441

(4) Cited in Dayabhag IV-III-19;

(5) *Ib.* p. 20.

(6) *Ib.* p. 21

(7) V-1-8 (Setlur) 441.

(8) Mit. II-XI-2.

(9) Yaj. II-148; cited in Mit. II-XI-84.

(10) Mit. II-XI 35.; Virmitrodai V-1 48 (Setlur) 441.

(11) *Thakro v. Ganga Prasad*, 10 A. 197 (208) P. C.

to his first wife that he would appropriate that part of the property which he had purchased in his own name as a present to her in consideration of his being about to marry the second wife." (1)

The latter had gifted the share to her own daughters in 1878 from which the plaintiff, the son, sued to eject them alleging that the defendant's mother was permitted to hold the share *benami* for her husband. The Privy Council threw out the suit holding the wife's version more probable and that it constituted the share her *stridhan* over which she had full disposing power.

2558. Anwadeyak.—Anwadeyik is a post-marital gift made by the husband's relations or by her own, and is comprised in the six fold *stridhan* specified in the text (2) and is described as follows:—

Dayabhag.—Katyayan defines a gift subsequent. What has been received by a woman from the family of husband at a time posterior to that of marriage is called a gift subsequent, and so is that which is similarly received from the family of her kindred. Whatever is received by a woman after her nuptial either from her husband or from her parents through the affection of the giver. Bhṛigu pronounces to be a gift subsequent (3)

Anwadeyik *stridhan* may then include property received from the parents (4) or from a brother. (5) It includes all jewels presented to her for ordinary use but not family jewels lent to her for occasional use only. (6)

278. A woman cannot alien or devise her *stridhan* other than *Saudayak* during coverture without her husband's consent.

Synopsis.

- (1) *Husband's powers over stridhan* (3) *What is Saudayik stridhan* (2559).
 (2) *Powers over Saudayik stridhan* (2561-2562).

2559. Analogous Law.—The following texts define the term *Saudayik*:—

Katyayan :— Whatever is obtained by a married woman or damsel from the house of her husband or her father or from her brother or parents is called *Saudayik*.

Ib.—Having obtained *Saudayik* wealth woman have independent power over it, because it was given them for maintenance out of affection. The independence of a woman in respect of *Saudayik* is ever celebrated both as regards sale and gift even in respect of immovables. (7)

Vivad Chintamani :—(Citing the last) The word husband is also connected with "house," the word "*Sardha*" is an incorrect reading "*Brother*" is used illustratively. The meaning, therefore, is that what is obtained by a married or unmarried woman from her father or his family or from her husband or his family is called her *Saudayik*. The allotment for maintenance that follows is an extension of this. The same author thus states her power of disposal over it. (8)

2560. This section may be regarded as laying down an exception to the general rule applicable to all *stridhan* due to the woman's subjection to her

(1) *Thakro v. Ganga Prasad*, 10 A. 197 (208, 204).

(2) *Manu* IX, 194; *Mit* II XI 5-7.

(3) *Dayabhag* IV-1-2; Cited in *Virmitro-dai* v. 1 8 (Setlur) 441.

(4) *Sitabai v. Wasantirao*, 8 Bom L. R. 201 dissenting from *Harry Shankar v. Krishnarao*. Bombay unreported S. N. 84 of 1876.

(5) *Basant v. Kamikshya*, 38 C. 23 (27) P. C.

(6) Devala cited in *Dayabhag* IV-1-15; *May* IV X-6; *Sm. Ch.* IX-1 11; *Rukman v. Gungaram*, (1888) P. R. 81.

(7) Cited in *Vivad Chintamani* (Setlur) 255, 256.

(8) *Ib.*

husband during her coverture. (1) Moreover, the general spirit of Hindu law is not to allow women independence as regards disposition of property. In the case of females property or ownership has reference to the right of possession and right of enjoyment. The third element of ownership namely the power or disposition, is not recognised by Hindu lawyers. The right of absolute disposal did not enter into Vijyaneshwara's conception of the essentials of ownership and is a later development.

2561. Husband's right to seize wife's property.—The wife's subjection to her husband is evidenced by a right conferred on the husband to seize the property of his wife in case of extreme necessity as prescribed in the record of the following texts.—

Katyayan :—Neither the husband nor the son, nor the father, nor the brothers can assume the power over a woman's property to take it or bestow it. (2)

Mitakshara :—In a famine, for the preservation of the family or at a time when a religious duty must indispensably be performed, or in illness or "during restraint" or confinement in prison or under corporal penalties, the husband being destitute of other funds and, therefore, taking his wife's property, is not liable to restore it But if he seize it in any other manner or under other circumstances he must make it good. (3)

2562. The texts on the subject of the husband's right to seize his wife's stridhan are conflicting and those that recognize the rights, are, it is submitted, obsolete. Civil law cannot recognize what criminal law will punish as robbery and the tendency of the courts is to encourage no usurpation of property by appeal to the *jus marita*.

279. On the death of a maiden, her Succession to Stridhan is inherited by her heirs in the following order :—

- (1) Uterine brothers.
- (2) Mother.
- (3) Father.
- (4) The father's sapindas.
- (5) The mother's sapindas.
- (6) Her own sapindas. (1)

Synopsis.

(1) *Texts on succession to maiden's stridhan* (2564-2565).
(2) *Maiden's heirs* (2564-2565).

2563. Analogous Law.—The following texts support this section.

(1) Manu V-147-149; Narad IX-1, 2; 7 S. B. E. 49 West and Sup. (3rd Ed) 318-320 Mandlik P. 98; 365, 367 Jolly's H. L. 253; Bannerjee Marr. and Stridhan (4th Ed.) 840 Vijjarangam v. Lakshman 8 B. H. C. R. (OC)

244 (264); Bhau v. Rayhunath 229 (240).

(2) Cited in Sm. Ch. IX-II-13.

(3) Mit. II-XI-32; Dayabhag IV-1 19-25 Mayukh IV X-7-10; Viv. Chint (Setlur) 225; contra Sm. Ch. IX-II-14 (Setlur) 261.

Baudhayana :—The wealth of a deceased damsel, let the uterine brethren themselves take. On failure of them it shall belong to the mother, or if she be dead, to the father. (1)

Mitakshara.—(*Citing the last*) If a betrothed damsel die, the bridegroom shall take the rings and other presents or the nuptial gifts which had been previously given by him [to the bride] "paying however the charges on both sides," that is clearing or discharging the expense which has been incurred both by the person who gave the damsel and by himself, he may take the residue. But her uterine brothers shall have the ornaments for the head and other gifts, which may have been presented to the maiden by her maternal grandfather [or her paternal uncle] or other relations as well as the property which may have been regularly inherited by her. (2)

2564. Maiden's heirs.—The heirs of a maiden's Stridhan are as stated in the section her uterine brothers, mother, and father and failing them the nearest relations. "It has been held that these relations must mean the father's sapindas, since his sapindas are also the mother's sapindas by virtue of her identity with her husband of half of his body. (3) After the father's sapindas the mother's sapindas and after these her own sapindas take in succession. Thus a sister is preferred to a father's brother's son (4) and a father's mother's sister to a maternal grandmother (5) and a step-mother to a mother's sister." (6)

2565. The following text refers to the subject of this clause.

Mitakshara :—Should a damsel anyhow affianced, die before the completion, of the marriage, what is to be done in that case. The author replies : "If she die [after troth plighted], let the bridegroom take back the gifts which he has presented; paying, however, the charges on both sides." 30 If a betrothed damsel die, the bridegroom shall take the rings and other presents, or the nuptial gratuity which had been previously given by him [to the bride] "paying, however, the charges on both sides" that is, clearing or discharging the expense which has been incurred both by the person who gave the damsel and by himself, he may take the residue. But her uterine brothers shall have the ornaments for the head, and other gifts which may have been presented to the maiden by her maternal grandfather [or her paternal uncle] or the relations, as well as the property, which may have been regularly inherited by her. For Baudhyayan says "The wealth of a deceased damsel, let the uterine brethren themselves take. On failure of them, it shall belong to the mother, or if she be dead, to the father" (7)

The Virmitrodrai contains an elaborate discussion on the subject of succession to maiden's Stridhan, (8) but most of it is of little practical value.

Succession to Stridhan of woman with children. **280.** Except as otherwise hereinafter provided, the Stridhan of a woman with children devolves on her following relations :—

- (1) Unmarried daughters.
- (2) Married daughter who is poor or childless.
- (3) Married daughter who is well to do whether she has children or not.
- (4) Daughter's daughter.
- (5) Daughter's son.
- (6) Son.
- (7) Son's son.

(1) *Janglubi v. Jetha*, 32 B. 409 (418).

(1) Cited in *Mit.* II-XI-80.

(2) *Mit* IX-XI-80.

(3) *Dwaarka Nath v. Sarat Chandra* 39 C. 319 (328); *Janglubi v. Jetha*, 32 B. 409 (418).

(4) *Dwaarka Nath v. Sarat Chandra* 39 C.

319.

(5) *Janglubi v. Jetha*, 32 B. 409; *Gandhi v. Jadab* 24 B. 192 (212).

(6) *Kamala v. Bhagvathi* 34 M. 45

(7) *Mit* IIXI-2, 30.

(8) *Ch. V. (Setjur)* 438-456.

- (8) Husband.
- (9) Her nearest sapindas.

Synopsis.

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|--|---------------------------------------|
| (1) <i>Succession to Stridhanam of woman leaving issue</i> (2566). | (5) <i>Daughter's son</i> (2572). |
| (2) <i>Unmarried daughter</i> (2567). | (6) <i>Son</i> (2573). |
| (3) <i>Married daughter</i> (2568-2570). | (7) <i>Grandson</i> (2574). |
| (4) <i>Daughter's daughter</i> (2571). | (8) <i>Husband's sapindas</i> (2575). |

2566. Analogous Law—This section is drawn from the Mitakshara in which this order of succession is set out and explained⁽¹⁾ and it will be set out in the sequel under appropriate heads.

2567. Unmarried daughter.—The first heir to a mother's stridhan is her unmarried daughter and she is so declared in the
 Cl. (1). Mitakshara. ⁽²⁾

A question arises and has been raised whether a betrothed daughter is unmarried. The Mitakshara uses the expression *Kumari* to designate an unmarried daughter and it has been held that reading contextually it means that the daughter must also be unbetrothed.⁽³⁾ But it is submitted that the term "Kumari" means really a virgin and would include a betrothed but unmarried daughter.

2568. Married daughter.—The succession of a married daughter is provided in the following text.
 Cl. (2).

Mitakshara :—Hence if the mother be dead, daughters take her property in the first instance, and here, in the case of competition between married and maiden daughters the unmarried take the succession but on failure of them the unmarried daughter and here again in the case of competition between such as are provided and those who are endowed, the unendowed take the succession first but on failure of them those who are endowed. Thus Gautam says a woman's property goes to her daughter unmarried or unprovided ⁽⁴⁾ or provided as is implied by the connective particle in the text. Unprovided are such as are destitute of wealth or without issue ⁽⁵⁾

2569. Referring to this text Sir Guru Das Banerjee writes: "I think Vijyaneshwar's meaning is, that the rich daughters whether they have children or not, should all be excluded by the indigent daughters whether they are childless or have children. And I presume that the childless daughters would be preferred, to those having issue, only when the competitors are poor, and their means and circumstances are equal. In the case of daughters who are poor in different degrees no hard and fast rule can be laid down, but a court of justice should take to account the circumstances of each case, and order distribution accordingly. It will be noted that no preference is ordered by the Mitakshara as it is by the Dayabagh, to a daughter who has or is likely to have male issue over a daughter who is barren or a childless widow, ⁽⁷⁾ while in Mithila the distinction between the rich and poor is immaterial. The difference in the three schools is due to the interpretation of the word "*Apratishthit*" in Gautam's text which has been translated "unprovided for" with wealth by some, and "with children" by other commentators. It is now settled that the former is the Mitakshara and the latter the Dayabagh view. In the first view, however, a minute enquiry into

(1) Mit II-XI-18-26

(2) Mit II-XI-13-25

(3) *Sreevith v. Sarbo*, 10 W. R 488

(490); *contra* Bannerji's Stridhan, (4th Ed.)

(4) Gautam 28, 22.

(5) Mit II-XI-13.

(6) Stridhan (4th Ed.) 867.

(7) *Wooma v. Gokulchand*, C O. 567 P.C.

the question of comparative poverty is not called for. When the difference in wealth is marked, the whole property passes to the poorest daughter. (1) Since the distinction is based on a special text which is limited only to the succession amongst daughters *inter se* it cannot be extended to other female relations, e.g., sisters by analogy. (2) Where several daughters inherit jointly they take as tenants-in-common without any right of survivorship. (3)

2570. As stated in the sequel unchastity and illegitimacy are no bar to succession to Stridhan though being a prostitute the daughter is regarded as neither married or unmarried and therefore take only in default of them. (4) But the contrary has been laid down in Allahabad where it is pointed out that consanguinity and not any theoretical spiritual benefit is the sole rule of succession to Stridhan. (5)

2571. Daughter's daughter.—After the daughters the daughter's daughter take the succession under an express text (6) which further provides : " If there be a multitude of these [grand daughters] children of different mothers and unequal in number, shares should be allotted to them through their mothers, as directed by Gautam. Or the partition may be according to the mother's and a particular distribution may be made in the respective sects. (7) That is, daughter's daughters inherit *per Stirpes* and not *per Capita*. (8) Daughters of predeceased daughters do not take anything in competition with daughters though the Mitakshara does not altogether ignore them. "But if there be daughters as well as daughter's daughters a trifle only is to be given to the granddaughters. So Manu declares "Even to the daughters of those daughters something should be given as may seem fit from the assets of their maternal grandmother, on the score of natural affection" (9) But this trifle is not a share and not claimable as such.

2572. Daughter's son.—Yajnavalkya's text contains no provision regarding the rights of a daughter's son and Vijayaneswar expressly mentions him as the next heir and supports his view on a text of Narad's which says : "Let daughters divide the mother's wealth or on failure of daughters their male issue". (10) According to the Smritichandrika the daughter's sons take like daughter's daughters. (11) As such they would take *per stirpes*. (12)

The question whether a daughter's son would also include an adopted son and if so what would be his share in competition with an *Auras* son has not yet arisen, but it is submitted that since such succession is solely based upon affinity in which the question of spiritual benefit has no place and since an adoption is more an act of the husband than of the wife an adopted son is no heir to his grandmother's Stridhan. (13)

(1) *Totawa v Basawa*, 28 B. 229.

(2) *Bhagirathi v Baya*, 5 B 264

(3) *Karupai v. Sankaranarayana*, 27 M 800 (303,314) F.B.; *Parson v. Scmli*, 36 B. 424 contra *Sengamalathammal v Velayuda*, 3 M.H.C.R. 312 (317); *Venkatarama v. Bhujanga*, 19 M. 107

(4) *Advayapa v Rudrava*, 4 B. 104; *Tara v. Krishna*, 31 B 495.

(5) *Ganga v. Ghasita*, 1 A. 46 (49,50); *Nagendra v. Benoy*, 30 C. 521; *Angammal v Venkata*, 26 M. 509.

(6) Mit. II-XI-15.

(7) Mit II-XI-16; Manu IX-193; Sm. Ch. IX-III-21.

(8) *Subramaniam v Arunachalam*, 28 M. 1.

(9) Manu IX-193; Mit. II-XI-17.

(10) Narad XIII-1; Mit. II XI 18; *Mayukh* IV-X-20.

(11) IX-III-25

(12) *Bannerji's Stridhan* (4th Ed.) 374

(13) *Bannerji's Stridhan* (1th Ed) 374,375.

2573. Son.—The son is next assigned a place in the line of succession both by Yajnavalkya ⁽¹⁾ and Vijyaneswar. ⁽²⁾ The view of the Dayabhag school will be noticed later. The question whether the son here includes also an adopted son has been answered both ways in the decided cases it being held that since the highest Hindu authorities place a son on adoption in the category of an Auras son ⁽³⁾ he must be so treated for succession to Stridhan. On the other hand the contrary has been laid down in other cases ⁽⁴⁾ in one of which the Pandits opined “If a man appoints another, his adopted son, that person so adopted stands in relation to him of his son, and offers up his funeral oblations and is heir to his estate, but the person so appointed does not become the adopted son of the adopter’s wife nor does he offer funeral oblations to her, nor succeed to her property.” ⁽⁵⁾ So in Bombay it has been held that “a son adopted by a widow with her husband’s consent will not inherit her property, which will go to her father’s brothers.” ⁽⁶⁾ Of course a woman cannot adopt a son to herself, and such adoption confers no right of inheritance on the adoptee. ⁽⁷⁾ It has been held that co-heirs inheriting Stridhan take as tenants-in-common, with no rights of survivorship ⁽⁸⁾ because this is a succession to obstructed heritage but the Privy Council point out that this is by no means an infallible test, nor indeed universally true. ⁽⁹⁾

2574. Grandson.—Failing sons, son’s sons inherit ⁽¹⁰⁾ grandsons by different sons inherit *per stripes* and not *per capita*. ⁽¹¹⁾ If the adopted son takes a share he will share equally with an Auras son. ⁽¹²⁾

2575. Husband’s nearest sapinda.—On failure of the grandson her husband and other nearest sapindas inherit ⁽¹³⁾ that is to say, the estate devolves as if she had died issueless. ⁽¹⁴⁾

281. (1) The stridhan of an issueless woman devolves on her husband if she was married to him in the Brahm form which will be presumed, and failing him to his nearest sapindas in the order of their succession to him.

(2) But if she was married to him in the Asur form (or some other unapproved form) it devolves on her mother, then on her father, and then on the father’s or mother’s nearest sapinda in the order of their succession to them.

(1) Yaj. II 118.

(2) Mit II XI-19; *Katuppai v. Sankara* 27 M. 800.

(3) Datt.Ch. (Suth) 219 Dayakram Sangrah V.I 1; Macn. H.L. 39, 40 followed *Teencowree v. Dinonath*, 8 W R. 49.

(4) *Sree Narain v. Bhaja Jha*, 2 B & S. R. 29 (34) 6 I D (OS) 380 (884) a (Mithila case.)

(5) 1b. P. 34; 6 I D. (O-3) 890 (384).

(6) 2 S A R. 178 cited in 1 Norton’s L C. H. L. 101.

(7) *Narendra v Dina*, 36 C. 824.

(8) *Karuppa v Sankara*, 27 B. 300; *Parson*

v. Somli, 36 B 424; but see Mit. 1 IV-2: 3 Dig. 608; *Katama Natchiar v. Raja of Shivganga*, 9 M.I.A. 543 (615); *Venkayamma v. Venkotaramanayamma*, 25 M. 678 (687) P. C

(9) *Venkayamma v Venkotaramanayamma*, 25 M 678 (637) P. C

(10) *Gautam* XII-32; Yaj. II-50; *Mit II. XI-24*; *Raman v. Jajivan Das*, 41 B. 618.

(11) *Sm Chand. IX-III 25*.

(12) *Nagin Das v Bachoo*, 40 B. 270 P. C.

(13) *Mit-II-XI-25*.

(14) *Mit-II-XI-9*.

Synopsis.

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| (1) <i>Succession to stridhan of woman dying issueless</i> (2576). | (5) <i>Different views as to order of succession</i> (2580)-2582. |
| (2) <i>Texts on the subject</i> (2576). | (6) <i>Mithila Law</i> (2583). |
| (3) <i>Marriage in Brahma for in, presumption as to</i> (2577). | (7) <i>Heirs of Asur marriage</i> (2584). |
| (4) <i>Stridhanam of Brahma married woman</i> (2577). | |

2576. Analogous Law.—The rule here stated is deduced from the following text.

Mitakshara:—If a woman die "without issue" that is having no progeny, in other words having no daughter nor a daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property as above described shall be taken by her kinsmen namely her husband and the rest as will be (forthwith explained.)

10 The kinsmen have been declared generally to be competent to succeed to a woman's property. The author now distinguishes different heirs according to the diversity of the marriage ceremonies. "The property of a childless woman married in the form denominated Brahm or any of the four (unblamed modes of marriage) goes to her husband, but if, she have progeny, it will go to her (daughter's) daughter, and in other forms of marriage (as the Asur etc) it goes to her father and mother on failure of her own issue (1)

11. Of a woman dying without issue as before stated and who has become a wife by any of the four modes of marriage denominated Brahm, Daiv, Arsh and Prajapitya, the whole property as before described, belongs in the first place to her husband. On failure of him it goes to her nearest kinsmen (*Sapinda*) allied by funeral oblations. But in the other forms of marriage called Asur, Gandharb, Rakshash and Paishach, the property of a childless woman goes to her parents, that is to say, her father and mother. The succession devolves first (and the reason has been before explained, (1) on the mother, who is valuably exhibited (first) in the elliptical phrase *pitr-gami* implying goes (*gacheti*) to both parents (*pitaram*), that is to the mother and to the father. On failure of them their next of kin take the succession. (2)

2577. Stridhan of Brahm married woman—It has already been seen

CL (1).

that of all the 8 forms of marriage only two forms, the Brahm and the Asur survive (§ 414). The question of stridhan succession then depends upon whether the woman was married in one form or the other. And since law presumes that in the absence of anything appearing to the contrary all marriages are performed in the Brahm form (3) (§ 532) it follows that clause 3 lays down the normal rule of devolution of Stridhan; clause 2 only applies to exceptional cases.

The same presumption applies equally to Shudras if the parties belong to a respectable family. Such a presumption was made in the case of Kamathis who were held to be "an intelligent and respectable section of the Hindu community" (4) and there is no room for any other presumption in the case of non-Hindus such as the Cutchi Memons who follow the Hindu Law without following the Hindu religion (5) though the special rules as to the devolution of Stridhan do not apply to Khoja Mahomedans. (6) "The legal consequences of the classes of marriage, the approved and the disapproved, in relation to inheritance, vary according as their leading characteristics are blameworthy or not and suggest the inference that it is the quality and not the form of the

(1) Yaj. II—146

(2) Mit. II-XI-2.

(3) Mit. II-XI-10, 11

(4) S. 21 (4) (a); *Jagannath v. Ranjit Singh*, 25 C. 854 following *Thakoor Deyhee v. Baluk Ram*, 11 M. I. A. 189; *Gajabai v. Shahajirao*, 17 B. 114; *Jagannath v.*

Narayan, 36 B. 553 (559); *Girdharilal v. Government*, 1 B. L. R. 44 P. C. *Authi Kesavalu v. Ramanujam*, 32 M. 512.

(5) *Jagannath v. Narayan*, 34 B. 553 (553)

(6) *Moosa v. Haji Abaul*, 30 B. 197. (203)

(7) *Karim v. Pardhan*, 2 B.H.C.R. 276.

marriage that decides the course of devolution ; where the marriage is approved the husband and his side come in, when disapproved, they do not." (1)

2378. The Asur form of marriage has been already described. Asurs were the aborigines of India before the Aryan settler by whom *Asur* marriage was regarded as demoniacal. Its leading characteristic is the payment of a price for the purchase of the bride from her father (2) as distinguished from a present made to the bride. (3) In spite of the textual oburgations against it, it is quite commonly practised amongst Hindus of all castes, amongst Brahmins in Bengal (4) as amongst the Brahmins and other high caste residents of western (5) and Southern India where Sir Thomas Strange doubted whether any other form was observed. (6) Many variations of the Asur form have come into vogue and if the question were ever put to the test whether a given marriage was Brahm or Asur it might not always be easy to furnish the answer. What would for example be the class of a *Gundharba* (7) a *Santigrihit* (8) of a Katar marriage in which the wife is held to occupy a distinctly inferior position to a married wife. And there are several other marriages which defy classification according to the orthodox view of marriage.

2579. Assuming, however, that all marriages are of the form and class, the wife's stridhan goes to the husband and his nearer sapindas in the order laid down in the *Mitakshara* with reference to the succession to the property of a male, (9) that is to say, the husband takes the property as his own and is then competent to transmit it to his own heirs as his self-acquired property. It does not go to the wife's parents or relations at all.

2580. It is, however, said that the order of proximity in the case of the husband's sapindas must be in accordance with the following text :—

Brihaspati:—The mother's sisters, the maternal uncle's wife the paternal uncle's wife, the father's sister, the mother-in law, and the wife of elder brother are pronounced to be similar to mother's. If they have no legitimate offspring of the body, no stepson, nor a daughter's son then the sister's son and the rest take their property. (10)

2581. According to the text of *Mitra Misra* on failure of these (the inheritance devolves) on the stepson ; his sons and grandsons, because under such circumstances, these offer the natural oblations, and pay the debts, and because it has been ordained in this manner in the above text of *Manu*. (11) Then on the failure of these, though sapindas, such as a father-in-law, may be living, the sister's son and the rest have a right to inherit, according to the scale of their nearness mentioned in the text of *Brihaspati*, the property of their mother's sister and the rest, by virtue of the special text (of *Brihaspati*) which cannot have any other application.

(1) *Moosa v. Haji Abdul*, 30 B. 197 (203); *Govind v. Daolat*, 6 N. L. R. 3; 5 I. C. 426.

(2) *Manu* III-31; *Chun'al v. Suraj Ram*, 33 B. 433.

(3) *Jaikisondas v. Harkisondas* 2 B. 9 (15)

(4) *Bannerji's Marriage and Stridhan* (4th Ed.) 83

(5) *Steele's Law of caste* 159.

(6) 1 Str. H. L. 48.

(7) *Hajimu v. Bhadoorn*, referred to in (1846) B. S. D. A. 340; 7 B. S. R. 355; 356; *Mokund v. Bissessuree*, (1853) B. S. O. A. 159; *Fanindra v. Rajeswar*, 11 C. 468 P. C.

(8) *Prandhur v. Ramchender*, (1861) B. S. D. A. 16; *Durrapsingh v. Bussurdhun* 2 Hay 395.

(9) *Thakoor Deyhee v. Baluk Ram*, 11 M. I. A. 135 (175); *Champat v. Shida*, 8 A. 398 (895); *Ganesh v. Ajudhia*, 28 A. 345; *Jaganmath v. Ranjit Singh*, 25 C. 354 (866); *Marya v. Sivabagyathachi*, (1911) 2 M. W. N. 168; *Kanakammal v. Ananthamathi*, 37 M. 298.

(10) 2 W. and B. 99; *Bannerji M. and S* (4th Ed.) 386.

(11) *Manu* IX-188.

This order not only accords with the text of Brihaspati but also with that given in the Mayukh ⁽¹⁾ and the Smṛiti Chandrika ⁽²⁾ but being in conflict with that indicated in the Mitakshra, the latter must prevail ⁽³⁾ and has been upheld by the Privy Council who held that the co-widow was entitled to succeed to the property of a woman dying without issue, in preference to her husband's brother or husband brother's son on the ground that a wife was a Sapinda of her husband and therefore on failure of the husband the co-widow was his nearest sapinda and entitled to the property in suit. ⁽⁴⁾ Referring to Brihaspati's text their Lordships said: "They are of opinion that the text of Brihaspati should be read distributively as regards the property of women married according to one of the approved forms and the property of those married in one of the lower forms. In the one case those of the heirs enumerated in Brihaspati who are blood relations of the husband, viz., the husband's sister's son, the husband's brother's son and the husband's brother will succeed to the women's property and in the other cases the relations of the father will succeed. In the diversity of opinion amongst the text writers whether Brihaspati's series of heirs take in the order in which they are enumerated their Lordships think that the better opinion is that the order of succession is not indicated." ⁽⁵⁾

2682. According to this view, Kamlakar enumerates the following relations as ranking next to the husband —

- (1) The step-son.
- (2) The step-grandson.
- (3) The rival wife.
- (4) The step-daughter.
- (5) The husband's other Gotraj sapindas, and

(6) Bandhus, in the order, in which they inherit his property. This view is indorsed by the Bombay Court ⁽⁶⁾ in a case in which the step-grandson was held entitled to a woman's stridhan in preference to a co-widow or to the husband's brother's son; and a co-widow was preferred to the grandchildren of the father-in-law's brother; because she was the nearest sapinda of the deceased husband ⁽⁷⁾ and the whole brother of the husband to his half brothers. ⁽⁸⁾ So in Madras the step-son is preferred to the sister's son ⁽⁹⁾ and following the same rule the grandson of a co-widow is preferred to a nephew and co-widow ⁽¹⁰⁾ and so the Privy Council preferred a co-widow to the husband's brother or the husband's brother's son ⁽¹¹⁾ and the same high tribunal in another case confirmed rights of the collateral heirs of the husband ⁽¹²⁾ and the Allahabad Court maintained the rights of a collateral relation who was the near sapinda of the brother of the deceased husband in preference to the brother of the deceased ⁽¹³⁾ and in Madras the husband's brother's daughter's son is placed

(1) May, IV-X-80 examined in *Kesserbai v Hunsraj*, 80 B. 481 P. C.

(2) Sm. Ch. IX III 136.

(3) Bannerji's M & S (4th ed) 387

(4) *Kesser Bai v. Hunsraj*, 80 B. 481 P. C. affirming *O A Kesser Bai v. Manghibai*.

5 Bom. L. R. 244, reversing 6 Bom. L. R. 17; *Krishnai v. Shripati*, 80 B. 398.

(5) *Kesserbai v Hunsraj*, 80 B. 431 (451) P. C.

(6) *Gojabai v. Shahajirao*, 17 B. 114 approved in *Kesserbai v. Hunsraj*, 80 B. 431 P. C.

(7) *Krishnai v. Shripati* 80 B. 383.

(8) *Parmappa v. Shiddappa*, 80 B. 607.

(9) Sm. Ch. IX-III 88; *Brahmappa v. Papama*, 18 M. 138.

(10) *Jagannath v. Runjit Singh*, 25 C. 354 (367).

(11) *Kesserbai v. Hunsraj*, 80 B. 481 P. C.

(12) *Thakoor Deyhee v. Balak Ram*, 11 M. I A 139 (175).

(13) *Champak v. Shiba*, 8 A 393

before the sister's daughter's son (1) Some modern text writers, however, favour the right of the deceased's step-daughter as against the collateral relations of the husband. (2)

Since the husband's Sapindas succeed to the Stridhan of his wife, there can be no distinction between his natural and adopted son as both are the sapindas of their father and would take equally. (3)

2583. The same principle governs the Mithila country where the text of

Mithila Law

Brihaspati has been declared in favour of the Mitakshara (4) according to which the husband's brothers's son (5) and the husband's sister's son are preferred to his paternal great-grandfather's great-grand son. (6)

The Mitakshara is silent on who are to take on a total failure of the husband's heirs. In Bombay it is suggested that in that case the father's sapindas next inherit. (7) This view is deduced from a text quoted in the Mitakshara that "on failure of relations on both sides (the husband's and the parent's) the King becomes the supporter and master of a female" and is endorsed by Sir Gurudas Bannerji who, however, adds "that it is not clear whether the paternal kinsmen should come after the husband's sapindas or after his Samnodaks." (8)

2584. Heirs of Asur Marriage.—Turning next to the heirs to Stridhan

Cl. (2).

of a woman married in the Asur form it has already been seen that the Mitakshara expressly mentions the mother, the father, the father's next of kin, and the mother's next of kin in the order of succession. (9) In this view after the parents the heirs to her stridhan would be, her sister's son, her husband's sister's son, her husband's brother's son, her brother's son, her son-in-law and her husband's younger brother in accordance with the following text :—

Brihaspati :—The mother's sister, the maternal uncle's wife, the paternal uncle's wife the father's sister, the mother-in-law and the wife of an elder brother are pronounced similar to mothers. If they have no son born in lawful wedlock, nor daughter's son, nor his son, then the sister's son and the rest shall take their property. (1)

As already observed, the Privy Council have held that this text of Brihaspati, is illustrative and not exhaustive and that it should be read distributively as regards the property of women married according to one of the approved forms and the property of those married in a disapproved form; in the one case, those of the heirs enumerated in the text who are blood relations of the husband will succeed, and in the other case the relations of the father will succeed. (11) Under the Mayukh, however, the kinsmen enumerated by Brihaspati take in the order named by him. With this difference there is no other

(1) *Venkatasubramaniam v. Thaya rammah*, 21 M. 263.

(2) Golap Sbastri's H. L. (4th Ed) 580. Bhattacharya H.L. 580 Bannerjee's Marriage; and Stridhan (3rd Ed) 406; but see *Nanja v Sivabagyalhachi*, 36 M. 116 (119).

(3) *Padma v Court of Wards*, 8 C. 802 P. C. *Joy Kishore v. Panchoo*, 4 C. L. R. 588 (555); *Changadhar v. Hira Lal*, 48 C. 944 (956).

(4) *Bachha v Jugmohan*, 12 C. 848 (856), 857; *Mohun Pershad v. Kishen Mohun*, 21 C. 344.

(5) *Bachha v. Jugmohan*, 12 C. 848 (856, 357).

(6) *Mohun Pershad v. Kishen Mohun*, 21 C. 344.

(7) 1 W. and B. 243.

(8) *Marriage and Stridhan* (4th Ed) 106

(9) *Mit II-XI-11*; *Vijjarangam v. Lakshuman* 8 B. H. C. R. (OC) 244; *Dwarkanath v. Sarat Chandra*, 39 C. 119.

(10) Cited in May. IV X 30

(11) *Kesarbai v. Hunsraj*, 60 B. 421 P. C

difference between ⁽¹⁾ the Mitakshara and the Mayukh order of succession to the Stridhan of a woman married in either from. Amongst the distant kinsmen Gotraj take precedence of Bandhus. ⁽²⁾ But the wives of Gotraj Sapindas and Samanodaks possess the rights of inheritance co-extensive with those of their husband's after whom they are entitled to take. ⁽³⁾

282. (1) Both under the Mitakshara and the Dayabhag *Sulk* goes first to the uterine brothers, then to the mother and in default of both, it goes to the heirs of the other *Stridhan*.

(2) Provided that in the Mithila Country it is first taken by the uterine brothers, then by the mother, and then by the father.

(3) And in Southern India the uterine brothers take in preference to the mother.

Synopsis.

- (1) *Heirs to Sulk* (2585). (3) *Mithila law* (2587).
(2) *Texts on the subject* (2585). (4) *Dravid departure* (2588).

2585. Analogous Law.—This and the next section state special rules governing the devolution of certain classes of technical stridhan. The rule here stated is with the variations noted in clauses (2) and (3) applicable alike to the Mitakshara ⁽⁴⁾ and the Mayukh. ⁽⁵⁾

The texts on this point somewhat differ as will be apparent from the following :—

Gautam (one reading) The sister's fee belongs to the uterine brothers after the death of the mother. ⁽⁶⁾

Ib. The sister's fee belongs to the uterine brothers. after them it goes to the mother, and next to the father. Some say before her ⁽⁷⁾

Ib. The sister's fee belongs to her uterine brothers, if her mother be dead Some declare, that it belongs to them) even while the mother lives ⁽⁸⁾

2586. But the variation in the reading is immaterial since, the brother being mentioned first he was probably intended to take first, and this is the view now generally held. ⁽⁹⁾

After the brother and the mother the course of devolution follows the other Stridhan.

(1) In the absence of legitimate issue, illegitimate issue inherit, daughters taking before sons ; otherwise succession follows the ordinary law or custom.

(2) Nothing in this section applies to a married woman.

(1) *Krishnai v Shripati*, 30 B 388 : *Kesar B. v Hunsraj*, 30 B 431 P.C. *Perrappa v Shiddappa*, 80 B. 607.

(2) 1 W. & B. 215.

(3) *Lakshmi Bai v. Jayram*, 6 B H O R. (AC) 152; *Lallubhai v. Mankuwarbar*, 2 B. 388.

(4) Mit. II-XI-14.

(5) *May. IV-X-32 : Sitabai v. Wasantrao* 8 Bom. L. R. 201.

(6) *Gautam XXVIII-23*; as cited in Mit.

II XI-14 ; Same Translation in *May. IV X-32*

(7) *Gautam XXVII-23* as cited in *Dayabhag IV-III-27*; *Virmirodai* (Sarkar) 242 ; *Sm. Ch. IX-III-32, 35* ; *Vivad Chint* (Tagore) 270.

(8) *Gautam XXVIII-25, 26* ; 2 S B.E. 303.

(9) 2 *Vyavastha Chandrika* 423, 550; *Bhattacharya's H. L. (2nd Ed.)* 578 ; *Cunn, H.L.* 119.

2587. Mithila.—In the Mithila country after the brother and the mother, the father takes, which is also consistent with one reading of the text before cited and accepted by the Vivad Chintamani which is a local authority in the Mithila country.

2588, Dravid Departure.—In the Dravid country where the Smriti Chandrika is a special local authority the variation in reading before noticed is accepted so that the Sulk is first inherited by the mother and then by the full brother.

283. In the Mayukh and the Dravid country the following classes of Stridhan follow a special line of devolution:—

(1) *Yautak Stridhan* goes to the maiden daughters in the first instance.

(2) Anvadheyak, Adhivednik and Pritti Datt stridhans are shared equally by (i) the sons and unmarried daughters, (ii) by the sons and married daughters and failing them, it is inherited by the daughter's children and son's son.

Provided that in the case of Stridhan mentioned in the last clause widowed daughters are excluded and the widows of Gotraj sapindas do not inherit any stridhan.

2589. Analogous Law.—The first clause stating that the Yautak Stridhan goes first to the unmarried daughters alone, not to the sons is in accordance with Manu (1) followed both in the Mitakshara (2) and the Mayukh. (3)

As to Anvadheyik Stridhan (4) Manu declares that it shall be inherited by her children (5) and it has been so held. (6) As amongst daughters the unmarried are preferred to the married. (7) The same rule extends to Southern India (8) except that widowed daughters are excluded from inheriting it (9) and the widows of Gotraj Sapindas do not take as they do under the Mayukh. (10) Consequently, neither the brother's widow (11) nor the daughter-in-law (12) will take as heir.

Pritti Dutt.—Is a species of Anvadheyak and follows the same rule. (13)

(1) Manu IX-139.

(2) Mit II-XI-13.

(3) Manu IX-139 cited and followed in May IV-X-17.

(4) Manu IX-195; May I V-X 14 (Mandlik) 95.

(5) Means a gift to a woman from her husband or his family subsequent to her marriage. *Hurry Shankar v Krishnaro* cited in *Dayal Das v Savitribai* 84 B 885 (889).

(6) *Ashabai v. Haji Tyeb*, 9 B 115 (126) followed in *Sitabai v Wasant Rao*, 3 Bom. L. R. 301 (208); *Dayal Das v. Savitri Bai*, 31 B 885; *Jagannath v. Narayan*, 84 B 558 (558).

(7) *Dayal Das v. Savitribai*, 84 B 885.

(8) *Sm. Chand IX-III-111*; *Mullu v. Dorasingha*, 8 M. 280; *Sengamalathammal v. Volayanda*, 8 M. H. C. R. 812 (813, 816); *Sm. Chand IX-III-1-11*; *Sengamalathammal v. Volayanda* 8 M. H. C. R. 812 (813, 816); *Mullu v. Dorasinga* 8 M. 280; *Venkatarama v. Bhujanga*, 19 M. 107.

(9) *Sm. Chand IX-III-9*.

(10) *Bandam v Bandam*, 4 M. H. C. R. 180; *Thayammal v. Annamalai*, 19 M. 85.

(11) *Thayammal v. Annamalai*, 19 M. 85; *Kanakammal v. Ananiharathi*, 37 M. 293.

(12) *Bandam v Bandam*, 4 M. H. C. R. 180.

(13) *Jaganath v. Narayan*, 34 B. 558 (558).

SPECIAL RULES OF DAYABHAG SUCCESSION.

Succession to Sulk and Anvadheya.

284. The heirs to the Sulk, Anvadheya and gifts received during maidenhood of a woman subject to the Dayabhag law are in the first instance her—

- (1) brothers of the whole blood.
- (2) mother.
- (3) father
- (4) husband

and it then follows the line of succession applicable to other stridhan.

2590. Analogous Law.—This section is supported by an express text of the Dayabhag. (1)

Devolution of Stridhan under the Dayabhag law.

285. Under the Dayabhag law stridhan other than Sulk, Ayautak and Pritti Dutt and other special classes of stridhan, hereinafter, provided for, devolves on the following heirs :—

- (1) The son and unbetrothed daughter.
- (2) Married daughter having or who is likely to have a son.
- (3) Son's son.
- (4) Daughter's son.
- (5) Son's son's son.
- (6) The son of a rival wife.
- (7) Her son's son.
- (8) A barren daughter or sonless widowed daughter.
- (9) The parents.
- (10) Brother.
- (11) The husband.

Synopsis.

- | | |
|--|---|
| (1) <i>Dayabhaga texts on devolution of stridhan</i> (2591). | (5) <i>Daughter's son</i> (2595). |
| (2) <i>Son and betrothed daughter</i> (2592). | (6) <i>Son's son's son</i> (2596). |
| (3) <i>Married daughter having or likely to have issue</i> (2593). | (7) <i>Son of a rival wife</i> (2597). |
| (4) <i>Son's son</i> (2594). | (8) <i>Barren or widowed daughter</i> (2599). |
| | (9) <i>Other heirs</i> (2600). |

2591. Analogous law :—The Dayabhag law on the subject of this section is supported by the following texts.

Devala. A woman's property is common to her sons and unmarried daughters, when she is dead; but if she have no issue, her husband shall take it, her mother, her brother or her father. (3)

Dayabhag. (Citing the last) Here it is expressly declared that the mother's goods are common to the son and unmarried daughter and if the maiden daughter were exclusively entitled to the whole of her mother's estate [notwithstanding the existence of the brother] the special text of Manu and others [which will be cited] concerning [yautak] wealth given at the nuptials, would be unmeaning; since she should have the right to all cases indiscriminately. (3)

(1) Dayabhag IV-III-25-28.

(2) Cited in Dayabhag IV-11-6

(3) Dayabhag IV-II-7.

2592. Son and betrothed daughter.—The next heir to the mother's Stridhan is her son and "unbetrothed" daughter. (1) The Sanskrit word for "betrothed" "*Kumari*" is so understood. The fact that the daughter is betrothed but not married is immaterial since both fall into a class apart. (2) But this view is combated by Jagannath who writes "Shri Krishna Taralankar, and others hold that unmarried daughter whether verbally betrothed or not, shall at the same time take equal shares. Does it not appear from the separate mention of them in the text of Gautam, that their title is successive? To this we reply, since it is acknowledged that the succession of a daughter who has been betrothed is barred by the claim of one who has not been affianced, both cannot have an equal right to inherit with their brother; one who has an equal title with the preferable heir, cannot be reduced to an equal succession with one who would have been excluded by that heir; for stronger and weaker claims cannot in the same circumstances, be equal. But as a son, who would be debarred by the existence of his own father, has an equal claim to the patrimony with his paternal uncle who had an equal right with his father, so likewise in the present instance a betrothed daughter who would have been debarred by a daughter not betrothed has an equal title with a son who had an equal title with a daughter who was not betrothed". (3)

2593. Married daughter having or who is likely to have an issue.—

CI. (2). The meaning of this phrase has already been examined in the preceding pages, while dealing with the general law of inheritance.

2594. Son's Son.—The son's son takes precedence of a daughter's son for it is reasonable, since the married daughter is debarred from the inheritance by the son, that the son of the debarred daughter shall be excluded by the son of the person who bars her claim. (4)

2595. Daughter's son.—The daughter's son takes next, for as the text of Manu expresses, "Even the son of a daughter delivers him in the next world, like the son of son" (5)

CI. (4) **2596. Son's son's son.**—The son's grandson is placed on the authority of Shri Krishna. (6)

2597. Son of a rival wife.—His claim was affirmed in an old case decided in 1836 (7) on the authority of the court Pandit who cited Dayakram Sangrah in support of his opinion. Gulab Shastri assigns him even a higher place between (3) and (4). (8)

2598. Grand and great grandson.—According to the Dayabhag, barren and widowed daughters should come in after the daughter's son, but both Shri Krishna (9) and Raghunandan support the order given here, and Shrikrishna's views are considered as preferable in this matter.

(1) *In Basanta v. Kamikshya*, 93 O. 28 (27) P.C. it was conceded that an "unmarried daughter" succeeds to the Ayautak Stridhan in the absence of a son

(2) *Sreenath v. Surbo*, 10 W.R. 488 (490) "The daughter not verbally betrothed, whom the legislator calls a virgin daughter." 8 Dig. 511.

(3) 3 Dig. 590.

(4) Dayabhag IV-II-11.

(5) Manu IX-139; cited in Dayabhag IX II-10; Dayatattva X-7 (Setlur) 500.

(6) Dayabhag IX-II-12: See Colebrooke's note.

(7) *Chund v. Kishonmune*, 6 B.S.R. 90 (95); 7 I.D. (OS) 734 (738).

(8) Sarkar's H.L. (3rd Ed) 415.

(9) Dayatattva X-8: (Setlur) 500. Dayakram Sangrah II-IV-7 (Setlur) 130; Bannerjee's Marriage and Stridhan (4th Ed.) 489.

2599. Barren or widowed daughter.—A barren or sonless daughter is placed here for reasons last given. According to the Cl. (9) Dayabhag her place is after the daughter's son in the list of heirs (1).

2600. Other heirs.—In default of her children, her step-sons or their male issue, the heirs to succeed are the heirs of a childless woman viz-her father, mother, brother and husband. (2). Cl. (10) (12)

286. Except the Sulk and Anvadheya Stridhans, the heirs to the stridhan of a childless woman are—

(a) *If married in Brahmin form—*

- (1) Husband. (3)
- (2) Brother.
- (3) Mother.
- (4) Father. (4)

(b) *If married in Asur form—*

- (1) Mother.
- (2) Father.
- (3) Brother.
- (4) Husband. (5)

(c) *After whom in whatever form married, her heirs are—*

- (5) Husband's younger brother. (6)
- (6) Son of husband's elder or younger brother. (7)
- (7) Sister's son, including step sister's son, (8)
- (8) Husband's sister's son.
- (9) Brother's son.
- (10) Daughter's husband. (9)
- (11) Father-in-law.
- (12) Husband's elder brother. (10)
- (13) Her father-in-law's great grand son in the male line.
- (14) The paternal grandfather of her husband or his issue. (11)

(1) Dayabhag IV-II-12.
(2) Basansa v. Kamik Shya, 33, C. 23, (27) P. C.

(3) Dayabhag IV-III-2-4; Bisto Pershad v. Radha, 16 W. R. 115 304.

(4) Dayakram Sangrah II-III-16, 17 (Setlur 128).

(5) Ib.

(6) who comes before widow's step brother Debiprassanna v. Harendra, 37 C. 868; In Toolsey v. Luckymoney, 4 C. W. N. 743 Sale J. placed a brother's son before the husband's younger brother of the half blood.

(7) This order is supported by Dayabhag

IV-III-31. as explained in Kesserbai v. Hunsroji, 30 B. 431 (451, 452) P. C., Bachha v. Jugmon 12 C. 348 (353).

(8) Dashrathi v. Bipin Bihari, 32 C. 261 P. C. Sashi Bhushan v. Rajendra, 40 C. 82 P. C.

(9) In Gossain v. Kishenmunee, 6 B. S. R. 90; 7. I. D. (O. S.) 734 the son of a co-wife was preferred to the son of the daughter's son of the woman's paternal great grand father.

(10) Dayabhag IV-III-39; Dayakram Sangrah II-VI-10 (Setlur) 133; Dayatattu X-39 (Setlur) 504.

(11) 3 Dig. 623 citing Vishnu Puran.

(15) The paternal great grandfather of her husband or his issue of the husband in order of propinquity.

(16) The Sakulyas. ⁽¹⁾

(17) The Samanodaks. ⁽²⁾

(18) Samanpravars.

(19) The Crown. ⁽³⁾

Heirs to property given by the father. **287.** The heirs to Stridhan given by the father are in the first instance—

(1) The full brother.

(2) The mother.

(3) The father.

(4) The husband.

2601. Analogous Law.—This section is based on the Dayabbag ⁽⁴⁾ and supported by judicial precedent. ⁽⁵⁾

Heirs to Yautak

288. The Yautak is in the first instance taken by—

(1) Unbetrothed daughters

(2) Betrothed daughters.

(3) Married daughters who have or are likely to have son.

(4) Barren and sonless widowed daughters.

(5) The son. ⁽⁶⁾

(6) Daughter's son. ⁽⁷⁾

(7) The son's son. ⁽⁸⁾

(8) The son's son's son. ⁽⁹⁾

(9) The son of a rival wife. ⁽¹⁰⁾

(10) Grandson of a rival wife. ⁽¹¹⁾

(11) Great grandson of a rival wife. ⁽¹²⁾

2602. Analogous Law.—Succession to Yautak under the Bengal school follows the orthodox texts in favouring the exclusive succession of daughters, the only difference being in the order in which the daughters take. This as

(1) Dayakram Sangrah II-V-11 (Setlur) 133.

(2) *Ib.* II-V-13 (Setlur) 133: In *Ib* § 12 it is said that if the woman be a Brahmin the heirs are "inhabitants of the same village" but this view is overruled by the Privy Council in *Collector v Cavalry*, 8 M. I. A 500.

(3) 3 Dig. 623 Jaganath placed next mother's Sapindas and Samanodaks; but does not mention Samanpravars.

(4) Dayabhag IV-III-10, 29 *Contra* Raghunandan Dayatattwa X-10, 11, 26 who places the husband first except as regards the property given by parents during maidenhood and *Shrikrishna* who places him first also as regards gifts subsequent. Dayakram Sangrah II-V-3, 4. See this sub-

ject discussed per Dwarka Nath Mitter J. in *Judoo Nath v Busunta*, 19 W. R. 264 (256.267).

(5) *Judoonath v Busunta*, 19 W. R. 264; *Hurry Mohun v. Sonalun*, 1 C 275; *Gopal v Ramachandra*, 28 C, 311; *Ram Gopal v. Narain*, 33 C 313.

(6) Dayabhag IV II 25; Dayakram Sangrah II-III 8;

(7) Dayakram Sangrah II-III-9.

(8) *Ib* § 10.

(9) *Ib*

(10) *Ib.* § 11.

(11) *Ib.* 13

(12) Manu X-131 Gautam XXVIII-21, Yajnavalkya II-117; *Bassanta v. Manikshya*, 33 C. 23 (27) P. C.

explained before, arises from the significance attached to the word "*Aprat*" and "*apratisthit*" which are interpreted to mean "unaffianced" and "not actually married." (1)

A widowed daughter having a son himself disqualified to inherit, will still count as a married daughter having a son. (2)

289. Persons disqualified from ordinary inheritance by reason of physical defects mentioned in S. 236 are equally incompetent to inherit to stridhan.

2603. Analogous Law.—The following texts support this section.

Manu:—Impotent persons and outcasts are excluded from a share of the heritage; and so are persons born blind and deaf as well as madmen, idiots, the dumb and those who have lost a sense (or limb). (3)

Mitakehara:—(Citing *the last*) The masculine gender is not here used restrictively in speaking of an outcaste and the rest. It must be therefore, understood that the wife, the daughter, the mother or any other female being disqualified for any of the defects which have been specified is likewise excluded from participation. (4)

2604. This passage however refers to succession to a male. And the question arises whether it is equally a disqualification to succession to Stridhan. On this point it was observed in a case "According to the Hindu lawyers, such and other infirmities are the signs of original sin, and it is the sin which is the cause of disinheritance and this is used as a ground for bringing men to repentance. The Stridhan, heir, would not be affected by this, and the widow, though dumb, may recover this portion of the property; the daughter cannot." (5)

290. (1) In the absence of legitimate issue, illegitimate issue inherit, daughters taking before sons.
Illegitimacy no bar, (2) Nothing in this section applies to a married woman.

Synopsis.

- (1) *Right of illegitimate children to inherit to mother* (2605). (3) *Preference as between degraded and undegraded children* (2607).
 (2) *Prostitute's children* (2606).

2605. Analogous Law.—Abundant texts (6) exist in the early Smritis recognizing one's natural offspring and there is no authority against the existence of heritable blood between the woman and her offspring. As such Hindu law recognizes children whether legitimate or illegitimate as entitled to inherit to their mother (7) in the absence of legitimate issue. (8) But the rule is obviously inapplicable to the illegitimate issue of a married woman.

2606. Prostitute's Children.—The rule is more applicable to professional prostitutes and to women who have become degraded by unchastity. In the

(1) Dayabhag 1V-II-23; Dayakram Sangrah II II-5,7.

(2) *Charu Chunder v. Nobe Sundari*, 18 C. 337.

(3) Manu 1X-201.

(4) *Vallabhram v. Hariganga*, 4 B. H. C. R. (A C) 135 (139). See Bannerjee's Marriage and Stridhan (4th Ed.) 869, 370.

(5) Mit. II-X-8 explained in *Vallabhram v. Hariganga*, 4 B. H. C. R. (A C) 135.

(6) Manu 1X 35 38.

(7) *Myna Bai v. Uttaram*, 2 M. H. C. R. 198 (203); *Arunagiri v. Ranganayaki*, 21 M. 40.

(8) *Meenakshi v. Muniandi*, 88 M. 1144.

case of the former attached as *devadasis* to pagodas, the courts both in Bombay ⁽¹⁾ and in Madras ⁽²⁾ have recognized the right of their illegitimate issue to inherit, daughters taking before sons. This is so by custom, if not by law. ⁽³⁾ But it is said that the pagoda girls should not be taken to determine the general law of their class, since they take by custom more than by law. ⁽⁴⁾

2607. The question is however one upon which one cannot feel certain since there are two views possible and both views are supported by a strong body of judicial opinions, since while on the one hand it is held that "with prostitutes the tie of kindred being broken, none of their relations who remain undegraded in caste, whether offspring or not inherit from them. Their issue after their degradation succeed." ⁽⁵⁾ On the other hand it has been held that "no tie of blood can be destroyed by unchastity, whatever personal disability may be imposed by express provisions of the law upon the person who has become unchaste; consequently, while inheritance is a right arising out of consanguinity, the unchastity or degradation of the *propositus* or *proposita* as the case may be, will not divert the descent of property, save where there is an express provision." ⁽⁶⁾ This view seems unquestionably right; for there is no authority for the proposition that when a woman has lapsed into prostitution, she becomes civilly dead, with the result that the tie of relationship which connects her to her kindred is completely severed. It has accordingly been held that the Stridhan of a degraded married woman would follow the natural line of succession applicable to her Stridhan. ⁽⁷⁾ As such the Courts have upheld the claims of the husband ⁽⁸⁾ stepson ⁽⁹⁾ brother's son ⁽¹⁰⁾ and the daughter. ⁽¹¹⁾

(1) *Jaya Madhav v. Manjunath*, 19 Bom. L. R. 320.

(2) *Kamakshi v. Nagarathnam*, 5 M. H. C. R. 161; *Narasamma v. Gangu*, 19 M. 133; *Arunagiri v. Ranganayaki*, 21 M. 40. *Subharaya v. Ramasami*, 28 M. 171 (177).

(3) *Venku v. Mutlukannu*, 12 M. 214.

(4) *Meenakshi v. Munandi*, 38 M. 1144.

(5) *Strange's Manual* § 863, P. 89; *Tara Munnee v. Mottee* 7 B. S. R. 325, 8 I. D. (O. S.) 247; *Kamineymoney (In re)* 21 C. 697; *Tripura v. Harimati*, 38 C. 495; *Myna Bai v. Ustaram*, 2 M. H. C. R. 146 (233); *Sivasangu v. Minal*, 12 M. 277; *Narasamma v. Gangu*, 18 M. 183 (134).

(6) *Hiralal v. Tripura*, 40 C. 650 (675) F. B.; overruling *Tara Munnee v. Mottee*, 7 B. S. R. 325; 8 I. D. (O. S.) 247; *Ram Nath v. Durga* 4 C. 550; *Kamineymoney*, 21 C. 697; *Ramananda v. Raikishori*, 22 C. 847; *Sona Moyee Secretary of State*, 25 C. 254; *Sundari v. Pitambari*, 32 C. 871 dissenting

from *Sivasangu v. Minal*, 12 M. 277; *Narasamma v. Gangu*, 18 M. 133 following *Bisheshkur v. Mata Gholam*, 2 N. W. P. H. C. R. 300, *Ganga v. Ghasita*, 1 A. 46 F. B.; *Narain v. Tirlok*, 29 A. 4; *Adeyapa v. Rudrappa*, 4 B. 104; *Tara v. Krishna*, 31 B. 495 (511); *Jaganath v. Tripura*, 34 B. 553 (559); *Kojiyadu v. Lakshmi*, 5 M. 149; *Subharaya v. Ramasami*, 23 M. 171; *Bhuminath v. Secretary of State*, 10 C. W. N. 1085; *Sundari v. Nemye*, 6 C. L. J. 372; *Tripura v. Harimati*, 38 C. 493; *Ram Prasad v. Subu Bai*, 4 N. L. R. 31; *Subharaya v. Ramasami*, 23 M. 171; *Meenakshi v. Munandi*, 38 M. 1144; *Jagannath v. Narayan*, 34 B. 552 (559).

(7) *Hiralal v. Tripura*, 40 C. 650 F. B.

(8) *Narain v. Tirlok*, 29 A. 4.

(9) *Subaraya v. Ramasami*, 23 M. 171.

(10) *Hiralal v. Tripura*, 40 C. 650 P. C.

(11) *Tara v. Krishna*, 31 B. 495.

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ADDENDA.

[Bringing citations to August 1919.]

A widow's right to adopt does not depend upon her inheriting any property from her husband, and she may make an adoption though no property vests in her. *Pratap Singh v. Agar Singh*, 36 M. L. J. 511; 17 A. L. J. 522; 50 I. C. 457 P. C.

An endowment for the worship of God without specifying the deity is void. *Chande v. Hartibola*, 29 C. L. J. 366.

Though there may be necessity for incurring a debt it does not follow that such necessity would support a loan the terms of which are onerous which must be otherwise proved. *Nazir Begam v. Raghunath Singh*, 23 C. W. N. 700 P. C.

Adoption by a widow aged 15 upheld on the ground that she had obtained sufficient maturity of understanding to comprehend the nature of the act. *Basappa v. Shudramappa*, 21 Bom. L. R. 217; 50 I. C. 786.

Of two co-widows in Bombay, the senior may adopt without any express authority of her husband, but the junior cannot adopt without the consent of the senior co-widow or the special authority of her husband *Id.*

It is on the creditor seeking to recover his debt from the joint family to prove that it was contracted by the manager for a purpose binding on the family. *Gurusami v. Gopalaswami*, 36 M. L. J. 588; 50 I. C. 775.

A Jagir must be taken *prima facie* to be an estate only for life. The words "putra-poutradi" in the grant of Jagir, do not, at all events outside Bengal, necessarily import an estate of inheritance descending to collaterals. *Ram Narayan v. Ram Saran*, 36 M. L. J. 344 P. C. reversing O. A. 42 C. 405.

A married female may act as archak of a temple. *Annaya v. Ammakka*, 35 M. L. J. 196 (209) F. B.

In order to raise any presumption at all the consent must be the consent of the next reversioner. The joining in of a contingent reversioner raises no presumption of necessity. *Gur Narayan v. Sheolal*, 46 C. 566 P. C.

A benami transaction is not necessarily illegal or void. A benamidar may maintain a suit upon his benami title though the beneficiary may claim to be added as a party. There can be no estoppel against the beneficiary unless the alienee's position is worsened by it. *Gur Narayan v. Sheolal*, 46 C. 566 P. C.

